The Rule of Law's Lack of Rules

JAMES BERNSTEIN*

Abstract

This Article critiques the reliance on judge-made standards by the Supreme Court, arguing that such standards, while flexible and comprehensive, create significant challenges in application, particularly in lower courts. Standards, characterized by broad and adaptable language, grant judges considerable discretion, often resulting in inconsistent and unworkable outcomes. This phenomenon contributes to what Ran Hirschl terms "juristocracy," where the judiciary exerts considerable influence over significant social, political, and economic issues, often due to implied deference from other branches of government.

The analysis highlights the operational difficulties standards pose, especially the lack of objective criteria, which can lead to judicial misapplication and legal uncertainty. It further explores how this judicial discretion undermines predictability and stability in the law, particularly in cases involving fundamental rights and executive deference. By examining several appellate cases, this Article highlights the discrepancies and risks associated with the use of standards, emphasizing the need for the Supreme Court to adopt clearer, more rigid rules tethered closely to the Constitution's text.

This Article proposes that the Court should favor explicit rules over malleable standards to promote greater consistency and protection of individual rights, reducing judicial overreach and enhancing legal clarity. This shift would mitigate the juristocratic tendencies observed in the current judicial landscape and ensure that

* B.A., Columbia University; J.D. Georgetown University Law Center. I am forever grateful to Professor Kevin Tobia for his continued encouragement, help, and support throughout the drafting of this piece.

constitutional adjudication remains more aligned with democratic principles and less susceptible to individual judicial interpretations.

I. INTRODUCTION

Judge-made standards are helpful tools from the bench to institute frameworks to approach future cases. A standard uses broad language to capture a wider swath of scenarios—but a standard also allows a judge to fill in the gaps in its otherwise empty phrases. To this point, a standard is as confining as it is malleable because it can change in the face of new but narrowly differentiated circumstances. Standards generally mimic the law. Given the existence of many "edge-cases," where no two cases are exactly alike, standards are typically more amenable than a firm rule. For one, a standard establishes a foundational case on which to build future opinions. Moreover, a standard's pliability allows judges to apply it as they see fit. It may come as no surprise, then, that the Supreme Court in particular has used standards of late to reach broader judgments about important social, political, and economic cases.

The challenge with standards, however, lies in their application in lower courts. Despite their widespread use, circuit courts, for

instance, apply standards at will or on a whim.[1] That is why, perhaps, Ronald Turner identified the fact that lower courts have "declined to recognize [a] claimed right in the absence of objective criteria for assessing" a case.[2] Without objective criteria, the rights found in one case are harder to ascertain in another. More to the point, lower courts have found some standards to be completely "unworkable" despite their frequent use.[3]

There is also a second order effect of Supreme Court standards: judge-made standards appear to be part of the broader problem of the "juristocracy," or the judiciary's active role in cases in light of implied deference from the other branches of government.[4] Ran Hirschl coined the term to apply to this phenomenon across the globe.[5] This Article will examine juristocracy as it pertains specifically to the more recent phenomenon of implied deference to the judiciary in the United States. A key aspect of the United States' unique juristocracy arises from the operational challenges of justice-made standards. Indeed, applying a Supreme Court standard requires lower courts to, in effect, put themselves in the mind of the author of the opinion. While a standard may better mirror how the law practically works, standards offer little guidance to establish any semblance of rigidity in their application.[6] This malleability also allows a wayward judge to misapply the Court's decision. And, as for the very people rules are supposed to help, a standard creates a kind of legal paralysis that may prevent stakeholders from pushing forward.[7] Regardless of where one stands on the outcome of a given rule, there is always a risk that a court, especially a lower court, may effectively disregard or undermine it. Standards require judicial interpretation; thus, salient political cases continue to flow into courts where judges—not politicians—settle these questions.

1. *See* Ronald Turner, *W(h)ither Glucksberg?*, 15 *DUKE J. CONST. L. & PUB. POL'Y.* 183, 210 (2020) (discussing the application of *Glucksberg* in lower court decisions post-*Obergefell).*

2. *Id.*

3. *Id.*

4. *See* Ran Hirschl, *"Juristocracy"—Political, not Juridical*, 13 THE GOOD SOC'Y 6 (2004).

5. *Id.*

6. *See* Turner, *supra* note 1.

7. *See* Hirschl, *supra* note 4

Therefore, this Article argues that judges should favor clear rules that limit judicial agency in future cases and, therefore, opposes the Supreme Court's development of new standards for constitutional cases. Moreover, this Article argues that judges should favor clear rules that limit a judges' agency in future cases. Instead, the Court should approach cases through a stricter lens that tethers judgments to the text of the Constitution, no matter how sweeping the decision. These rules lose some of the play in the proverbial joints that a standard allows. In exchange, the Court may better promote protections of individual rights and liberties. Standards related to determining fundamental rights and liberties as well as executive deference serve as the model "test" cases from the Court.

The juristocracy problem writ-large is not limited exclusively to these cases. However, for purposes of this Article, the analysis does not consider the juristocracy in a statutory context because that is significantly more reliant on political appetites, absence of legislative gridlock, and broader public opinion. If anything, the juristocracy may be more pronounced in a statutory case—a lack of action from one branch may spur judicial action—but the remedies differ significantly. Thus, the juristocracy problems in a constitutional case simply operate differently than the juristocracy problem in a statutory case. This Article focuses on the former rather than the latter because remedies—namely, constitutional amendments—are harder to achieve, making judicial intervention more pronounced.

Part II explains the term "juristocracy," its problems, and differentiates it from judicial review. Part III examines several cases that exemplify how juristocracy functions. To bolster the point that standards fail, this section also considers some courts of appeals opinions and how the differences in results call attention to the juristocratic risk. This Article focuses on appellate courts because varying opinions that potentially create circuit splits increase the likelihood that the Supreme Court will hear a given case. Part IV offers solutions to the problem.

II. JUDGE-MADE RULES AND THE JURISTOCRACY

A. Juristocracy

Standards, however difficult to apply or understand, offer greater leeway to litigants and justices alike. For example, standards mirror the law in an "everyday" sense. But this judicial wiggle room is a double-edged sword: without guidance and a clearly defined orientation point, judges may apply standards to their taste. These sorts of "tests" resemble the recent trend of punting otherwise legislative questions to the Supreme Court so that it may resolve them.

Incidentally, this trend of *de facto* deference to the judiciary has a name: juristocracy.[8] Ran Hirschl coined the term to refer to the trend of "political deference" to the judiciary.[9] In his words, "juristocracy" refers to the "growing reliance on courts and judicial means for articulating and determining core political issues."[10] This means that where a legislature would ordinarily act, a judge fills the void.[11] Hirschl identifies that "constitutional courts in most leading democracies have been frequently called upon to determine a range of matters, from the scope of expression and religious freedoms, privacy and reproductive rights, to public policies pertaining to education, immigration, criminal justice, property, commerce, consumer protection, and environmental regulation."[12] Courts' commitment to standards has resulted in a tremendous expansion of rights on balance. In the last decade alone, the Supreme Court has upheld the right of same-sex couples to marry and ensured the workplace rights of transgender individuals.[13] Despite these civil rights victories, these were still questions settled in courts.[14] The misapplied litigious impulses of rights advocates highlight the trend of judicial deference.

8. *See* Hirschl, *supra* note 4, at 8.

9. *Id.*

10. *Id.* at 6.

11. *Id.*

12. *Id.*

13. *See* Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton County, 590 U.S. 644 (2020).

14. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton County, 590 U.S. 644 (2020).

Part of the basis for the juristocracy, Hirschl explains, is a kind of self-interest among the "political" actors in government.[15] As Hirschl writes: "the most plausible explanation for voluntary, self-imposed deference to the judiciary is . . . that political power holders who either initiate or refrain from blocking [judicial deference] estimate that it serves their interests to abide by the limits imposed by greater judicial intervention in the political sphere."[16] In other words, if a policy-maker is hamstrung by wayward judicial actors, they can shift the blame to others instead of taking responsibility themselves. In this way, "juristocracy" benefits all actors since legislators can remain in office and judges can make consequential rulings.[17]

Additionally, Hirschl offered several explanations for why the judiciary has become a battleground, beginning with the impact of "competitive" electoral politics.[18] But a more likely reason for this *cause celebre* is the fact that "the transfer of core political questions to the courts, and judicial empowerment more generally, may become an attractive option for influential yet increasingly threatened elites seeking to entrench their policy preferences, making them safe from the vicissitudes of democratic politics."[19] Simply stated, the strength of judicial rulings gives political "elites" greater reason to seek court resolutions rather than the legislative process.

While the scope of this Article is limited, it takes the existence of a juristocracy as a given, focusing not on whether it exists, but on what should be done about it. While Hirschl identifies juristocracy as a global problem, the juristocracy trend is distinct in the United States for at least four reasons: (1) it is comparatively new; (2) there has been a general trend of legislative deference to *both* the executive and the judiciary;[20] (3) federalism leads to greater lawmaking at other levels of government; and (4) the American constitutional tradition uniquely mixes elements of textual interpretation and common law jurisprudence. To this last point, the issues associated with juristocracy in the United States are also limited to constitutional law cases. After

15. Hirschl, *supra* note 4, at 6.

16. *Id.* at 8.

17. *Id.* 8–9.

18. *Id.* at 9.

19. *Id.*

20. *See* James J. Bernstein, *Abandon Judicial "Neutrality": Why* Chevron *Deference Stifles Technological Innovation*, RICH. J. L. & TECH. (2020).

all, statutory case results, however dissatisfying they may be for some, have a quick remedy: passing a new law.[21] While new laws require both political will and majorities to pass legislation, the differing remedies create different juristocracy problems.

As for the other two elements, which this Article has not explored, they help explain the unique nature of the American juristocracy writ large. Notably, the federalism element sets American government apart from its companion democracies in the West.[22] Paradoxically, federalism catalyzes the juristocracy by diversifying laws and even having some laws that do not reach other, neighboring jurisdictions, individuals may be more likely to settle scores in federal courts. Additionally, the general trend of deference from the legislature does not *per se* target the judiciary as it may in other countries that Hirschl would identify as embodying the juristocracy problem.[23] To the extent that the judiciary has gained more authority from the legislative branch, the executive branch has gained more authority too. Thus, the juristocracy problem in the United States is probably much smaller than in other common law jurisdictions. Moreover, deference to the executive falls under various statutory schemas—all the more reason that the United States juristocracy problem is unique to constitutional cases. The forms of deference are not the same.

Therefore, juristocracy refers to the same trend but through a narrower lens. Here, "juristocracy" refers to the recursive machinery of rightly delegated judicial review. Once the legislator defers authority to the judiciary, through silence or complacence, judges, especially Supreme Court justices, use this power to create standards, not rules, that only they may interpret. Once authority is out of the political process it effectively remains only in the hands of the judiciary.

21. *See William* Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331, 407 (1991) ("Whatever the legislative resolution of these issues, it may be more satisfying, in a democracy, for the elected legislature rather than the unelected Justices to make and debate the policy choices.").

22. *See, e.g.*, David McCormick & Jared Cohen, *Federalism and American Power*, NAT'L AFFAIRS (2021).

23. Hirschl, *supra* note 4, at 6–7.

Thus, the juristocracy problem refers to a kind of "strange loop."[24] No matter the starting point, one finds oneself at the beginning again with judges determining the scope of constitutional rights or liberties.[25] Standards create a recursive system in which the most thorny and complicated legal issues are settled by judges in all instances without any available interference from the public, especially through the legislative or electoral processes.

In this vein, some of the principally bad actors in the American juristocracy are members of the judiciary themselves. Unlike thebroader global juristocracy problem Hirschl identifies, wherein legislators abdicate authority, the American juristocracy is equally the product of the judiciary itself.[26] In drafting standards, judges only return power back to themselves. Part of this is the result of a larger trend wherein the legal academy enables judges since "leading law reviews . . . continue to portray an almost exclusively court-centric picture of constitutional law."[27] Quietly, judges have flipped the narrative: rather than debating the origins or limits of judicial power, the question is often "What ought to be done?" for a given case because judicial questions have become increasingly political.[28]

Critically, it is not as if another approach would completely minimize the juristocracy problems that Hirschl identifies.[29] The opposite may be true: if a court ruled that abortion is unconstitutional, for example, this would mean that judges commandeered a significant political issue and, conceivably, foreclosed legislation.[30] On a high

24. Strange Loop, Wolfram, https://mathworld.wolfram.com/StrangeLoop.html.

25. *Strange Loop*, Wolfram MathWorld, https://mathworld.wolfram.com/StrangeLoop.html (last visited Feb. 27, 2025).

26. *Contra* Hirschl, *supra* note 4, at 6–7.

27. Hirschl, *supra* note 4 at 7.

28. *Compare* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the judiciary's role in interpreting the Constitution and limiting judicial authority), *with* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (demonstrating the judiciary's active role in shaping political outcomes by overturning longstanding precedent and redefining constitutional rights).

29. Hirschl, *supra* note 4.

30. *Id.* at 8 ("The transfer to the courts of contested political 'hot potatoes' such as abortion or affirmative action in the United States . . . offers a convenient retreat for politicians who have been unwilling or unable to settle contentious public disputes in the political sphere.").

level, this embodies the "juristocracy" since it is a hyperactive judicial intervention. However, perhaps even more significantly, a sweeping and punitive ruling—such as in this example—can provoke alternative action in ways that a more measured standard might not. For instance, following the Court's decision in *Dobbs*, several states passed laws or amendments codifying abortion protections.[31] By contrast, standards enable legislative paralysis by placing stakeholders and policy makers in limbo. While rules may carry worrisome results they also provide legal clarity, and this clarity is more likely to initiate a response rather than the silence that typically follows the creation of judicial standards.[32]

It bears mentioning, too, that a "juristocratic" standard is not to indict the whole system of judicial review. Indeed, in the American legal tradition, judicial review, properly applied and executed, helps mitigate the problems associated with the juristocracy. As John Marshall famously wrote in *Marbury v. Madison*, "it is emphatically the province of the judiciary to say what the law is."[33] Judicial review, normatively, must seek to explain the law, whether it is consistent with constitutional protections or, more basically, to explain what the scope of the law is in its meaning or application. Thus, courts need not shy away from difficult or overtly political legal cases if there is a clearly ascertainable constitutional principle at issue.

Consider this, admittedly over-simplified, example to illustrate the point: say one challenges a felonious speeding statute that

31. Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). *See, e.g.*, Nicole Nixon, et al., *A Year Since* Dobbs*, These Are the Many Ways States Are Protecting Abortion*, NPR (June 23, 2023, 9:48 AM), npr.org/2023/06/23/1183646356/dobbs-roe-abortion-protections-illinois-maryland-michigan-colorado-minnesota.

32. As a keystone example, take the Court's decision in *Dobbs* to overturn *Roe v. Wade*. *Dobbs*, 597 U.S. at 215. On one hand, *Roe* provided immeasurable protections for women and their bodily autonomy; on the other, *Roe* provided the Court with the means to make determinations just the same. The Court alone was left to answer questions like: Are late-term abortions constitutional? Are heart-beat bills constitutional? To what extent must a state give opportunities for a woman to seek an abortion in cases of rape or incest—or when her life was at stake? While it may take time, settling these questions at the ballot box—or with a "foot vote"—will likely provide greater protections in the long run than leaving these incredibly consequential decisions in the hands of unelected judges.

33. Marbury v. Madison, 5 U.S. 137, 177 (1803).

stipulates one cannot drive more than sixty-five miles per hour on the highway. The statute defines a rate of travel and assume, too, that the legislature also adequately defined "highway" in this context. After numerous appeals, the case reaches the Supreme Court. Under Marshall's conception of judicial review, the Court may rule in several ways: it may take a strict constructionist approach and determine that any instance in which someone is driving more than sixty-five miles per hour violates the law, or it may take a relatively more lenient approach and say that, considering the realities of driving, a motorist should be afforded a five mile per hour cushion, effectively making the speed limit seventy miles per hour in practice. In either case, the expectation of judicial review is satisfied, properly creating a rule of law.

Imagine the same case with identical facts and posit that the court determined that an individual may not be "unreasonably burdened" from driving at the rate of traffic. What does this mean? Well, only a judge may adequately determine whether a possible lead-footed driver was "speeding" depending on the context. If similar drivers occupied the motorway at one time—say on the German autobahn[34]—conceivably no speed would violate the law. By contrast, a more cautious jurist may say, when confronted with this scenario and precedent, that all instances over the posted speed limit would not unreasonably burden the driver.

So, therein lies the problem of the American juristocracy: at first blush, all instances of possible rule-breaking are appropriately context sensitive and standards provide a framework to assess the case; however, in creating a trend of context to future cases, a judge simultaneously creates a situation in which only she may determine the contours of the law. This amounts to the deference that Hirschl had in mind insofar as it allows judges the maintain absolute authority over a single facet of the law.[35] Again, in statutory cases, the remedy is revision. Revising a statute would buck the juristocratic result at the very least. But, in constitutional cases, the only remedy would be

34. *See, e.g.*, Rob Schmitz, *Germany Might Ask Drivers to Pump the Brakes on the Autobahn*, NPR (Mar. 21, 2023, 4:23 PM), npr.org/2023/03/21/1165093933/germany-might-ask-drivers-to-pump-the-brakes-on-the-autobahn.

35. *See* Hirschl, *supra* note 4, at 8–9 (noting that judicial review has expanded judges' authority beyond traditional constitutional interpretation).

undertaking an arduous amendment process—a process so difficult that it's unlikely to occur.

B. How Judge-Made Standards Differentiate from Judicial Review

A judge-made standard is, in effect, a "test." This could be of the more explicit sort—like the ones the Court has written for patent cases[36]—or one that requires lower courts to apply a similar analytical rubric. A standard follows a form like the following: marshaling common language, a justice creates a widely applicable framework to use uniformly and allow other judges or future justices of the Court to consider whether a precedent conforms with the case at bar. A standard, in essence, gives the judiciary an option—without a bright line rule, an opinion can shift according to changing circumstances. That is key to a standard. Cases, and even the law more generally, are highly context sensitive and a standard provides a more workable framework for judges in that it can change depending on the facts at hand. Since it is inevitable and expected that no two cases will perfectly align, standards gesture at some interpretative lens without constraining a jurist.

For example, under the *Planned Parenthood v. Casey* framework, lower courts had to determine whether an abortion-limiting measure was an "undue burden."[37] There is no conditional test there because the court did not describe what an "undue burden" is. However, lower courts were required, with little guidance from the Court's opinion, to determine whether a "burden" was "undue."[38] By contrast, a different court may have realized the property protections of the Fourteenth Amendment and ruled that a state cannot fully outlaw abortion.[39] But this judgment would resemble a more binary logic: "yes this is constitutional for textual basis X" or "no a statute is illegal

36. *See, e.g.*, Amgen Inc. v. Sanofi, 598 U.S. 594 (2023).

37. Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

38. *Id.* at 986 (Scalia, J., dissenting) ("[T]he standard is inherently manipulable and will prove hopelessly unworkable in practice.").

39. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 289 (2022) ("*Casey*'s notion of reliance thus finds little support in our cases, which instead emphasize very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'" (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991))).

because of the Constitution provides for Y." The *Casey* test, however, granted more interpretative agency to a judge.[40]

Similarly, in Eighth Amendment cases, courts consider whether torture or the means of execution "shocks the conscience."[41] There is an intuitive appeal to this standard: judges may deploy it when gross abuse is clearly present but there is no way to neatly assign the case within an originalist interpretive framework. Moreover, it allows a judge to follow her gut-level instincts, instincts that are possibly, if not likely, shared with the general public. But where one punishment unsettles one justice, another may be wholly at ease. There is no companion test to share whether something ought to shock one's conscience.

A more in-depth case discussion will follow in a later section, but the relevant fact gleaned from this limited analysis is this: judges have used, written, and considered standards as a critical part of the judicial process in more recent years.[42] Again, there are plenty of bases to explain this trend—namely, contorting the law to suit changing needs and circumstances. But it remains unclear what the penalty is for judges when, following the issuance of a standard, they misapply or wholly ignore the Court's instruction. Despite their widespread and pervasive use in the last few decades, there is no solid framework to assess whether a judge is actually following the standard's framework. Part of this is the product of a standard in practice: if standards are adjustable, a lower court judge, for instance, may titrate a standard's flow over a given case as she sees fit.

III. ILLUSTRATING JURISTOCRACY: FOUR KEY CASES

Four cases, *Bartkus v. Illinois*, *Washington v. Glucksberg*, *Chevron v. Natural Resources Defense Council.*, and *West Virginia v. EPA* highlight, to some extent, the juristocracy problem.[43] These cases embody the juristocracy in several ways—namely, they involve standards, decide consequential issues of law, and lower courts have

40. *Casey*, 505 U.S. at 880.

41. *See, e.g.*, Rochin v. California, 342 U.S. 165, 172 (1952).

42. *See Infra* Section III.

43. *See* Bartkus v. Illinois, 359 U.S. 121 (1959); Washington v. Glucksberg, 521 U.S. 702 (1997); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); West Virginia v. EPA, 597 U.S. 697 (2022).

struggled in uniformly applying the Court's rubric. On this point, these cases call attention to the recursive deference associated with the juristocracy in constitutional cases. To further explore these commonalities, the cases will be paired—*Bartkus* with *Glucksberg* and *Chevron* with *West* Virginia—to examine how similar themes emerge in their analysis.[44]

A. Rights' Standards

1. Selective Incorporation

At one time the application of the Bill of Rights only applied to the Federal government, not the states.[45] However, the ratification of the Fourteenth Amendment eventually changed this. Now, through a doctrine known as "incorporation" the Supreme Court has required the states to comply with most of the provisions of the first eight amendments.[46] Some, like the Fifth Amendment's double jeopardy clause, remain unincorporated. The Court has offered several justifications for this including, notably, in *Bartkus v. Illinois*.[47]

Alfonse Bartkus was tried and acquitted in Federal Court in 1953 for robbing the Federal Home Loan and Savings Bank.[48] Following his acquittal, the federal government suggested that the state of Illinois try Bartkus too.[49] Ultimately, the state convicted Bartkus and sentenced him to life in prison.[50] Justice Frankfurter's majority opinion held that successive state and federal prosecutions are not in violation of the Fifth Amendment.[51] Justice Frankfurter further explained the practical basis for this standard:

44. *Compare Bartkus*, 359 U.S. at 121 *with Glucksberg*, 521 U.S. at 702; *Compare Chevron*, 467 U.S. at 837 (1984) *with West Virginia*, 597 U.S. at 697.

45. *Incorporation Doctrine*, LEGAL INFORMATION INSTITUTE, law.cornell.edu/wex/incorporation_doctrine (last visited Feb. 27, 2025).

46. *Id.*

47. *Bartkus*, 359 U.S. at 121.

48. *Id.*

49. *Id.* at 122.

50. *Id.*

51. *Id.* at 139.

> Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of state law, the result would be a shocking and untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States.[52]

Plainly, it would be unreasonable to fully bar another trial if a trial court imposed a lenient sentence on a defendant and therefore deprived another government from trying this individual.

While the basis may have changed in the intervening decades, the Court has continued to leave the double jeopardy clause unincorporated. More to the point, a judicial standard motivates a judge's choice to incorporate select provisions of the Bill of Rights. The standard for incorporation is whether a right is "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history and tradition."[53] On its face, this may read like a test, and justifiably so, as it provides for a procedural step for judges to apply and it allows for some historical analysis. But lest one fall for the pageantry of the process or the quant dressings of the analysis, make no mistake: this is a standard. After all, it is a judge who would determine whether a right is "fundamental." It is a judge who would determine the extent to which a right is "deeply rooted." Does, for instance, a law that is passed in 1790 that has been unrecognized and unenforced lend credence to the idea that a right, or lack thereof, is "deeply rooted"? What if some prohibitions violated the letter and spirit of the Constitution when enacted but were left unchallenged because a would-be plaintiff lacked political procedural rights? The opinion provides no guidance as to how to ascertain either of the prongs for incorporation.

Adding insult to possible injury, the lack of clearer rules only harms the very individuals the Court seemed to be trying to help when

52. *Id.* at 137.

53. *Modern Doctrine on Selection Incorporation of Bill of Rights*, LIBRARY OF CONGRESS, constitution.congress.gov/browse/essay/amdt14-S1-4-3/ALDE_00013746 (last visited Feb. 9, 2025).

it designed incorporation. In a dissenting opinion in *Bartkus*, for example, Justice Hugo Black explained that failing to hold states and the federal government to account for transgressing the Fifth Amendment's Double Jeopardy protections will only "make scapegoats of helpless, political, religious, or racial minorities and those who differ, who do not conform and who resist tyranny."[54] Justice Black further emphasized that "the victims [of this standard] will most often be the poor and the weak in our society, individuals without friends in high places who can influence prosecutors not to try them again."[55] In the emanations of a standard's penumbras is the fact that they harm individual defendants in the end. There are practical problems associated with standards beyond the intellectual head-spinning that may occur in interpreting them.

2. Substantive Due Process Rights

Harold Glucksberg only wanted to help. Dr. Glucksberg "occasionally" treated terminally ill patients in Washington, a state that had outlawed the "assisting [of] another [person] in the commission of self-murder."[56] The law in question held that a "person is guilty of promoting a suicide attempt when he knowingly causes or aids another person to attempt suicide."[57] Nevertheless, in his professional judgment, Dr. Glucksberg believed that some of these patients would be better served "in ending their lives if not for Washington's assisted suicide ban."[58] Dr. Glucksberg and three other physicians challenged the law.[59] The district court determined that the ban violated the Fourteenth Amendment and an *en banc* Ninth Circuit court of appeals affirmed.[60]

In the end, the Supreme Court reversed the district court's decision.[61] Writing for the majority, Chief Justice William Rehnquist

54. *Bartkus*, 359 U.S. at 163 (Black, J., dissenting).
55. *Id.*
56. Washington v. Glucksberg, 521 U.S. 702, 707 (1997).
57. *Id.*
58. *Id.*
59. *Id.* at 708.
60. *Id.* at 709.
61. *Id.*

first examined the history of assisted suicide in the United States.[62] The record was convincing: there were bans on assisted suicide dating back before the founding of the colonies. Still, States have "engaged in serious, thoughtful examinations of physician assisted suicide and other similar issues" and may still seek to pursue other laws.[63] The more pertinent detail of the opinion relates to the constitutional question at issue. To determine whether a right is fundamental, the court must consider whether it is "deeply rooted in this Nation's history and tradition" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[64] The Court held that there was neither a deeply rooted basis nor an implicit basis for claiming that one has a right to assisted suicide.[65] Of particular relevance, the Court specifically rejected arguments that the assisted suicide ban follows in line with other fundamental rights cases involving personal autonomy. The Court explained, though, that just because "many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[66]

The court is relatively consistent: the test to determine whether something is a fundamental liberty is identical to the test for fundamental rights: a liberty must be "deeply rooted" in the nation's history and "implicit" to the concept of "ordered liberty."[67] Where this relates to the issue of juristocracy is borne out in the language of the majority opinion.[68] The lower courts, relying on other due process cases, applied what they believed to be the proper scope of the standard.[69] The Court, without clarifying the limits or satisfactorily explaining the basis for doing so, differentiated *Glucksberg* from precedent.[70]

62. *Id.* at 710.

63. *Id.* at 719.

64. *Id.* at 721.

65. *Id.*

66. *Id.* at 727.

67. *Id.* at 721–22.

68. *Id.* at 702.

69. *See* Compassion in Dying v. Washington, 49 F.3d 586 (9th Cir. 1995), vacated by 79 F.3d 790 (9th Cir. 1996) (en banc).

70. *Glucksberg*, 521 U.S. at 702.

Recently, *Glucksberg* served as the basis for the Court's opinion in contemporary cases—namely, *Bruen*, through its "text and history" approach, and *Dobbs*.[71] Despite its carry-over from the incorporation test, judges have still nevertheless found it "unworkable."[72] A failure to provide a workable framework only increases the likelihood of misapplication, varying application, or, more tellingly, that cases will reach the Court for a new decision.[73] Additionally, "Federal judges have also noted that *Bruen* does not provide clear guidance for comparing newer laws to older laws or figuring out what historical evidence is even relevant, leading to 'disarray among the lower courts.'"[74] What makes this standard so difficult, perhaps, is the lack of clear signposts—or, relatedly, the fact that the goalposts shift and move without a clear reason as to how or why.

Consider, for instance, how courts of appeals have applied *Glucksberg* in recent cases involving monetary bail. In *Holland v. Rosen*, the Third Circuit held that a cash bail scheme in New Jersey did not violate *Glucksberg* because substantive due process dictates and did not need to provide a substantive "right to bail."[75] Plainly stated, the Court wrote that "cash bail and corporate surety bond are not protected by substantive due process because they are neither sufficiently rooted historically nor implicit in the concept of ordered liberty."[76] In the end, the Third Circuit held that there need only be a compelling state interest—and it existed in *Holland*.[77]

By contrast, in *Lopez-Valenzuela v. Arpaio*, the Ninth Circuit reached a completely different result.[78] The Ninth Circuit wrote that,

71. *See, e.g.*, New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 13 (2022) (applying *Glucksberg*'s historical analysis to determine the scope of Second Amendment rights); *see also* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (relying on *Glucksberg* to reject substantive due process protections for abortion).

72. Clara Fong, Kelly Percival, and Thomas Wolf, *Judges Find Supreme Court's* Bruen *Test Unworkable*, BRENNAN CENTER FOR JUSTICE (June 26, 2023), https://www.brennancenter.org/our-work/research-reports/judges-find-supreme-courts-bruen-test-unworkable.

73. *Id.*

74. *Id.*

75. Holland v. Rosen, 895 F.3d 272 (3d. Cir. 2018).

76. *Id.* at 296.

77. *Id.*

78. Lopez-Valenzuela v. Arpaio, 770 F.3d 772 (9th Cir. 2014).

while there is no fundamental right to bail, "what is at stake here is 'the individual's strong interest in liberty,' and the Court was careful 'not [to] minimize the importance and *fundamental* nature of this right'".[79] The Ninth Circuit could not justify whatever state interest, compelling or otherwise, that may exist in this case and held that *Glucksberg* invalidated the state's bail scheme.[80]

Putting aside the ramifications of a pre-trial detention, two Courts of Appeals approached diametrically different results with respect to bail. But the mechanics of the case are ostensibly identical: both apply, or at least gesture at, *Glucksberg*. But, if *Glucksberg* were a clear, ascertainable precedent, one may wonder how it is possible that two lower courts reached such different results. The devil is in the details: the ambiguity surrounding Glucksberg means that lower courts may apply its analysis as they choose. The politics and practicalities of this decision run deep, too. Much like in *Bartkus*, the failure to provide an easily accessible framework does one of two things: it may either deprive someone of their liberty or undermine a state's interest in ensuring presence at trial.

B. Chevron*'s "Major Question"*

In 1977 Congress passed the Clean Air Act Amendments.[81] During the twilight years of the Carter administration, the Environmental Protection Agency took one reading of the statute to perform its regulatory functions.[82] In 1981, however, that reading changed with a new presidential administration. *Chevron v. Natural Resources Defense Council* sought to clarify whether the new construction of the statute was permissible.[83] In essence, *Chevron* determined the extent to which an executive agency—in this case, the EPA—may be afforded deference in interpreting laws.[84] In an unanimous opinion, Supreme Court wrote that "[w]hen a court reviews an agency's construction of the statute which it administers, it is

79. *Id.* at 780 (quoting U.S. v. Salerno, 481 U.S. 739, 750 (1987)).

80. *Id.* at 788.

81. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–40 (1984).

82. *Id.* at 840–41.

83. *Id.* at 843.

84. *Id.* at 842-44.

confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . ."[85] The Court continued, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[86] Simply, the majority's opinion turned on whether an executive agency's interpretation of a statute was a "permissible construction."[87]

This case created the colloquially known *Chevron* deference standard.[88] In brief, if an agency's construction of a statute is "permissible" and Congress has not spoken on the issue, courts did not second guess the agency's judgment.[89] After all, there is some deference that occurs when Congress passes a regulatory statute: presidents, charged with "executing" the law, may choose to regulate certain industries differently.

But this deferential standard only furthers the problem of the juristocracy in the United States. For one, only courts may determine whether a statutory reading is fair. Part of the *Chevron* standard requires Courts to avoid interpreting the statute as passed: Courts do not actually consider the meaning of the words, only whether an executive agency construed a statute within reasonable bounds.[90] By contrast, the Court could rule on the legal questions, namely, the meaning of the statute. Doing so would allow the legislature, not the Court, to potentially revise the law.

85. *Id.* at 842.

86. *Id.* at 843.

87. *Id.*

88. See Loper Bright Enters. v. Raimondo, 603 U.S. 369, 369 (2024) for the Supreme Court's decision to overturn *Chevron*. While *Loper Bright* got rid of one standard, it somewhat replaced it with another juristocratic-adjacent rule: it is not so much that Courts now say that "deference to an agency is allowed" or, alternatively, "deference to an agency is not allowed" but "some deference is allowed—so long as we determine that it is allowed." Put more plainly, the Court did not go all the way in affirming a rule in favor of a standard but, rather, left open the possibility of replacing one standard with another. As but one example, how may the court answer the question of some forms of implied but broad deference to, say, the Department of Justice and its prosecutorial powers? Inevitably some deference will exist but how (or in what forms) is left to the justices to determine.

89. *Chevron*, 467 U.S. at 837–38.

90. *Id.* at 843–45.

Chevron embodied the juristocracy problem perhaps more than any other case. *Chevron* essentially enabled the judiciary to maintain the status quo: if the court would not strike down a law or an agency's reading of the law, statutes stay on the books for decades as a product of legislative paralysis and self-interest.[91] If nothing else, a legislature would not do politically damning work if they could simply blame the courts, as Hirschl identifies.[92] In effect, *Chevron* makes legislators out of judges. In all events, when a judge determines whether an agency has proffered a "permissible" read of a statute it functions no differently than amending, repealing, or completely replacing it.

Two courts of appeals decisions on the dire and important issue of the regulation of armed weapons illuminate the challenge of *Chevron*. Almost as an act of serendipity, both cases involve the same regulation, too. In 2018, the United States Department of Justice issued a new rule that attempted "to classify bump-stock-type devices as machine guns" and, therefore, in violation of federal law.[93] Two separate suits came out of this rulemaking. The first, *Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives* aimed at defining whether the government's new interpretation was valid.[94] Applying *Chevron*, the D.C. Court of Appeals held that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") new order was entitled to *Chevron*'s core holding.[95] The D.C. Circuit held that *Chevron* covers statutes in both a civil and criminal context.[96] The majority's opinion clarified that, in spite of the fact that "the plaintiffs submit that *Chevron* deference has no application to regulations interpreting statutes [like the one at issue] because they impose criminal penalties on violators," the Court of Appeals identified that the plaintiffs failed "to demonstrate

91. *See* Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 GEO. MASON L. REV. 501, 502, 514 (2015) (discussing how *Chevron* has reinforced congressional inaction and affected administrative agencies and courts: "In the absence of congressional intervention (which dynamic interpretation makes less likely), an agency will be tempted to take great liberties in 'dynamically' updating a statute, and reviewing courts may well look the other way").

92. Hirschl, *supra* note 4, at 8.

93. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1, 9 (D.C. Cir. 2019).

94. *Id.* at 28.

95. *Id.* at 23.

96. *Id.* at 24–25.

a likelihood of success in establishing a general rule against applying *Chevron* to agency interpretations of statutes that have criminal-law implications."[97] As a result, *Chevron* could apply in this context.

However, the Sixth Circuit reached a difficult conclusion.[98] In *Gun Owners of America v. Garland*, the Circuit Court held that the Justice Department was not entitled to *Chevron* deference.[99] The Sixth Circuit concluded that *Chevron* "categorically does not apply to the judicial interpretation of statutes that criminalize conduct."[100] Since the regulation "applies to a machine-gun ban carrying criminal culpability and penalties" the Court of Appeals could not "grant *Chevron* deference to the ATF's interpretation."[101] This interpretation flows from the modern standards associated with delegation—standards that, in a criminal context, are at odds with *Chevron*'s ambiguity principle—since the Court has allowed Congress "to delegate to the executive branch the responsibility for defining crimes, but only so long as it speaks 'distinctly.'"[102] In other words, Congress may delegate authority to the executive in the criminal world but only when the legislative commands are clear. For the Sixth Circuit, then, *Chevron* is incompatible with the overarching criminal jurisprudence that the Supreme Court has already provided.[103]

Interestingly, at the heart of both of these cases is *the same regulation*. It strains even the most sympathetic mind to find that two courts of appeals could reach different views over what is essentially one case. While the *Holland* and *Lopez-Valenzuela* Circuits had the benefit of respectively distinct circumstances, here, the *Guede* and *Garland* circuits had no such distinctions. How these courts of appeals analyze *Chevron* and its conflicting nature, or lack thereof, in a criminal context result in diverging opinions. While *Chevron* looks like a rule, in practice it is a standard, if for no other reason than because, as seen in *Guedes* and *Garland*, the determination of a statute's ambiguity is left up to judges exclusively—who, in turn, do not actually resolve the

97. *Id.* at 23–24.
98. Gun Owners of America, Inc. v. Garland, 992 F.3d 446 (2021).
99. *Id.* at 466.
100. *Id.* at 454.
101. *Id.*
102. *Id.* at 456.
103. *Id.*

ambiguity themselves. As Justice Neil Gorsuch explained in a denial of certiorari in *Guedes*:

> How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared "reasonable"; and to guess *again* whether a later and opposing agency interpretation will *also* be held "reasonable"?[104]

Chevron, therefore, also embodies the juristocracy problem insofar as it refers to the strange loop analysis that courts at all levels apply for sets of cases.

Perhaps as an outgrowth of the unworkability of *Chevron*, the Court birthed the "major questions doctrine."[105] The Major Questions Doctrine refers to the fact that "for matters that 'affect the entire national economy' or go beyond the 'traditional authority' of the delegee, Congress, in the Court's opinion, must provide 'substantial guidance.'"[106] The Major Questions Doctrine is a standard-in-practice: it goes beyond *Chevron*'s "ambiguity" requirement and instead allows the Court to have the final judgment over delegation questions.[107] Criticisms of the doctrine call attention to the fact that it allows the Supreme Court to go beyond determining the contours of "what the law is" and implement its preferred policy preferences.[108] In a way, the Major Questions Doctrine is the juristocracy problem taken to its

104. Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring).

105. *See Major Questions Doctrine and Canons of Statutory Construction*, LIBRARY OF CONGRESS, constitution.congress.gov/browse/essay/artI-S1-5-6/ALDE_00013931.; *see also* West Virginia v. EPA, 597 U.S. 697 (2022).

106. *Id.*

107. *See* Kevin Tobia, Daniel E. Walters, & Brian Slocum, *Major Questions, Common Sense?*, 97 S. CAL. L. REV. 1153 (2024) (discussing how the Major Questions Doctrine extends judicial authority by allowing the Court to resolve delegation issues, going beyond *Chevron*'s ambiguity requirement).

108. *Id.*

logical extreme, at least in administrative law: if the Court is the exclusive arbiter over serious and consequential policy questions, then the only federal branch that the Constitution immunizes from elections is able to rule over large swaths of both the public and private sphere without accessible checks.

The Major Questions Doctrine more generally embodies the juristocracy problem mentioned here since it provides no greater clarity about the state of the law for laypeople and policymakers alike. The Major Questions Doctrine, much like *Chevron* or *Glucksberg*, effectively invites only policy paralysis. In a way, the doctrine allows the Court to punt the question ofwhether a given policy, in and of itself, is constitutional; rather, the Court is able to claim that certain policy goals are inconsistent with, say, delegation principles.[109] Failing to address this more fundamental former question creates stasis insofar as the Court has cosigned a legislature's future failure to act. Thus, if the Court ruled directly on policy, not on the more illusory delegation issues, the Court could indirectly invite change.

IV. WHAT CAN BE DONE INSTEAD?

No matter how far-reaching an opinion, the Court need not ignore pressing social or governmental questions. Indeed, it is the duty of the Court to determine "what the law is"—the reach, its protections, and its meaning.[110] This Article does not call for the court to avoid difficult, thorny, or even "hot" political issues. On the contrary, the Court has rightly upheld various rights—but housed these decisions in the text of the Constitution. Thus, future decisions must take refuge in the Constitution alone. Take *Glucksberg* as a starting point: however one may feel about the merits of a constitutional right to assisted suicide, there was nothing preventing the Court from grounding its opinion in the Fourteenth Amendment's "liberty" or "property" provisions. This applies in either direction, too. The Court may have held that either provision allowed or did not allow for a constitutional right to assisted suicide. There was no justification for introducing the supposed deep historical roots into the opinion, unless it was intended

109. 597 U.S. at 779 (Kagan, J., dissenting) (stating that the Major Questions Doctrine allows the Court to avoid constitutional questions and functions as a "get-out-of-text-free card").

110. Marbury v. Madison, 5 U.S. 137, 177 (1803).

to maintain the judiciary's supremacy in this area.[111] By contrast, in *Obergefell*, the Court ruled on the rights of same-sex couples to marry and may have implicitly abandoned *Glucksberg* in doing so for the better.[112] Indeed, Justice Anthony Kennedy's opinion firmly took hold in the text of the Constitution. The Court's ruling in *Obergefell* is ideal; while it was undoubtedly far-reaching and perhaps controversial at the time of its issuance, it still provided a concrete rule.[113]

At minimum, the Court's opinions must provide two things: (1) an easily ascertainable textually rooted command and (2) a guiding, but limited, principle to apply in future cases. Enter: rules. A rule is distinct from a standard in that it is grounded in the Constitution's explicit language and, in doing so, provides a North Star for lower courts. Importantly, a rule helps mitigate some of the juristocracy problems, namely that the judiciary is essentially delegating to itself.

With some luck, the language of these rules-based opinions will avoid the use of simple, lay language. While a rule may be more straightforward than a standard, standards explain only how judges may apply them. Instead, rules are probably, to the non-lawyer, more difficult to grasp. This is not to dissuade the otherwise active court watcher from informing oneself about these future rules. Rather, by more narrowly tailoring an opinion, tethering it to a clear, intelligible principle in the Constitution, and carefully using particular language, rules may remove the comparatively more vacuous language of a standard.

As an example of what *not* to do, take Amy Coney Barrett's defense of the Major Questions Doctrine in which she said that "[c]ontext is not found exclusively 'within the four corners' of a statute" but "[c]ontext also includes common sense."[114] What becomes somewhat difficult to ascertain, however, is what constitutes "common sense," and more importantly, to what extent common sense should be considered. In the end, it appears that the most logical determiner of what sense is common is the judge. But in promulgating standards like the Major Questions Doctrine, judges downplay the complexity of their

111. *Compare* Obergefell v. Hodges, 576 U.S. 644 (2015), *with* Washington v. Glucksberg, 521 U.S. 702 (1997).

112. *Compare* Obergefell v. Hodges, 576 U.S. 644 (2015), *with* Washington v. Glucksberg, 521 U.S. 702 (1997). *See also* Turner, *supra* note 1.

113. *See* Turner, *supra* note 1.

114. Biden v. Nebraska, 600 U.S. 477, 511–12 (2023) (Barrett, J., concurring).

decisions and, in effect, hide the juristocracy ball. Some difficulty in discerning the divergence between lay and legal terms—like "context"—may explain why some standards are hard to apply.[115] Though, again, rules may enable another form of the juristocracy, they are still preferable. At bottom, rules can call attention to judicial malfeasance or overreach. If two disparate political action groups can both readily say that the Court has favored their views in a standard, then the opinion offers no clarity and no means to catalyze or codify change.

Moving forward, both the Court and the country would be better served by taking a stricter, more text-oriented approach to decisions. Of course, the Court may consider even the most major, pressing questions—from non-delegation to the rights of couples to marry. And future cases will no doubt work their way into lower courts. To best ensure that other courts promote a precedent's right or principal protection, the Court must make clear what the concept is in the form of a rule.

V. CONCLUSION

In his dissent in *Casey*, Justice Antonin Scalia acknowledged that many people might consider "the power of a woman to abort her unborn child [] a 'liberty' in the absolute sense"; and that it is a "liberty of great importance to many women."[116] But Justice Scalia went on to explain that the plurality holding "concedes that the amorphous concept of 'undue burden' has been inconsistently applied by the Members of this Court in the few brief years since that 'test' was first explicitly propounded."[117] Like Justice Scalia's dissent, this Article takes a similar tack: there are a great many liberties, economic interests, and rights—all of which are of "great importance" to many people—that the Supreme Court has left at the behest of other jurists. At its core, this is the product and, indeed, the catalyst for the American juristocracy problem. In avoiding the creation of bright-line rules, judges have favored "tests" which only enable judges, not

115. *See* Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. (2015).

116. Planned Parenthood v. Casey, 505 U.S. 833, 980 (1992) (Scalia, J., dissenting).

117. *Id.* at 985.

policymakers or even citizens, to hold the final word over areas of significant public policy. In hopes of avoiding this problem in future, perhaps even dire, decisions, the Court ought to favor rules. Here, the Court may instead approach serious conundrums but do so in a way that creates clear, applicable, and definitive judgements. This Article does not argue against the importance of the judiciary in ensuring and upholding public and private constitutional rights; rather, what this Article targets is the recursive machinery which does not offer any final say on the matter.