HIGH CALIBER, YET UNDER FIRE: THE CASE FOR DEFERENCE TO ATF RULEMAKING

*Tess Saperstein**

In the wake of the deadliest mass shooting in U.S. history, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") utilized its regulatory power to ban bump stocks. Given its long history of congressional marginalization and political demonization, the ATF has historically been hesitant to engage in binding forms of regulation. However, with the support of the public and a Republican president, the ATF interpreted "machine guns," which were already banned under the National Firearms Act, to include bump stocks. The legal challenges that ensued questioned the ATF's regulatory authority by invoking the rule of lenity. The litigation that has percolated throughout the courts of appeals has distilled into a fundamental question about agency deference: when an agency, such as the ATF, retains both criminal law enforcement and regulatory power, what level of deference should be given to its interpretations of statutes? With the Supreme Court set to hear oral arguments in Garland v. Cargill *this term, one of the cases that challenges the ATF's regulatory authority, this Note explores the primary justifications for the rule of lenity and explains why they do not apply when agencies engage in notice and comment rulemaking. Furthermore, this Note argues that, as an agency with technical expertise in an area that experiences rapid technological advancement and is subject to continual political accountability, the ATF presents the prototypical case for agency deference.*

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Introduction

In a country with more firearms than people, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") has been tasked with regulating the United States' 340 million personal firearms. In addition to shouldering this herculean responsibility, the agency has been plagued by partisan obstruction which has largely prevented it from issuing effective regulations. However, after the 2017 mass shooting in Las Vegas,[1] renewed political will to regulate firearms reinvigorated the ATF's regulatory authority when the Trump Administration ordered the agency to ban bump stocks—the accessory which made the Las Vegas shooting the deadliest in American history. In accordance with the Trump Administration's directive, the ATF used its statutorily delegated authority to interpret the National Firearms Act ("NFA") and the Gun Control Act ("GCA") to designate bump stocks as a weapon that was already banned under the NFA and GCA. Pursuant to notice and comment, the ATF published a rule stating that the term "machine guns" also included bump stocks. Owners of the 280,000 to 520,000 bump stocks in circulation at the time would be required to either destroy the devices or hand them over to the ATF.[2] The litigation that ensued brought to light a fundamental question about the agency which has been tasked with administering the nation's gun laws: as an agency that has been granted both criminal law enforcement and regulatory power, what level of deference should be given to its interpretations of statutes?

One issue that has persisted throughout *Chevron*'s rocky forty-year history is whether deference should be given to agencies when they interpret statutes that impose criminal penalties. Given the ATF's previous unwillingness to engage in more authoritative forms of regulation, there is little precedent on what level of deference—if any—should be granted to the ATF when it intends to regulate "with the force of law."[3] However, the ATF is the quintessential example of an agency whose interpretations should be granted deference by courts. When the ATF regulates via notice and comment, it acts deliberately, with the force of law, and utilizes its unique, technical expertise in response to rapidly advancing technology.

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1. Kalhan Rosenblatt, *Las Vegas Shooting Is Deadliest in Modern U.S. History*, CBS News, https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-shooting-deadliest-modern-u-s-history-n806486 [https://perma.cc/5QTV-6QJ9] (last updated Aug. 20, 2018, 6:56 PM).

2. At the time the rule was proposed, the ATF estimated that there were between 280,000 and 520,000 bump stocks in circulation in the United States. Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66538 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

3. United States v. Mead Corp., 533 U.S. 218, 227 (2001).

After decades of marginalization due to the controversial nature of its primary mission, the ATF has only recently reclaimed its regulatory power by issuing binding regulations through notice and comment. However, the litigation surrounding the first of these rules—the bump stock ban—brought to the forefront an ambiguity in *Chevron* and its progeny: whether an agency's interpretation of a criminal statute should be granted deference by courts. Although the rule of lenity is frequently put forth as an obstacle to agency deference in these circumstances, the principles behind the rule are not violated by ATF rulemaking. First, notice concerns are obviated by the Administrative Procedure Act's ("APA") procedural requirements for notice and comment. Second, the legislative supremacy rationale, which stated that the legislature was solely responsible for determining what constituted a crime, did not account for the advent of the administrative state. Instead, it was formulated solely in response to a fear of judicially created crimes, which raise separation of powers concerns that are not at issue when agencies engage in rulemaking.[4] The ATF also embodies the most desirable characteristics of congressional delegations to agencies. Through its technical knowledge and access to data, the ATF has developed expertise in complex machinery that is frequently changing due to technological innovation. Also, given the prominence of the gun control debate in political agendas and the contentiousness of gun control proposals, any attempted regulation by the ATF will be met with intense scrutiny. Therefore, it will be more sensitive to the will of the electorate than its less conspicuous counterparts and less likely to depart from its statutory mandate.

In Part I, I discuss the origins of the ATF and how its historical treatment as an afterthought by Congress and a political boogeyman by the National Rifle Association ("NRA") instilled an overly cautious approach to regulation. For much of the twentieth century, the agency knew that any regulation it promulgated would subject it to allegations that they were "jack-booted government thugs"[5] bent on violating the Second Amendment. Further, without the strength of the modern gun control movement, there was little political will to defend the agency. Only after a Republican president ordered the ATF to take action in the

4. Daniel Richman, *Defining Crime Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. ON REG. 304, 321 (2022).

5. In 1995, the NRA sent out a fundraising letter stating that gun control legislation would give "jack-booted government thugs more power to take away our constitutional rights, break in our doors, seize our guns, destroy our property, and even injure or kill us." *NRA Defends Vitriol Toward Federal Agents*, SF GATE (May 1, 1995), https://www.sfgate.com/news/article/NRA-Defends-Vitriol-Toward-Federal-Agents-3034757.php [https://perma.cc/33GT-HXJX].

wake of the deadliest mass shooting in American history was the ATF empowered to utilize its regulatory power to ban bump stocks.

In Part II, I use the specific challenges to the ATF's regulatory power to illustrate the academic arguments against granting deference to agencies when they interpret criminal statutes. The primary challenge invokes the rule of lenity, which stands for the proposition that vague criminal laws cannot be weaponized as a "trap for the innocent."[6] However, the primary justifications for the rule of lenity—notice and legislative supremacy—do not apply when the agencies engage in notice and comment rulemaking. First, the APA's procedural requirements for notice and comment ensure that affected parties have ample opportunity to become aware of the new rule and voice their opposition to it. Second, the legislative supremacy rationale was formed before the advent of the administrative state and was primarily concerned with judicially created crimes. Unlike the judiciary, executive agencies have subject-area expertise and are accountable to the public through presidential elections. As a result, neither of the justifications for the rule of lenity can be applied when agencies engage in notice and comment rulemaking.

In Part III, I demonstrate why the ATF exemplifies the principles justifying agency delegation: it has relevant and essential expertise that the judiciary lacks, and it is uniquely accountable to the electorate. Congress intended to delegate its power to the agency which had technical expertise in firearms. Although some academics have argued that the agency expertise rationale does not apply when interpreting criminal statutes because criminalization represents a moral judgment, this argument frames the debate at the highest level of generality as opposed to analyzing the specific rules the agency is promulgating. When agencies, such as the ATF, receive a broad statutory mandate from Congress, the moral judgment has been made by the legislature, and the ATF is empowered to act according to that original judgment. Additionally, the political salience of the ATF's primary area of regulation ensures that it will be subject to continual scrutiny and accountable to the electorate.

I.
The ATF, Politicized and Contextualized

Although the ATF traces its history as far back as 1789,[7] the agency has struggled to establish a coherent identity. Originally established as a tax-collecting agency within the Department of Treasury, the Office of Internal Revenue was tasked with collecting taxes on imported spirits

6. United States v. Cardiff, 344 U.S. 174, 176 (1952).

7. *ATF History Timeline*, Bureau Alcohol, Tobacco, Firearms & Explosives, https://www.atf.gov/our-history/atf-history-timeline [https://perma.cc/KM4P-ZSUB] (last visited Nov. 7, 2023).

and tobacco.[8] In 1863, Congress added a law enforcement component to the agency and authorized the Office to hire three detectives to investigate alcohol tax evaders.[9] This represented the first coordinated effort between tax collection and law enforcement.[10] However, this marriage of regulatory and law enforcement functions would plague the agency as it became a repository for new industries that Congress deemed as needing of regulation, such as firearms and explosives.[11]

Motivated by a desire to respond to high-profile incidents of gun violence, including gang violence in the early twentieth century,[12] Congress passed the National Firearms Act of 1934 ("NFA") and the Federal Firearms Act of 1938 ("FFA").[13] The Alcohol Tax Unit of the Bureau of Internal Revenue ("ATU") was responsible for enforcing the criminal provisions of these laws,[14] which ultimately established the framework for future gun control measures.[15] The NFA established a mandatory licensing scheme for "importer[s], manufacturer[s], and dealers in firearm[s] . . . "[16] and imposed a steep tax on specific firearms, such as machine guns, which were traditionally associated with gangsters.[17] The Justice Department ("DOJ") had hoped that the legislation would contain even broader regulatory authority, while evading Second Amendment objections, since it was based on Congress's taxing power.[18] However, as a result of lobbying by the NRA and other interested parties, the bill was stripped of clauses that would have regulated all handguns.[19]

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8. *Id.*
9. *Id.*
10. *Id.*
11. Chelsea Parsons & Arkadi Gerney, Ctr. for Am. Progress, The Bureau and the Bureau 3 (2015), https://www.americanprogress.org/wp-content/uploads/sites/2/2017/03/ATF-report-webfinal2.pdf [https://perma.cc/A98E-SZM3].
12. Carol Skalnik Leff & Mark H. Leff, *The Politics of Ineffectiveness: Federal Firearms Legislation, 1919-1938*, 455 Annals Am. Acad. Pol. & Soc. Sci. 48, 54 (1981) (noting that public fears of the "roving gangster" served as "the essential backdrop for early New Deal gun control efforts").
13. *History of the Badges*, Bureau Alcohol, Tobacco, Firearms & Explosives, https://www.atf.gov/our-history/photo-gallery/history-badges# [https://perma.cc/NH3E-NE7W] (last visited Nov. 7, 2023); *see also* Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J.L. STUD. 133, 136–37 (1975) (stating the public's newfound fear of gangsters motivated a campaign for federal firearms control).
14. *History of the Badges*, *supra* note 13.
15. Zimring, *supra* note 13, at 138.
16. National Firearms Act of 1934, Pub. L. No. 73–474, § 2(a), 48 Stat. 1236, 1237 (1934).
17. *Id.* at 1236, 1237; *see also* Zimring, *supra* note 13, at 138 ("The tax rate, $200 per transfer, did not seem calculated to encourage extensive commerce in these weapons.").
18. Leff & Leff, *supra* note 12, at 54.
19. Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. PENN. L. REV. 637, 647 (2022).

The FFA expanded the NFA's licensing scheme by requiring manufacturers and dealers to obtain a license in order to transport "any firearm or ammunition" in interstate commerce.[20] However, the ATU had difficulty enforcing the FFA because of its scienter requirement:[21] dealers could only be prosecuted if they knowingly violated the law.[22] Since the ATU was still operating under the auspices of the Department of Treasury, little attention was devoted to a unit that focused on law enforcement as opposed to revenue collection.[23] By the time these holes in the regulatory structure came to light, Congress's interest in further regulating firearms had passed. With crime rates declining, the public lost interest.[24] As far as the politicians were concerned, they had succeeded in passing legislation that—at least in theory—got weapons out of criminals' hands.[25] For the next thirty years following the enactment of the FFA, no major federal gun laws were passed, and enforcement of existing laws stagnated.[26]

In the 1960s, crime rates once again increased and social unrest proliferated, leading to a resurgence of interest in federal law enforcement.[27] Furthermore, the high-profile assassinations of President John F. Kennedy, Robert Kennedy, and Martin Luther King, Jr. kept the issue in the public consciousness, inspiring Congress to introduce new legislation regulating firearms.[28] The result was the Gun Control Act of 1968 ("GCA").[29] The

20. Federal Firearms Act of 1938, Pub. L. 75–785, § 2(a), 52 Stat. 1250, 1250 (1938).

21. Zimring, *supra* note 13, at 140 ("From the standpoint of prosecuting dealers for violation of the federal ban against sale to felons, the requirement of knowledge, coupled with the absence of a verification system, rendered the Act stillborn.").

22. Federal Firearms Act §§ 2(b)-(i), at 5.

23. Leff & Leff, *supra* note 12, at 56; Zimring, *supra* note 13, at 140 ("[The FFA] was deficient in a number of respects, and further crippled by a tradition of less-than-Draconian enforcement by the Internal Revenue Service.").

24. Zimring, *supra* note 13, at 144 ("[V]iolent crime rates were at far lower levels than had been experienced in the 1920s and '30s, and the public fear of crime had diminished to levels that, in hindsight, symbolized domestic tranquility.").

25. *Id.* at 143 ("Congress got pretty much what it wanted in the F.F.A.: a symbolic denunciation of firearms in the hands of criminals, coupled with an inexpensive and ineffective regulatory scheme that did not inconvenience the American firearms industry or its customers.").

26. *Id.* at 142 ("Few resources were invested in the enforcement of the Federal Firearms Act."); Charles & Garrett, *supra* note 19, at 652–53 (stating that the Department of Justice brought 66 criminal cases for federal weapons offenses in 1947 and only 371 in 1967—out of more than 30,000 total prosecutions).

27. *See* PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. JUST., THE CHALLENGE OF CRIME IN A FREE SOC'Y 24 (1967) ("The picture portrayed by the official statistics in recent years, both in the total number of crimes and number of crimes per 100,000 Americans, is one of increasing crime . . . The public can fairly wonder whether there is ever to be an end."); *see also* Zimring, *supra* note 13, at 148 ("Urban riots during the period 1964-1968 and increased fear of crime had a manifold impact on the quality of American urban life.").

28. Zimring, *supra* note 13, at 146–48.

29. Gun Control Act of 1968, 18 U.S.C. §§ 921–928 (1968).

GCA contained a series of changes to federal gun control policy that were enacted to further its three main objectives: (1) the elimination of interstate traffic in firearms and ammunition which had previously frustrated state and local law enforcement; (2) the prohibition of certain groups, such as minors, felons, and those who had been adjudicated as mentally disabled, from owning firearms; and (3) the prohibition of the importation of firearms unless they were designated by the Secretary of Treasury "particularly suitable for . . . sporting purposes."[30]

Once again, the Department of Treasury was responsible for the enforcement of the law,[31] authority which was delegated to the newly named Bureau of Alcohol, Tobacco and Firearms ("ATF").[32] Although the Secretary of Treasury was authorized to promulgate regulations pursuant to the GCA, the agency was not politically empowered to exercise this authority.[33] The bill's hearing process demonstrated that policymakers did not view the ATF's experience as particularly authoritative or instructive. Since the ATF was a division of the Treasury at the time, the Commissioner of Internal Revenue represented the agency at the hearings.[34] As a result, there were minimal discussions of the practical considerations that went into the law, such as how it would be enforced.[35]

Despite the existence of certain terms in the GCA that needed further clarification, the ATF was reluctant to overstep its congressional mandate through broad regulation. This was clearest in the agency's approach to the statutory phrase "sporting purposes." Since the GCA granted the Secretary of the Treasury the authority to permit the importation of firearms if they were "generally recognized as particularly suitable for or readily adaptable to sporting purposes,"[36] it was essential that the Secretary provide guidance as to which firearms fell into this category. Instead of defining the term, the Secretary kicked that responsibility down the road by delegating it to the

30. Zimring, *supra* note 13, at 149 (outlining the major objectives of the GCA); *Id.* § 925(d)(3).

31. Charles & Garrett, *supra* note 19, at 658 ("Treasury again was tasked with enforcement of the Act.").

32. By the time of the GCA's passage, the ATU had been renamed the Alcohol, Tobacco and Firearms Division. WILLIAM J. VIZZARD, IN THE CROSS FIRE: A POLITICAL HISTORY OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS 4 (1997). Shortly afterwards, it became known as the Bureau of Alcohol, Tobacco, and Firearms. David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 640 (1987). For simplicity, I will refer to the Bureau in all its historical variations at "the ATF."

33. VIZZARD, *supra* note 32, at 31.

34. *Id.* at 30.

35. *Id.* ("Testimony and discussion seldom dealt with issues of how the law would be enforced or the impact of changing any part of the bill on its other provisions . . . Thus what little experience existed in the [ATF] was not available to the committee.").

36. Gun Control Act of 1968, 18 U.S.C. § 925(d)(3) (1968).

Commissioner of Internal Revenue.[37] Once again, "sporting purposes" was left without a definition. Rather than risk political backlash by taking a policy stance on what types of weapons could be imported, the Commissioner established a complicated point system for determining whether certain weapons could be imported under the GCA, taking into account criteria such as the length, weight, and caliber.[38] Although these standards provided clear rules for firearms importers, the system also provided step-by-step instructions for foreign manufacturers to incorporate the criteria into their designs, thereby ensuring that their weapons could be sold in the United States.[39] Indeed, ATF figures show a significant drop off in handgun imports immediately after the GCA went into effect, but handgun imports rebounded by 1973, just five years after the GCA was enacted.[40]

The ATF's hesitation to exercise its regulatory power was in part due to the staunch opposition of gun rights activists. The NRA had opposed many of the gun control measures that were previously introduced in Congress, but it wasn't until the organization's ideological shift in the 1970s that the ATF became the primary subject of its ire. The ATF had recently established a higher national profile as a result of the Ford Administration's expansion of its resources.[41] Following the "Revolt in Cincinnati," the name given to the 1977 meeting of the NRA in which a radical subset of the organization ousted its former leaders and rewrote its bylaws, the ATF became an easy target.[42] As early as the Carter Administration, the agency learned that any attempts to engage in the rulemaking power which was delegated to it through the GCA would be met with strong opposition from gun rights activists.[43] Even mild proposals were

37. 26 C.F.R. § 178.112(c) (1968); Zimring, *supra* note 13, at 155.

38. U.S. Dep't of Treasury, Internal Rev. Serv. Factoring Criteria for Weapons, Form 4950; *see also* Vizzard, *supra* note 32, at 45.

39. Zimring, *supra* note 13, at 165.

40. *See id.* at 167–70 (analyzing Census and ATF data). Zimring notes that the Census Bureau and ATF's numbers begin to diverge in 1972, and by 1973, their numbers can no longer be reconciled with one another. Since the ATF's figures are derived from forms filed by holders of import licenses, whereas Census Bureau data comes from customs records, the ATF's figures are more likely to reflect the effect of Form 4590.

41. Vizzard, supra note 32, at 49; U.S. Gov't Accountability Off., PAD-87-4, Handgun Control: Effectiveness and Costs 43 (1978) (describing Project Concentrated Urban Enforcement, in which the ATF received a congressional appropriation to bring 179 additional special agents and other resources to three major cities).

42. Joel Achenbach et al., *How NRA's True Believers Converted a Marksmanship Group Into a Mighty Gun Lobby*, Wash. Post (Jan. 12, 2013), https://www.washingtonpost.com/politics/how-nras-true-believers-converted-a-marksmanship-group-into-a-mighty-gun-lobby/2013/01/12/51c62288-59b9-11e2-88d0-c4cf65c3ad15_story.html [https://perma.cc/L58A-J2H7].

43. Vizzard, *supra* note 32, at 55.

stonewalled and eventually withdrawn.[44] In March 1978, the ATF proposed a rule which would have required firearms licensees to report virtually all of their firearms transactions to the ATF on a quarterly basis.[45] The lobbying group Gun Owners of America responded swiftly,[46] and, within months, Congress passed an appropriation restriction that prohibited the ATF from implementing the proposed regulation.[47]

With the election of President Reagan, gun rights activists had a staunch ally in office. In September 1981, the Reagan Administration announced its intention to follow through on its campaign promise to abolish the ATF.[48] This appeared to be a clear win for the gun lobby, which had called for the dismantlement of the agency for years.[49] However, as plans to shift the ATF's functions to other agencies solidified, the gun lobby had a change of heart, and the ATF's chief opponent became its savior. Without the ATF, the gun lobby would lose its primary villain and recruiting tactic.[50] The proposed plan would have involved transferring the ATF's functions to the Secret Service, an agency with a reputation for competence that would have been much more difficult for the NRA to villainize.[51] Instead, the gun lobby used its political influence to block the President's plan to abolish the ATF.[52] As a result, in July 1982, Congress passed an appropriations rider stating that the funds could not be used for "any proposed reorganization of the Bureau of Alcohol, Tobacco and Firearms or the transfer of the Bureau's functions, missions, or activities to other agencies within the Department of Treasury" and that no future transfer of functions could be accomplished without the approval of both the House

44. William J. Vizzard, *The Impact of Agenda Conflict on Policy Formulation and Implementation*: *The Case of Gun Control*, 55 PUB. ADMIN. REV. 341, 342 (1995).

45. Firearms Regulations, 43 Fed. Reg. 11800 (Mar. 21, 1978) (to be codified at 27 C.F.R. pts. 178, 179).

46. Gun Owners for America passed out a "fact sheet" to Members of Congress on March 22, 1978, which alleged that ATF Executive Director Rex Davis proposed a nationwide gun registration file that would give the agency "access to the name and address of every [g]un [o]wner in the country." *Firearms Enforcement Efforts of the Bureau of Alcohol, Tobacco and Firearms: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 96th Cong. 68–69 (1980) (statement of G.R. Dickerson, ATF Dir.).

47. Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 95-429, 92 Stat. 1002 (1979).

48. Phil Gailey, *White House Planning to Kill Firearms Enforcement Unit*, N.Y. TIMES (Sept. 19, 1981), https://www.nytimes.com/1981/09/19/us/white-house-planning-to-kill-firearms-enforcement-unit.html [https://perma.cc/B9C5-YJ2B].

49. VIZZARD, *supra* note 32, at 80–81.

50. *Id.* at 81.

51. Tim Murphy, *Flashback: How Republicans and the NRA Kneecapped the ATF*, MOTHER JONES (Jan. 17, 2013), https://www.motherjones.com/politics/2013/01/atf-obama-gun-reform-control-alcohol-tobacco-firearms/ [https://perma.cc/W3JU-H79B].

52. VIZZARD, *supra* note 32, at 81.

and Senate Committees on Appropriations.[53] As recently as 2013, the gun rights lobby demonstrated its ability to block reform despite overwhelming public outcry. Following the mass shooting at Sandy Hook Elementary, which resulted in the death of twenty children and six teachers, the country seemed poised to enact major gun control legislation. A bipartisan amendment sponsored by conservative Democrat Joe Manchin and Republican Pat Toomey emerged which would have required background checks for unlicensed dealers at gun shows and online sales.[54] Despite the inclusion of additional provisions that would have strengthened gun rights,[55] the NRA called on its members to lobby against the bill.[56] Only four months after the shooting, the amendment failed.[57]

Given the agency's unique history of politization and its bureaucratic placement in the Department of Treasury—where tax and monetary policy, as opposed to law enforcement, are prioritized[58]—the ATF has been hesitant to make waves. Instead of fully utilizing its regulatory authority, it has largely focused on ensuring compliance with existing laws.[59] In 2002, the ATF was moved from the Department of Treasury to the Department of Justice as part of the Homeland Security Act.[60] Despite a continual expansion of the ATF's purview, the agency has frequently found itself caught in the crossfire of partisan attacks that impede its ability to execute its core functions. Since 2004, Congress has included appropriation riders which have limited the ATF's ability to take certain regulatory actions.[61] These

53. Urgent Supplemental Appropriations Act, Pub. L. No. 97-216, 96 Stat. 189 (1982) (prohibiting the use of the appropriated funds for reorganization in the fiscal year ending on September 30, 1982).

54. Jennifer Steinhauer, *A Senator's Search for an Ally Keeps a Gun Bill Alive*, N.Y. Times (Apr. 10, 2013), https://www.nytimes.com/2013/04/11/us/politics/compromise-on-background-checks.html [https://perma.cc/4XN5-QY8M].

55. *Id.*

56. Robert Draper, *Inside the Power of the N.R.A.*, N.Y. Times (Dec. 12, 2013), https://www.nytimes.com/2013/12/15/magazine/inside-the-power-of-the-nra.html [https://perma.cc/MMV9-TU6M].

57. *Id.*

58. Vizzard, *supra* note 32, at 83.

59. In a 2009 conference report, conferees noted that they "remain[ed] concerned with the existence of significant regulatory backlogs" at the ATF. H.R. Rep. No. 111-366, at 659 (2009) (Conf. Rep.); William J. Krouse, Cong. Research Serv., R41206, The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF): Budget and Operations for FY2011 2 (2011) ("[T]he lion's share of ATF's resources are allocated to its firearms compliance and investigations program. While the ATF periodically checks the records of federally licensed gun dealers, the major focus of the firearms program is the reduction of firearms-related violence.").

60. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(c)(1), 116 Stat. 2135, 2274 (codified at 28 U.S.C. § 599A(c)(1) (2012)).

61. Winnie Stachelberg et al., Blindfolded, and With One Hand Tied Behind the Back, Ctr. Am. Progress 4–5, 8–9 (Mar. 18, 2013), https://cdn.americanprogress.org/wp-content/uploads/2013/03/GunRidersBrief-7.pdf [https://perma.cc/4UJW-JUMN].

riders have prohibited the ATF from releasing firearm trace data, required the Federal Bureau of Investigation to destroy all approved gun purchaser records within twenty-four hours, and prohibited the ATF from requiring gun dealers to submit their inventories to law enforcement.[62] Similarly, in 2006, as a result of lobbying from gun rights activists,[63] Congress added an amendment to the PATRIOT Act's reauthorization which required ATF directors to receive Senate confirmation.[64] Since then, the ATF has suffered from a lack of leadership.[65] The politicization of the agency has made it particularly difficult for nominees to be confirmed. Indeed, nominees from both Republican and Democratic presidents have been blocked by the Senate.[66] Even President Trump's nomination of a former top police union official failed to get the necessary Republican support.[67] As a result, the ATF struggled without a permanent leader for thirteen of the fifteen years from 2006 to 2021.[68]

Instead of engaging in more binding forms of regulation, most of the ATF's regulatory efforts have taken the form of classification letters to firearm manufacturers which have comparatively little persuasive value in court and are not binding on parties, other than in individual rulings.[69] By channeling their regulatory efforts through individual letter

62. *Id.*; *see also, e.g.*, Consolidated Appropriations Act of 2010, Pub. L. No. 111–117, 123 Stat. 3034, 3128–3129 (2009).

63. Giovanni Russonello, *How Congress Has Undermined Gun Regulators*, N.Y. Times (May 26, 2021), https://www.nytimes.com/2021/05/26/us/politics/congress-guns-atf.html [https://perma.cc/H57K-FC5Q].

64. U.S. PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 504, 120 Stat. 192, 247 (2006) (to be codified at 6 U.S.C. § 531).

65. PBS News Hour, *Why the ATF is Often Leaderless and How It Affects the Agency's Work*, PBS (Sept. 9, 2021, 6:40 PM), https://www.pbs.org/newshour/show/why-the-atf-is-often-leaderless-and-how-it-affects-the-agencys-work#transcript.

66. *Id.*; Richard B. Schmitt, *ATF Nominee Is Trapped in D.C. Crossfire*, L.A. Times (Feb. 25, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-feb-25-na-atf25-story.html [https://perma.cc/26T6-8YBJ].

67. Sadie Gurman, *Trump Pulls Nomination of Ex-Police Union Official to Lead ATF*, Wall St. J. (May 19, 2020, 10:17 PM), https://www.wsj.com/articles/trump-pulls-nomination-of-ex-police-union-official-to-lead-atf-11589938551 [https://perma.cc/RK4X-PSFG].

68. In 2013, the Senate confirmed President Obama's nominee, B. Todd Jones, who only served as director until 2015. News Release, Bureau of Alcohol, Tobacco, Firearms & Explosives, ATF Announces B. Todd Jones to Depart (Mar. 20, 2015), https://www.atf.gov/news/pr/atf-announces-b-todd-jones-depart [https://perma.cc/CD9X-JVLS]. There was not another confirmed director until 2022 when the Senate confirmed President Biden's nominee, Steve Dettelbach. Mark Berman, *Senate Confirms ATF Director Nominee Steve Dettelbach,* Wash. Post (July 12, 2022, 1:14 PM), https://www.washingtonpost.com/national-security/2022/07/12/dettelbach-atf-guns-senate/ [https://perma.cc/KKA5-CH9V].

69. The ATF's Handbook explains that "ATF letter rulings classifying firearms may generally be relied upon by their recipients as the agency's official position concerning the status of the firearms under Federal firearms laws. Nevertheless, classifications

rulings and "open letters" to industry members, the ATF has implicitly agreed to a tradeoff: it could exercise some regulatory authority, without a significant risk of political backlash.[70] Many courts have granted only *Skidmore* deference to ATF classifications,[71] meaning the court defers to the agency only to the extent the letter is persuasive.[72] However, some lower courts have continued to demonstrate uncertainty as to how much deference the ATF should be granted.[73]

In February 2018, the ATF was thrust back into the center of controversy. Facing additional pressure from the public to take action in the wake of the shooting at Marjorie Stoneman Douglas High School, the Trump Administration directed the DOJ to "propose for notice and comment a rule banning all devices that turn legal weapons into machine guns."[74] This action marked the culmination of the DOJ and ATF's cautious announcement in December 2017 that it had begun "the process of determining" whether or not bump stocks could be banned

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are subject to change if later determined to be erroneous or impacted by subsequent changes in the law or regulations." Bureau of Alcohol, Tobacco, Firearms & Explosives, ATF National Firearms Act Handbook § 7.2.4.1 (2009) [hereinafter ATF Handbook], https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download [https://perma.cc/TPJ8-XTXR]; *see also* Vizzard, *supra* note 32, at 107 ("Issues requiring policy or legislative changes were usually avoided, because ATF lacked the political resources to initiate such change."). A search of the Federal Register reveals that, since 2000, the ATF has issued 31 final rules related to arms and munitions. In the same time period, the agency published 117 open letters related to firearms, according to the ATF's website.

70. *See* ATF Handbook § 1.4.2 ("Rulings do not have the force and effect of law but may be cited as precedent with respect to substantially similar fact situations. Courts will recognize and apply such rulings if they are determined to correctly interpret the law and regulations.").

71. *See, e.g.*, Freedom Ordnance Mfg., Inc. v. Brandon, No. 3:16-cv-00243-RLY-MPB, 2018 WL 7142127, at *5 n.7 (S.D. Ind. Mar. 27, 2018) (applying *Skidmore* deference to ATF classification letter); Innovator Enters. v. Jones, 28 F. Supp. 3d 14, 24 (D.D.C. 2014) (same); Sig Sauer Inc. v. Jones, 133 F. Supp. 3d 364, 369 n.7 (D.N.H. 2015) (assuming ATF's interpretation of the NFA in a classification letter was entitled to *Skidmore* deference).

72. *See* Skidmore v. Swift & Co. 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

73. *See, e.g.*, Springfield Inc. v. Buckles, 292 F.3d 813, 818 (D.C. Cir. 2002) (declining to decide whether *Chevron* or *Skidmore* applies to ATF informal adjudication revoking company's import permit); United States v. One TRW, Model M14, 7.62 Caliber Rifle, 441 F.3d 416, 420 (2006) (stating the amount of deference ATF rulings are entitled to is unsettled and declining to decide the issue); *c.f.* P.W. Arms, Inc. v. United States, No. C15-1990-JCC, 2016 U.S. Dist. LEXIS 194103, at *22 (W.D. Wash. Aug. 10, 2016) (granting *Chevron* deference to ATF letter).

74. Application of the Definition of Machinegun to ''Bump Fire'' Stocks and Other Similar Devices, 83 Fed. Reg. 7949 (Feb. 20, 2018).

through the ATF's rulemaking authority.[75] However, the President's announcement ordering the ATF to ban bump stocks took the agency by surprise.[76] The agency had not yet finished determining whether it had the authority to ban bump stocks through rulemaking, and ATF officials had privately indicated their belief that new legislation would be required in order to ban bump stocks.[77] Nonetheless, the ATF had been backed into a corner, forced to take a policy position that would make it the center of a legal controversy that would implicate the ATF's fundamental regulatory authority.

II.
ATF Interpretations & Lessons From the Bump Stock Ban

In order to implement the President's policy decision, the ATF used its rulemaking authority to classify bump stocks as "machine guns,"[78] weapons which were already banned under the text of the NFA and GCA.[79] Bump stocks are attachments to semiautomatic firearms that allow them to fire faster.[80] Without the bump stock, the shooter would have to manually pull the trigger of the firearm in order to fire each individual round.[81] The bump stock replaces the semiautomatic firearm's standard stock which is the part of the firearm held against the shoulder.[82] By replacing the standard stock, the firearm can use the recoil effect "to bounce the rifle off the shooter's shoulder and 'bump' the trigger back into the shooter's trigger finger, thereby firing the weapon repeatedly."[83]

The NFA defines "machine gun" as including "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single

75. Press Release, Department of Justice, Justice Department and ATF Begin Regulatory Process to Determine Whether Bump Stocks Are Prohibited (Dec. 5, 2017), https://www.justice.gov/opa/pr/justice-department-and-atf-begin-regulatory-process-determine-whether-bump-stocks-are [https://perma.cc/46T9-H52E].

76. Michael D. Shear, *Trump Moves to Regulate 'Bump Stock' Devices*, N.Y. Times (Feb. 20, 2018), https://www.nytimes.com/2018/02/20/us/politics/trump-bump-stocks.html [https://perma.cc/X3M7-TDJU].

77. *Id.*

78. The NFA and GCA spell the word "machinegun." *See* ATF Handbook, *supra* note 69, § 2.1.6. For stylistic purposes and in accordance with most courts that have ruled on the issue, this Note will use the spelling "machine gun."

79. 18 U.S.C. § 922(o) (2022).

80. Nicole Chavez, *What Are the 'Bump Stocks' on the Las Vegas Shooter's Guns?*, CNN (Oct. 5, 2017, 3:09 AM), https://www.cnn.com/2017/10/04/us/bump-stock-las-vegas-shooting/index.html [https://perma.cc/3SKJ-BPF7].

81. *Id.*

82. *Id.*

83. *Id.*

function of the trigger."[84] The term "machine gun" also includes "any part designed and intended solely and exclusively . . . for use in converting a weapon into a machine gun."[85] Since the GCA generally prohibits the transfer or possession of machine guns,[86] by classifying bump stocks as such, the ATF could arguably ban the accessory without any new legislation being passed. However, this policy hinged on the ATF's interpretation of "automatically" and "single function of the trigger" as they are used in the GCA and NFA.

In the 2018 final rule, the ATF interpreted "single function of the trigger" to mean "a single pull of the trigger," a position which it had taken since 2006.[87] Additionally, "automatically" was interpreted to mean "as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single pull of the trigger."[88] Through these definitions, the ATF concluded that, since bump stocks convert semiautomatic firearms into machine guns by "harness[ing] the recoil energy of the semiautomatic firearm in a manner that allows the trigger to reset and continue firing without additional physical manipulation of the trigger by the shooter," the bump stock allows the semiautomatic firearm to "produce automatic fire with a single pull of the trigger."[89] Therefore, it qualified as a machine gun and was, with limited exceptions, illegal to transfer or possess.[90]

This was not the first time the ATF had considered whether bump stocks should be subject to additional regulation. Indeed, the agency had previously wavered on the issue. In 2002, Akins, a gun manufacturer, wrote to the ATF, requesting an evaluation of its new accessory—the Accelerator—which would accelerate the firing rate of a semiautomatic firearm so that "the practical effect is equivalent to a fully-automatic machinegun."[91] Initially, the ATF responded to Akins in a letter ruling that it had determined that the Accelerator was not a machine gun.[92] However, after receiving additional requests to evaluate other devices which were designed to increase the firing rate of a semiautomatic

84. 26 U.S.C. § 5845(b) (2018).
85. *Id.*
86. *See* 18 U.S.C. § 922(o).
87. Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66518 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).
88. *Id.* at 66519.
89. *Id.* at 66514.
90. *Id.* at 66515.
91. Akins v. United States, 312 F. App'x 197, 198 (11th Cir. 2009).
92. *Id.* The ATF noted that the prototype broke during testing, but the "theory of operation was clear even though the rifle/stock assembly did not perform as intended." Akins v. United States, No. 08-cv-988-T-26TGW, 2008 U.S. Dist. LEXIS 134550, at *5 (M.D. Fla. Sept. 23, 2008), *aff'd*, 312 F. App'x 197 (11th Cir. 2009).

firearm, the ATF decided to reconsider the issue and open an investigation into the Accelerator.[93] After testing the device for the second time, the ATF overruled its previous letters to Akins and determined that the Accelerator constituted a machine gun.[94] The ATF then published its revised ruling on the Akins Accelerator and the agency's general policy in Ruling 2006-2, which stated that "conversion parts that, when installed in a semiautomatic rifle, result in a weapon that shoots more than one shot, without manual reloading, by a single pull of the trigger, are a machinegun," under the NFA and GCA.[95] Citing legislative history from the NFA, the 2006 ruling determined that the phrase "single function of the trigger" was equivalent to a "single pull of the trigger."[96] Akins challenged the ATF's decision in court, alleging its actions were arbitrary and capricious.[97] Akins also alleged that it was deprived of due process because the "'[ATF] was required to provide a notice of proposed rulemaking via publication in the Federal Register' before issuing Ruling 2006-2."[98] The Florida district court dismissed this argument, stating that the 2006 Ruling was merely "an interpretive rule, to which the APA's notice and comment requirements do not apply."[99] The Eleventh Circuit affirmed the district court's decision, stating it must apply a "deferential standard" to the ATF's decision and that it "must presume that the actions of the government agency are 'valid.'"[100] The court concluded that the "interpretation by the [ATF] that the phrase 'single function of the trigger' means a 'single pull of the trigger' is consonant with the statute and its legislative history."[101]

However, between 2008 and 2017, the ATF walked back this position by issuing additional letter rulings which concluded that other bump stock-type devices were not machine guns.[102] In the letters, the ATF applied its 2006 interpretation of "single pull of the trigger" to other bump-stock-type devices, but it concluded that those devices did

93. *Akins*, 312 F. App'x at 199.
94. *Id.*
95. Bureau of Alcohol, Tobacco, Firearms and Explosives, No. 2006-02, Classification of Devices Exclusively Designed to Increase the Rate of Fire of a Semiautomatic Firearm (2006), https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire/download.
96. *Id.*
97. *Akins*, 2008 U.S. Dist. LEXIS 134550, at *9.
98. *Id.* at *21.
99. *Id.* at *22.
100. *Akins*, 312 F. App'x at 200 (quoting Gun South, Inc. v. Brady, 877 F.2d 858, 861 (11th Cir. 1989)).
101. *Id.*
102. Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66517 (Dec. 26, 2018) (to be codified at 27 C.F.R. pts. 447, 478, 479).

not "'automatically' shoot more than one shot with a single pull of the trigger."[103] At no point during this period did the ATF provide a clear definition of "automatically."[104] Instead, the ATF would conclusively state in letter rulings that certain devices were not machine guns because they did not "initiate an automatic firing cycle" or they lacked "automatically functioning mechanical parts."[105]

The implementation of the 2018 rule set off a wave of litigation across the country and brought to light a question that has long plagued administrative agencies: what level of deference should be granted to agencies when they are interpreting criminal statutes? Since the rule expanded the definition of "machine gun," individuals who violated the rule by failing to dispose of their bump stocks would be subject to the criminal penalties provided for in the NFA and GCA. In *United States v. Mead Corp.*, the Supreme Court clarified that not all forms of agency action are entitled to the level of deference described in *Chevron*.[106] Instead, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[107] The Court held out notice and comment rulemaking as the prototypical example of an agency exercising this authority.[108] Given how rarely the ATF has engaged in notice and comment rulemaking,[109] there is little precedent regarding the amount of deference that is granted to more binding forms of ATF regulation. Most of the litigation regarding the ATF's regulatory power related to its open letters and individual rulings, which have limited precedential weight.[110] The courts

103. *Id.* at 66517–18.
104. *Id.* at 66518.
105. *Id.*
106. United States v. Mead Corp., 533 U.S. 218, 218 (2001).
107. *Id.* at 226–27.
108. *Id.* at 227 ("Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.").
109. From March 2014 to January 2023, the ATF published eighteen final rules, many of which were technical changes to the Code of Federal Regulations and had no bearing on policy. *See, e.g.*, Technical Amendments to Regulations, 79 Fed. Reg. 46690 (Aug. 11, 2014) (to be codified at 27 C.F.R. pts. 447, 478, 479, 555, 646); Technical Amendments to Regulations; Corrections, 80 Fed. Reg. 59580 (Oct. 2, 2015) (to be codified at 27 C.F.R. pt. 555); Recordkeeping Regulations, 81 Fed. Reg. 38070 (June 13, 2016) (to be codified at 27 C.F.R. pt. 478).
110. The ATF defines rulings as "a formal ruling published by ATF stating its interpretation of the law and regulations as applied to a specific set of facts." ATF HANDBOOK, *supra* note 69, § 1.2.3. The Handbook explains that these rulings "do not have the force and effect of law but may be cited as precedent with respect to substantially similar fact

have not previously had the opportunity to determine whether regulations that are promulgated pursuant to notice and comment and have the force and effect of law[111] are granted deference.[112]

However, the Supreme Court has stated that informal ATF action is not entitled deference. In 2014, in *Abramski v. United States*, the Court addressed the issue of whether falsely claiming that the gun was for oneself on a gun purchase form constituted a material misrepresentation under the relevant statute.[113] In support of his argument that the misrepresentation was not material, the petitioner pointed to a 1979 ATF industry circular in which the agency stated, "[i]t makes no difference that the dealer knows that the purchaser will later transfer the firearm to another person, so long as the ultimate recipient is not prohibited from receiving or possessing a firearm."[114] In addition to noting the fact that the ATF had subsequently changed its interpretation of the statute, the Court rejected the petitioner's argument that the agency's opinion would be given deference.[115] The Court stated the ATF's informal guidance was "not relevant at all" to the Court's analysis as to whether a misrepresentation on a gun purchase form was material to the lawfulness of the sale.[116] The *Abramski* majority cited *United States v. Apel*, a decision which had been issued earlier that year, in which the Court stated, "we have never held that the Government's reading of a criminal statute is entitled to any deference."[117] However, neither *Abramski* nor *Apel* involved interpretations by an agency that were intended to carry the force of law,[118] one of the key requirements to trigger *Chevron* deference.[119] Therefore, the ATF's bump stock ban provided the perfect

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situations." *Id.* § 1.4.2. The ATF apparently does not anticipate that these rulings are granted any form of deference since "courts will recognize and apply such rulings if they are determined to correctly interpret the law and regulations." *Id.*

111. The ATF describes these as "regulations" which "interpret the statutes (the law) and explain the procedures for compliance." ATF HANDBOOK, *supra* note 69, § 1.4.1. The ATF states regulations have "the force and effect of law" and that courts will uphold the regulation "if they find a reasonable legal basis for it and if it generally is within the scope of the statute." *Id.*

112. *See, e.g.*, Firearms Import/Export Roundtable Trade Group v. Jones, 854 F. Supp. 2d 1, 9 (D.D.C. 2012) (alleging the ATF violated the APA by issuing policy pursuant to an open letter and failing to provide an opportunity for notice and comment).

113. Abramski v. United States, 573 U.S. 169, 171 (2014).

114. Brief for Petitioner at 7–8, Abramski v. United States, 573 U.S. 169, 171 (2014) (No. 12-1493) (quoting DEP'T OF THE TREAS., BUREAU OF ALCOHOL, TOBACCO AND FIREARMS NO. 79-10, INDUSTRY CIRCULAR (Aug. 7, 1979)).

115. *Abramski*, 573 U.S. at 191.

116. *Id.*

117. *Id.* (citing United States v. Apel, 571 U.S. 359, 369 (2014)).

118. *See Apel*, 571 U.S. at 368 (stating the Executive Branch documents the plaintiff cited in support of their interpretation were "not intended to be binding").

119. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

vehicle for courts to opine over how administrative expertise should be weighed against the rule of lenity.

Since *Chevron* was decided in 1984, the Court has placed many asterisks on an otherwise straightforward premise: courts must defer to an agency's reasonable interpretation of an ambiguous statute.[120] Just six years later, in *Crandon v. United States*, the Court deliberated over the interpretation of a criminal statute which prohibited government employees from receiving supplemental compensation from private parties for the employee's government service.[121] The petitioners argued that the statute didn't apply to them because the statute did not prohibit private payments made before an individual becomes a government employee.[122] The Court discussed the rule of lenity, which it described as a "time-honored interpretive guideline."[123] The rule of lenity was to be applied "[t]o the extent that the language or history of [the statute] is uncertain," thereby ensuring that individuals have fair warning as to the boundaries of criminal conduct and that "legislatures, not courts, define criminal liability."[124] After analyzing the text, history, and purpose of the statute, the majority concluded that the "literal reading" was "consistent with one of the policies that motivated the enactment of the statute."[125] The Court had already determined that none of the evidence justified a departure from the statutory language, but also added that "[t]o the extent that any ambiguity . . . remains . . . it should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent."[126]

The rule of lenity has deep roots in American jurisprudence.[127] It was first officially articulated by the Supreme Court in 1820 in *United States v. Wiltberger*.[128] Chief Justice Marshall described the "rule that penal laws are to be construed strictly" as "perhaps not much less

120. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

121. Crandon v. United States, 494 U.S. 152, 154 (1990).

122. Petition for Writ of Certiorari at 10–17, Crandon v. United States, 494 U.S. 152 (1990) (No. 88-031).

123. *Crandon*, 494 U.S. at 158 (quoting Liparota v. United States, 471 U.S. 419, 427 (1985)).

124. *Id.*

125. *Id.* at 168.

126. *Id.*

127. *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 29 (Amy Gutmann ed., 1997) ("The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity.").

128. 18 U.S. (5 Wheat.) 76 (1820).

old than construction itself."[129] However, the Chief Justice noted that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature."[130] He expressed his concern that courts would "depart[] from the plain meaning of words . . . in search of an intention which the words themselves did not suggest."[131] Chief Justice Marshall elaborated on this separation of powers justification for the rule of lenity, stating "the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment."[132]

The Court has established a two-step framework for applying the rule of lenity.[133] After determining at Step Zero that there is a criminal statute at issue which is being challenged as ambiguous, the Court proceeds to Step One, in which it identifies all plausible interpretations using the traditional tools of statutory construction.[134] At Step Two, the Court applies the most plausible reading of the statute, resorting to the rule of lenity only if a "grievous ambiguity" remains.[135]

Although the majority in *Crandon* did not address the issue of deference, in his concurrence, Justice Scalia stated, "we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."[136] Therefore, advisory opinions from the Attorney General, the Office of Legal Counsel, the Office of Government Ethics, and the Comptroller General were all "unentitled to what might be called ex officio deference under *Chevron*."[137] Part of Justice Scalia's hesitation may have been based on the expansive and seemingly unconstrained nature of these opinions. The opinions took a "catch-as-catch-can" approach and were "unified mostly by the extraordinary principle that this criminal statute is violated if and when its purposes seem to be offended."[138]

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129. *Id.* at 95.
130. *Id.*
131. *Id.* at 96.
132. *Id.* at 95.
133. Scholars have noted a change in the Court's approach to the rule of lenity. Professor Zachary Price describes this modern rule of lenity as having begun in 1990 with the Court's decision in *Moskal v. United States*, 498 U.S. 103 (1990), but it can also be traced back to Justice Frankfurter's 1961 opinion in *Callanan v. United States*, 364 U.S. 587 (1961). Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L. Rev. 885, 899 (2004).
134. Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 190 (2018).
135. *Id.*
136. Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring).
137. *Id.*
138. *Id.* at 180.

Nonetheless, the Court continued to defer to agency interpretations of statutes with criminal implications in many contexts. In fact, the Court explicitly condoned this type of deference in 1997 in *United States v. O'Hagan*.[139] *O'Hagan* dealt with the Securities Exchange Commission's ("SEC") interpretation of the Securities Exchange Act of 1934. The statute granted the SEC rulemaking authority to "define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."[140] In exercising that authority, the SEC promulgated Rule 14e-3(a), which created a duty to abstain from trading or disclose trading on the basis of material nonpublic information, regardless of "whether the trader owes a pre-existing fiduciary duty to respect the confidentiality of the information."[141] The Court rejected the defendant's argument that Rule 14e-3(a) exceeded the SEC's rulemaking authority. In granting the SEC the authority to "define . . . such acts and practices as are fraudulent,"[142] the Court stated that Congress expected the SEC to take prophylactic measures.[143] Therefore, because the goal was to prevent fraud in the first instance, the Rule was likely to "encompass[] more than the core activity prohibited." Since the SEC's interpretation was "reasonably designed to prevent fraudulent acts," the Court, citing *Chevron*, granted the interpretation "controlling weight."[144]

Additionally, the Court has explicitly condoned *Chevron* deference in the immigration context, despite its criminal implications. In 1999, in *INS v. Aguirre-Aguirre*, the Court reversed the Ninth Circuit for its failure to afford proper deference to the Board of Immigration Appeals' ("BIA") interpretation of the Immigration and Nationality Act in the context of an immigration adjudication.[145] However, despite the Court's clear statement that deference was appropriate "to this statutory scheme," it has subsequently wavered in cases in which the interpretation could apply to cases outside of the BIA's purview. In 2004, in *Leocal v. Ashcroft*, the Court did not defer to the BIA in its affirmance of an immigration judge's determination that a state driving-under-the-influence

139. 521 U.S. 642 (1997).
140. 15 U.S.C. § 78n(e) (2022).
141. *O'Hagan*, 521 U.S. at 669 (quoting United States v. Chestman, 947 F.2d 551, 557 (2d Cir. 1991) (en banc)).
142. 15 U.S.C. § 78n(e).
143. *O'Hagan*, 521 U.S. at 667.
144. *Id.* at 673–74.
145. INS v. Aguirre-Aguirre, 526 U.S. 415, 424–25, 433 (1999) (stating the court of appeals erred by failing to apply *Chevron* deference to the BIA's interpretation in an immigration adjudication). The Court also noted that deference to the BIA was appropriate in the immigration context because it implicates questions of foreign relations. *Id.* at 425 (quoting INS v. Abudu, 485 U.S. 94, 110 (1988)).

conviction constituted a "crime of violence," thus making the petitioner deportable.[146] In dicta, the Court added that, even if the statute hadn't been clear on its face, the rule of lenity would apply and it "would be constrained to interpret any ambiguity in the statute in petitioner's favor."[147] Even though the statute was being applied in a noncriminal context, it had both criminal and noncriminal applications.[148] Therefore, the Court was required to "interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context."[149]

Expanding on Chief Justice Marshall's articulation of the rule of lenity, academics have primarily relied upon two main justifications for the rule: notice and legislative supremacy.[150] It is a well-founded principle of constitutional due process that, in order to be convicted of a crime, a defendant must have had fair notice that their conduct was criminal.[151] It would be inherently unfair for vague laws to be weaponized as a "trap for the innocent" which "conceal either in determining what persons are included or what acts are prohibited."[152] However, many scholars have noted that the concept of "notice" is often a legal fiction.[153] Even ardent supporters of the rule of lenity, such as Justice Scalia, have recognized that "in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction . . . albeit one required in any system of law."[154] Instead, mere constructive notice is often sufficient for criminal liability,[155] demonstrating that the notice justification for the rule of lenity supports a general principle of fairness as opposed to a literal requirement.

The second justification for the rule of lenity is that it is the legislature's role to define what constitutes a crime. As a politically accountable

146. 543 U.S. 1, 11–13 (2004).
147. *Id.* at 11 n.8.
148. *Id.*
149. *Id.*
150. *See* Price, *supra* note 133, at 886 (describing notice and legislative supremacy as "the classic rationales" for the rule of lenity); Rabb, *supra* note 134, at 186 ("In the lenity cases, the Court usually justified its decisions on familiar grounds of legislative supremacy and fair warning, both constitutional mandates.").
151. Note, *The New Rule of Lenity*, 119 HARV. L. REV. 2420, 2424 (2006).
152. United States v. Cardiff, 344 U.S. 174, 176–77 (1952).
153. *See, e.g.*, F. Andrew Hessick & Carissa Byrne Hessick, *Nondelegation and Criminal Law*, 107 VA. L. REV. 281, 316 (2021) ("[the notice argument] rests on several fictions: that individuals actually know where to find new laws once they are published, that individuals take the time and effort to actually read those laws, and that laypeople can understand the substantive scope of those laws.").
154. United States v. R.L.C., 503 U.S. 291, 309 (1992) (Scalia, J., concurring).
155. Barlow v. United States, 32 U.S. 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.").

branch, the legislature is more sensitive than the judiciary to society's values, thereby putting it in a better position to define what acts are worthy of moral condemnation.[156] Relatedly, separation of powers concerns could also arise when both the crime-defining power and prosecutorial power are vested in the Executive branch, thereby allowing the promulgating enforcement agency to "shape substantive law to facilitate their targeting preferences."[157] However, the Court addressed this argument in *Touby v. United States*,[158] in which the petitioners were indicted for the manufacture of a drug that had been designated a controlled substance by the Attorney General under a temporary scheduling provision of the Controlled Substances Act. The Act permitted the Attorney General to utilize an expedited procedure to temporarily schedule a substance in order to "avoid imminent hazards to public safety."[159] The petitioners argued the temporary scheduling statute concentrated too much power in the Attorney General by giving them the authority to both schedule the drugs and prosecute crimes, thereby violating the principle of separation of powers.[160] The Court rejected this argument, stating it "has no basis in our separation-of-powers jurisprudence" because the principle of separation of powers "focuses on the distribution of powers *among* the three coequal Branches . . . it does not speak to the manner in which authority is parceled out within a single Branch."[161] Having already held that Congress satisfied the intelligible principle requirement and could constitutionally delegate the authority to define criminal conduct to the Attorney General, the Court found that the petitioner's separation-of-powers concern "merely challenge[d] the wisdom of a legitimate policy judgment made by Congress."[162]

Both the notice and legislative supremacy justifications for the rule of lenity can be rebutted when applied in the context of agency rulemaking. First, the constructive notice requirement can be satisfied through notice and comment rulemaking. Indeed, the notice and comment procedures required by the APA create a greater likelihood that affected parties will have actual, as opposed to constructive, notice of what constitutes criminal conduct. Agencies are statutorily required to "give interested persons an opportunity to participate in the rule"

156. Richman, *supra* note 4, at 316–17 (2022) ("[I]n a liberal democracy, [criminal law] is supposed to express the moral condemnation of specific conduct by a community that speaks through its representatives.").
157. *Id.* at 316.
158. 500 U.S. 160, 164 (1991).
159. 21 U.S.C. § 811(h) (2015).
160. *Touby*, 500 U.S. at 167.
161. *Id.* at 167–68 (citation omitted).
162. *Id.*

through the submission of comments.[163] The APA also generally requires that rules are published at least thirty days before they go into effect.[164] As Thomas Merrill has noted, "[a]dministrative rulemaking, at least in its modern guise, is subject to a much more unyielding set of procedural requirements" than legislative statute-making.[165]

Second, the fears that motivated the legislative supremacy rationale for the rule of lenity are largely inapplicable within the context of agency rulemaking because it was rooted in a fear of judicial—as opposed to executive—overreach. The legislative supremacy justification was primarily articulated in response to the fear that judges would usurp the role of the legislature by recognizing and enforcing federal common law crimes.[166] The Court first laid down the rule against federal common law crimes in 1812 in *United States v. Hudson & Goodwin*, although it viewed the issue as "having been long since settled in public opinion."[167] In *Hudson*, the Court concluded that the circuit court did not have common law jurisdiction over an indictment for libel because Congress had not "ma[de] [the] act a crime, affix[ed] a punishment to it, and declare[d] the Court [should] have jurisdiction of the offense."[168] If courts are empowered to define criminal conduct, then, unlike the legislature, judges can unilaterally catch citizens off guard and criminalize conduct by utilizing creative statutory interpretation to shoehorn an individual's otherwise innocent actions into a criminal statute.[169] However, this argument is inapplicable when an agency has clarified the meaning of a statute through rulemaking. When Congress has clearly delegated authority to define culpable conduct to an agency, the agency still must act within the bounds of Congress's instructions. Therefore, by delegating rulemaking authority to an agency, Congress doesn't entirely abdicate responsibility for defining criminal conduct. In 1911, over seventy years before *Chevron*, the Court stated in *United States v. Grimaud* that Congress "could delegate power to an agency to adopt regulations subject to criminal penalties, provided that Congress itself legislated

163. 5 U.S.C. § 553(c) (1966).
164. *Id.* § 553(d).
165. Thomas W. Merrill, *Rethinking Article I, Section 1*, 104 COLUM. L. REV. 2097, 2155 (2004).
166. Richman, *supra* note 4, at 321.
167. 11 U.S. (7 Cranch) 32, 32 (1812). In fact, the issue had been subject to vigorous debate throughout early American history. However, the tide turned against the power of the judiciary to make criminal law as American legal theorists shifted away from their former belief in the natural grounding of common law. Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S. CT. REV. 345, 359–60 (1994).
168. *Hudson*, 11 U.S. (7 Cranch) at 34.
169. *See* United States v. R.L.C., 503 U.S. 291, 309 (Scalia, J., concurring) (stating it is a "needless farce" to suggest that citizens have notice when the public is charged with knowledge of legislative history).

the penalties."[170] The Court found that, since Congress had passed a law authorizing the Interior Department to adopt rules regulating the "occupancy and use" of public forests, the criminal prosecution of a shepherd who violated the Department's forest grazing rules was within the scope of Congress's delegation. Since the Secretary of the Interior was acting within the bounds of the authority delegated to him by Congress, violation of the rules was made a crime "not by the Secretary, but by Congress."[171] The Court formalized this requirement in 1928 in *J. W. Hampton, Jr., & Co. v. United States* when it stated that, for the delegation of authority to be constitutional, Congress must provide an "intelligible principle" to which the delegee must conform.[172] Following the introduction of the "intelligible principle" requirement in 1928, the Court has not struck down a statute on non-delegation grounds since 1935.[173]

As part of the Executive Branch, agencies are accountable to the public both through presidential elections and the processes by which they interpret statutes. Whereas unelected, life-tenured Article III judges may issue opinions with impunity, the Executive Branch is subject to change with every presidential election. Furthermore, unlike Congress, agencies that proceed via notice and comment rulemaking are required by the APA to respond to comments in opposition and explain their reasoning.[174] Whereas Congress could pass legislation as quickly and with as little explanation as political reality allows,[175] agencies may see their rules overturned by courts because they were arbitrary, capricious, unsupported by substantial evidence, or based on inadequate factfinding.[176] Therefore, the APA ensures that agencies remain within the bounds of their statutory authority by subjecting final agency action to judicial review.[177]

As Congress began to routinely delegate interpretive authority to the Executive Branch, the rule of lenity took on new meaning. Given

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170. Richman, *supra* note 4, at 312 (quoting Thomas W. Merrill & Kathryn T. Watts, *Agency Rules With Force of Law*, 116 HARV. L. REV. 467, 501–02 (2002)); *see* United States v. Grimaud, 220 U.S. 506, 517 (1911).

171. *Grimaud*, 220 U.S. at 522.

172. 276 U.S. 394, 409 (1928).

173. *See* A.LA. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

174. 5 U.S.C. § 553(b)–(c) (1966); *see also* Sanford N. Greenberg, *Who Says It's a Crime?:* Chevron *Deference to Agency Interpretations of Regulatory Statutes That Create Criminal Liability*, 58 U. PITT. L. REV. 1, 56 (1996) ("[I]ndividuals who potentially face criminal penalties for violating administrative regulations are often more likely to have input regarding and notice of administrative regulations than the average citizen has input regarding and notice of congressional statutes.").

175. Greenberg, *supra* note 174, at 56.

176. 5 U.S.C. § 706(2)(A), (E)–(F) (1966).

177. *Id.* § 704.

that the justifications for the rule of lenity cannot be perfectly transposed into the context of agency rulemaking, lenity has been sporadically and inconsistently applied. In William Eskridge and Lauren Baer's comprehensive review of Supreme Court decisions involving an agency interpretation of a statute in the terms from 1983 to 2005, they categorized all 1,014 cases based on the level of deference the Court granted to the agency's interpretation.[178] Notably, they found mixed results in criminal cases.[179] Although in some criminal cases they identified an "anti-deference" regime—presumably based on lenity—in which the Court invoked a presumption of ruling against the agency, that anti-deference was only applied in 32.5% of all criminal cases.[180] Furthermore, when the anti-deference regime was invoked, the agency still won 37.8% of the time. For the remaining 67.5% of cases involving a criminal statute, the Court did not impose anti-deference, and the agency won 74% of the time.[181] Although Eskridge and Baer describe the anti-deference cases as being based on the rule of lenity and the constitutional avoidance canon,[182] their analysis demonstrates that the Court has not treated the rule of lenity as the *sine qua non* of agency interpretations of criminal statutes.

Despite the rule of lenity's deep roots in American jurisprudence and its widespread modern acceptance among judges of varying ideological persuasions,[183] courts disagree as to when it is applied in the chronology of statutory interpretation when *Chevron* deference to an agency's interpretation could resolve the issue.[184] However, the modern Supreme Court has provided guidance by generally setting a high bar for the invocation of the rule of lenity. The Court has stated the rule applies only if "after seizing everything from which aid can be derived . . . we can make no more than a guess as to what Congress intended."[185] Only if after employing all of the traditional tools of statutory

178. William N. Eskridge & Lauren E. Baer, *The Continuum of Deference*, 96 GEO. L.J. 1083, 1089–90 (2008).
179. *Id.* at 1116.
180. *Id.*
181. *Id.* at 1117.
182. *Id.* at 1220–21.
183. Thirteen out of the forty-two appellate judges surveyed in Abbe Gluck and Richard Posner's *Statutory Interpretation on the Bench* "singled out lenity and/or constitutional avoidance as 'actual rules' and distinguished them from the other canons, in terms of their mandatory application." 131 HARV. L. REV. 1288, 1331–32 (2018); *see also* Rabb, *supra* note 134, at 180 ("[L]enity is generally valid on a spectrum of interpretive approaches, regardless of ideological commitments.").
184. Elliot Greenfield, *A Lenity Exception to Chevron Deference*, 58 BAYLOR L. REV. 1, 41 (2006).
185. Reno v. Koray, 515 U.S. 50, 65 (1995) (quotations and internal citations omitted).

interpretation, judges find that a "grievous ambiguity or uncertainty"[186] in the statute remains, can the rule of lenity then be applied.

In 1995, in *Babbit v. Sweet Home Chapter of Communities for a Greater Oregon,* the Court clarified that the rule of lenity does not foreclose deference to an agency's interpretation of a statute that includes criminal penalties.[187] The *Babbit* Court distinguished its previous decision in *United States v. Thompson/Center Arms. Co.*, which dealt with the question of whether the respondent gun manufacturer "made" a short-barreled rifle when it packaged a pistol together with a kit that permitted the pistol to be converted into either an unregulated long-barreled rifle or a regulated short-barreled rifle.[188] In *Thompson/Center Arms. Co.*, the respondent contested the ATF's advisory that the respondent's product constituted a "firearm" under the NFA and was therefore subject to a tax.[189] The Court in *Thompson/Center Arms. Co.* concluded that it was "proper" to apply the rule of lenity and resolve an ambiguous provision of the NFA in the respondent's favor because the NFA has "criminal applications that carry no additional requirement of willfulness."[190] However, the *Babbit* Court distinguished *Thompson/Center Arms Co.* by describing it as a "specific factual dispute" in which "no regulation was present."[191] Indeed, the *Babbit* Court clarified, "[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement."[192] Unlike *Thompson/Center Arms Co.*, in *Babbit*, the Secretary of the Interior had promulgated a regulation specifically defining the purportedly ambiguous statutory term.[193] The *Babbit* Court went on to state that, even if an agency promulgated a regulation whose interpretation of a statutory criminal penalty provided "such inadequate notice of potential liability as to offend the rule of lenity," that was not the case in *Babbit.*[194] Since the regulation at issue had existed for two decades, the respondents had fair warning of its consequences.[195]

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186. Ocasio v. United States, 578 U.S. 242, 295 n.8 (2016) (quoting Muscarello v. United States, 524 U.S. 125, 138–39 (1998)).

187. 515 U.S. 687, 704 n.18 (1995).

188. United States v. Thompson/Center Arms Co., 504 U.S. 505, 507 (1992); *Babbit*, 515 U.S. at 704 n.18.

189. *Thompson/Center Arms Co.*, 504 U.S. at 508.

190. *Id.* at 517–18.

191. *Babbitt*, 515 U.S. at 704 n.18.

192. *Id.* In *Thompson/Center Arms Co.*, the Government argued that the Court should defer to two longstanding Revenue Rulings, however, the Court stated that "[e]ven if they were entitled to deference, neither of the rulings . . . goes to the narrow question presented here." *Thompson/Center Arms Co.*, 504 U.S. at 518 n.9.

193. *Babbitt*, 515 U.S. at 690.

194. *Id.* at 704 n.18.

195. *Id.*

As a result of the Court's mixed messages, courts of appeals have varied drastically in their approaches to deference.[196] This has become most apparent in the litigation over the ATF's bump stock ban, which has resulted in a circuit split. Both the District of Columbia[197] and Tenth Circuits[198] upheld the bump stock ban. After initially upholding the ban, the Fifth Circuit, convening en banc, vacated its prior decision and struck down the ban.[199] After an en banc Sixth Circuit was evenly split on the issue, in a subsequent case, a Sixth Circuit panel struck down the Rule.[200] Much of the disagreement focused on the ATF's interpretation of the NFA and GCA and whether it should be entitled to deference.

After determining that the Bump Stock Rule constituted a legislative rule which the ATF intended to have the force of law, the D.C. Circuit decided that the ATF's interpretation of the NFA should be granted *Chevron* deference.[201] In response to the appellant's argument that the rule of lenity should apply in cases in which an ambiguity is found in a criminal statute, the D.C. Circuit acknowledged that the rule of lenity "generally applies" to interpretations of the NFA and GCA, however, "in circumstances in which *both Chevron* and the rule of lenity are applicable, the Supreme Court has never indicated that the rule of lenity applies first."[202] By contrast, the Fifth Circuit concluded that a plain reading of the GCA and NFA found that bump stocks did not qualify as machine guns and, even if the statute were ambiguous, the rule of lenity would require that criminal liability is not imposed.[203] Similarly, the Sixth Circuit determined that the ATF was not entitled to deference because the statutory scheme was "predominately criminal in scope" and the ATF did not have any "special expertise . . . with respect to the construction of this statutory scheme that the judiciary lacks."[204] Both circuits opposing the Rule found that the rule of lenity would prohibit them from granting deference to the ATF. However, by failing to fully

196. *See* Greenfield, *supra* note 184, at 41–47 (finding three different interpretations of whether *Chevron* applied to criminal statutes).

197. Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1, 6, 35 (D.C. Cir. 2019) (affirming denial of a preliminary injunction).

198. Aposhian v. Barr, 958 F.3d 969, 989 (10th Cir.) ("Because ATF's Final Rule sets forth a reasonable interpretation of the statute's ambiguous definition of 'machinegun,' it merits our deference."), *vacated*, 973 F.3d 1151 (10th Cir. 2020), *vacated en banc sub nom.*, Aposhian v. Wilkinson, 989 F.3d 890 (10th Cir. 2021).

199. Cargill v. Garland, 57 F.4th 447, 451, 457 (5th Cir. 2023).

200. Hardin v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 65 F.4th 895, 897–98 (6th Cir. 2023).

201. *Guedes*, 920 F.3d at 20, 32.

202. *Id.* at 27.

203. *Cargill*, 57 F.4th at 451 ("But even if that conclusion were incorrect, the rule of lenity would still require us to interpret the statute against imposing criminal liability.").

204. *Hardin*, 65 F.4th at 900–01.

explore the historic justifications for the rule of lenity, the Fifth and Sixth Circuits oversimplified its application and lowered the standard for when it should be invoked.

III.
How Should Courts Treat ATF Rules?

Although the principles motivating the rule of lenity do not squarely apply to agency interpretations of criminal statutes through notice and comment, this does not mean that agencies, as a whole, should be given deference whenever they engage in such rulemaking. Instead, an analysis of the reason for Congress's delegation of authority is warranted. Since the ATF exemplifies the principles justifying agency delegation, it should be granted deference.

First, it was unambiguously Congress's intent to delegate to the ATF broad authority to promulgate rules. Indeed, deference "is not accorded merely because the statute is ambiguous and an administrative official is involved."[205] Instead, in most cases, the agency's authority to promulgate rules is clear because the statute grants the agency broad authority to enforce all provisions of the statute.[206] By contrast, in *Gonzales v. Oregon*, the Court found that the Attorney General exceeded the bounds of Congress's delegated authority when he issued an interpretive rule restricting the use of controlled substances for physician-assisted suicide.[207] The Controlled Substances Act granted the Attorney General rulemaking authority only pursuant to the exercise of specific duties.[208] However, neither the GCA nor the NFA contain such limiting language. As the D.C. Circuit pointed out in *Guedes v. ATF*, the GCA includes broad language, stating that the agency, through the Attorney General, may "prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter."[209] Since the GCA is a purely criminal statute,[210] it would make Congress's statutory delegation of rulemaking authority meaningless if the ATF's interpretations of the GCA were regularly struck down by courts due to lenity concerns. Similarly, the NFA affirmatively states that the Attorney General[211] shall "prescribe all needful rules and regulations for the enforcement of" the

205. Gonzales v. Oregon, 546 U.S. 243, 258 (2006).
206. *Id.* at 258–59 (collecting cases).
207. *Id.* at 268 ("[T]he CSA does not give the Attorney General authority to issue the Interpretive Rule as a statement with the force of law.").
208. *Id.* at 259.
209. Guedes v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 920 F.3d 1, 7 (D.C. Cir. 2019) (quoting 18 U.S.C. § 926(a)).
210. *Id.* at 26.
211. *See* 26 U.S.C. § 7801(a)(2)(A) (2018).

Act.[212] However, failure to comply with any provision of the NFA may subject an individual to up to ten years in prison.[213] Therefore, any rule promulgated pursuant to the NFA may have criminal implications.

Second, unlike Congress, which is comprised of generalist politicians who come and go with each election cycle, agencies are often staffed by lifelong bureaucrats who develop expertise in a particular field.[214] The Supreme Court has emphasized the importance of the expertise rationale for agency delegation, stating that "[a]dministrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to the agency."[215] The Court's acceptance of the expertise rationale also explains why it has stated that deference to agencies reaches its outer limits when the agency has no more expertise than a court in resolving a regulatory ambiguity.[216]

Expertise is not acquired merely because the agency has experience applying certain legal standards. Indeed, some agency interpretations are not granted deference because they "fall more naturally into a judge's bailiwick."[217] The Court has recognized such a limit to agency deference in cases involving a common-law property term[218] or the awarding of attorneys' fees.[219] However, reviewing courts must be at their "most deferential" when an agency is "making predictions, within its area of expertise, at the frontiers of science."[220] The ATF's technical expertise provides it with the unique ability to adapt to rapidly changing technology, a capacity which is particularly necessary given the continually evolving nature of firearms. In addition to the on-the-ground experience it gains through its criminal law enforcement arm, the ATF's regulatory arm provides it with unique access to information about the industry it oversees. While many law enforcement agencies are committed to the reduction of gun crime, the ATF is the only federal agency that has a relationship with the firearms industry through regulatory personnel known as industry operations investigators ("IOIs").[221] The ATF retains sole federal regulatory authority over Federal Firearms

212. *See Guedes*, 920 F.3d at 26 (quoting 26 U.S.C. § 7805(a) (1998)).
213. 26 U.S.C. § 5871 (1984).
214. Margaret H. Lemos, *The Other Delegate*, 81 S. Cal. L. Rev. 405, 445 (2008).
215. Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (internal quotes omitted).
216. *Id.*
217. *Id.*
218. *Id.* (citing Jicarilla Apache Tribe v. Fed. Energy Regul. Comm'n, 578 F.2d 289, 292–93 (10th Cir. 1978)).
219. *Id.* (citing W. Va. Highlands Conservancy, Inc. v. Norton, 343 F.3d 239 (4th Cir. 2003)).
220. Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, 462 U.S. 87, 103 (1983).
221. Parsons & Gerney, *supra* note 11, at 99–100.

Licensees ("FFLs"), which are dealers authorized to engage in the business of manufacturing, importing, or selling firearms in the United States.[222] The ATF also operates the National Tracing Center, which is the only entity capable of tracing firearms from the manufacturer to the point of first retail sale. Through its oversight of FFLs and its firearm tracing capabilities, the ATF is uniquely able to detect patterns in illegal firearms commerce and respond to these patterns through regulation.[223]

A notable example of the ATF drawing upon its expertise and regulating in response to changing technology was its 2022 final rule which addressed the proliferation of privately made firearms, or "ghost guns."[224] The 2022 rule amended prior ATF-promulgated definitions of "frame or receiver" as they are used in the GCA and NFA.[225] Under current law, licensed manufacturers or importers are required to identify firearms with a serial number engraved on the receiver or frame of the weapon. Additionally, since frames or receivers are included in the statutory definition of "firearm,"[226] any person who wishes to legally manufacturer, import, or deal in frames or receivers must first obtain a license from the ATF.[227]

The prior definition of "firearm frame or receiver," which was first promulgated in 1968, was informed by the single-framed firearms which were common for civilian use at the time.[228] Therefore, "firearm frame or receiver" was defined as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."[229] However, the firearms that have gained popularity among civilians since 1968 no longer resemble those that were in common usage at the time the original definition was promulgated.[230] Instead, firearms with split frames or receivers—which do not fall under the precise wording of the original definition—now constitute the majority of

222. Bureau of Alcohol, Tobacco, Firearms & Explosives, Congressional Budget Submission: Fiscal Year 2019, at 6 (2018), https://www.atf.gov/file/147951/download.
223. *Id.*
224. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652, 24652 (Apr. 26, 2022) (to be codified at 27 C.F.R. pts. 447, 478, 479).
225. *Id.*
226. 18 U.S.C. § 921(a)(3)(A)–(B) (2022).
227. 18 U.S.C. §§ 922(a)(1)(A), 923(a) (2022).
228. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. at 24654.
229. Commerce in Firearms and Ammunition, 33 Fed. Reg. 18555, 18558 (Dec. 14, 1968) (to be codified at 26 C.F.R. pt. 178).
230. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. at 24655.

firearms in the United States.[231] Additionally, technological advancements now allow firearm manufacturers to sell firearm parts kits to unlicensed individuals.[232] Since these privately assembled firearms include frames or receivers that fall outside of the ATF's definition, they were not required to be serialized.[233] Therefore, if the firearm is subsequently used in a crime and recovered by law enforcement, it is extremely difficult to trace.[234] The fact that these "ghost guns" are difficult to trace makes them extremely attractive to criminals. The ATF found that the number of privately made firearms recovered by law enforcement and submitted to the ATF for tracing increased 1,083% from 2017 to 2021.[235] In response to these developments, the ATF finalized a new rule in 2022 which added to the definition of a "firearm" to include "weapons parts kit."[236] Similarly, the rule expanded the definition of "frame or receiver" to ensure that modern firearms with split or multi-part receivers also fall under the statutory definition.[237]

Some academics have argued that the expertise rationale for agency delegation does not apply when agencies are interpreting criminal statutes. Professors Andrew Hessick and Carissa Byrne Hessick contend that criminalization represents a moral judgment, something which does not depend on objective data or methodologies.[238] However, this argument assumes that when agencies promulgate regulations pursuant to criminal statutes, they are criminalizing activity that would otherwise be considered innocent, thereby making a moral judgment independent of the delegating statute. In reality, many of the gaps which agencies are tasked with filling can hardly be considered philosophical quandaries. The only "moral" judgment that could be discerned from the ATF's ghost gun rule is that the nation's gun laws should continue to be applied in response to advancing technology which would otherwise allow individuals to skirt the law.

Hessick and Hessick's argument ignores the possibility that, in enacting the enabling statute, Congress made the initial moral judgment and decided that the best way to enact its will was to delegate

231. *Id.*
232. *Id.*
233. *Id.* at 24655–56.
234. *Id.*
235. 2 Bureau of Alcohol, Tobacco, Firearms and Explosives, *Part III: Crime Guns Recovered and Traced Within the United States and Its Territories*, *in* National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns Intelligence and Analysis 5 (2023).
236. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. at 24735.
237. *Id.*
238. Hessick & Hessick, *supra* note 153, at 323.

rulemaking to an agency. Through rulemaking, the agency uses its technical expertise to determine how Congress's moral judgment can best be implemented. As long as the agency does not depart from the statute's intelligible principle or offer an interpretation that clearly contradicts Congress's intent—both of which are requirements under the Court's current jurisprudence—the agency cannot be said to have made a moral judgment independent of Congress.

At the highest level of generality, any agency decision could be portrayed as a moral judgment. However, the ATF's decision to expand the definition of "firearm frame or receiver" required significantly more technical expertise than Hessick and Hessick's analysis suggests. Specifically, only through the ATF's monitoring of trends in firearm manufacturing, sales, and criminal usage could it conclude that only ten percent of currently manufactured firearms in the United States would fall under the present definition of "frame or receiver" and thereby be subject to the GCA and NFA.[239]

Furthermore, the fact that the ATF has historically found itself at the crosshairs of political controversy, as discussed in Part I, may make it even better suited to engage in rulemaking. This politicization ensures that the ATF is subject to continual and significant scrutiny, thereby making it the ideal candidate for deference. First, the ATF's politicization has made it generally hesitant to exercise its regulatory power. Therefore, on the rare occasions that it does engage in notice and comment, it must act with the level of deliberateness that the Court contemplated when it stated in *United States v. Mead Corp.* that deference is owed when the agency makes rules that are intended to "carry[] the force of law."[240] That external scrutiny can serve as a check on the agency, ensuring that they do not exceed their congressional mandate or skip any procedural steps because they will be subject to the litigious ire of gun rights activists. Finally, the salience of gun control as a hotly contested social issue[241] ensures that the ATF is politically accountable. One of the justifications for delegations to agencies as opposed to the courts is that, as part of the Executive Branch, agencies are more likely to be accountable to the public. This is particularly true for the ATF since presidential candidates have increasingly made gun control a

239. Transcript of Motion Hearing at 122–23, United States v. Rowold, 429 F. Supp. 3d 469 (N.D. Ohio 2019) (No. 60) (concluding a minority of firearms currently manufactured contain all three elements of the current frame or receiver definition).

240. 533 U.S. 218, 226–27 (2001).

241. Erik Luna, Commentary, *The .22 Caliber Rorschach Test*, 39 HOUSTON L. REV. 53, 62 (describing the debate over gun control as a debate about "diametrically opposed cultures and worldviews").

cornerstone of their policy agendas.[242] More than half of registered voters stated that gun policy was "very important" to their vote in the 2020 presidential election.[243] Therefore, unlike agencies which deal in more obscure areas of the law, the public can clearly articulate its dissatisfaction with the ATF's actions through voting.

Conclusion

The Bump Stock Rule represented a turning point in the history of the ATF. In response to the deadliest mass shooting in American history, a Republican president ordered the ATF to ban the firearm accessory that allowed the Las Vegas shooter to fire ninety shots in just ten seconds.[244] This unprecedented act of bipartisan interest in gun control supplied the ATF with the political will to use its regulatory powers as it never had before. While *Chevron* itself may have a precarious future at the Supreme Court, any deference regime will have to grapple with the apparent tension between agency interpretations of criminal statutes and the rule of lenity. However, as I have demonstrated, there are certain cases in which there is no tension at all. The first justification for the application of the rule of lenity when agencies interpret criminal statutes is that agency regulation fails to provide notice to affected individuals, thereby setting a "trap for the innocent."[245] However, when the ATF regulates through notice and comment, regulated individuals and industries have as much constructive—or actual—notice as if the rule had been published in the United States Code. Unlike the lawmaking process,

242. Andrew J. McClurg, *Sound Bite Gun Fights: Three Decades of Presidential Debating About Firearms*, 73 UMKC L. Rev. 1015, 1015 (2005) ("[G]un control has been one of the most frequently asked-about subjects over twenty-eight years of presidential debating."); *see also* Fred Backus, *A Candidate's Position on Gun Control Laws Matters, but for Democrats More than Republicans*, https://www.cbsnews.com/news/gun-control-laws-candidate-opinion-poll-2022-06-07/ [https://perma.cc/TAA6-WMN9] (June 7, 2022, 6:50 PM); CBS Boston, *Where They Stand: 2020 Presidential Candidate Views on Gun Control*, CBS News (Sept. 9, 2019, 2:36 PM), https://www.cbsnews.com/boston/news/gun-control-2020-presidential-candidate-views-platforms/ [https://perma.cc/NSN5-DJED].

243. *4. Important Issues in the 2020 Election*, Pew Rsch. Ctr. (Aug. 13, 2020), https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election/ [https://perma.cc/TY58-3RQ4].

244. Larry Buchanan et al., *What is a Bump Stock and How Does it Work?*, N.Y. Times, https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html [https://perma.cc/L6KL-B8CL] (Mar. 28, 2019); Martin Kaste & Ryan Lucas, *Justice Department Bans Bump Stocks, Devices Used in Deadly Las Vegas Shooting*, NPR (Dec. 18, 2018, 12:14 PM), https://www.npr.org/2018/12/18/677788059/justice-department-bans-bump-stocks-devices-used-in-deadly-las-vegas-shooting [https://perma.cc/5LKL-LR95].

245. United States v. Cardiff, 344 U.S. 174, 176 (1952).

the APA requires that the agency receive and respond to critiques of a rule before it becomes final. An agency's rule can be entirely upended if the reviewing court finds that the agency failed to adequately respond to alternative proposals,[246] whereas laws are not sent back to Congress because they failed to respond to the concerns of a constituent.

The second justification for the rule of lenity stems from Congress's historical position as the best arbiter of moral judgment because it is the branch that is most responsive to society's values. Therefore, Congress is best suited to determine what acts are worthy of criminalization. However, when the agency is given a clear mandate that itself contains a moral judgment, an agency's interpretation of a criminal statute does not usurp Congress's role. Instead, the agency utilizes its expertise to fill the gaps that will inevitably become apparent in the statute.

As the Trump Administration did with the Bump Stock Rule, the Biden Administration has continued to leverage the rulemaking power of the ATF to pursue its gun control agenda.[247] However, as challenges by gun rights activists percolate through the lower courts, the ATF will have to continue the fight for its newfound regulatory power for the foreseeable future.

246. Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 56 (1983) (declaring agency rule arbitrary and capricious because it "failed to offer the rational connection between facts and judgement").

247. Jared Gans, *Biden Administration Finalizes New Rule Tightening Regulations on Gun Stabilizing Braces*, THE HILL (Jan. 13, 2023, 9:31 PM) https://thehill.com/homenews/administration/3813012-biden-administration-finalizes-new-rule-tightening-regulations-on-gun-stabilizing-braces/ [https://perma.cc/4ACF-A48N]; *see* Factoring Criteria for Firearms With Attached "Stabilizing Braces," 88 Fed. Reg. 6478 (Jan. 31, 2023) (to be codified at 27 C.F.R. pts. 478, 479).