

## Litigating the Bump-Stock Ban

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### THE CASE MADE FOR ADMINISTRATIVE LAW TEXTBOOKS

If a law professor dreamed of a case that could touch on the most substantial issues taught in administrative law classes, he would dream of *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*. The case runs the gauntlet, featuring issues of statutory construction and deference, the procedural requirements under the Administrative Procedures Act (“APA”), the Appointments Clause and statutory conflicts between vacancy statutes, standing, exceptions to *Chevron* deference including questions of waiver, and allusions to many more textbook issues. Because some of these issues are less settled than others, a companion case—*Aposhian v. Barr*, features some alternative outcomes such as the lower court characterization of the agency action at issue as interpretive, in opposition to the preliminary findings in *Guedes*, where the court held the Bump-Stock Rule was legislative. Both cases reviewed challenges to a final rule published by the Department of Justice and Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). When the Supreme Court denied a writ of certiorari for injunctive relief in *Guedes*, one Supreme Court Justice issued a statement raising more administrative law questions and challenging some administrative law presumptions that, if borne out, could further unsettle substantial administrative law issues.

At the heart of the dream case lies a dispute over the definition of “machine gun” and a rule promulgated by the agency to clarify the meaning of two terms contained in the statutory definition that are not otherwise defined. This article attempts to address all of the major administrative law issues raised in *Guedes* and their potential outcomes by walking through a *Chevron* analysis, starting with (1) whether the Bump-Stock Rule satisfies *Chevron* step zero, then looking at (2) whether any exceptions prevent the application of *Chevron*, and ending with (3)

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whether the Bump-Stock Rule satisfies the test in *Chevron*, thus warranting *Chevron* deference. Under existing precedent, *Chevron* deference applies to the Bump-Stock Rule. This article tries, however, to anticipate the nuanced (or watershed) deviations at each stage of the analytical process that present themselves to the Supreme Court if either case (or both) come before the Court on their merits.

## I. A HISTORY OF MACHINE GUNS

Born in the trenches as bulky, military, rapid-fire weapons, machine guns evolved over time, changing their form and becoming more portable and efficient.<sup>1</sup> The massive, hand-driven gatling machine gun, invented during the Civil War, was the “first firearm to solve the problems of . . . the firing of sustained bursts.”<sup>2</sup> The weapon also gave “small numbers of U.S. troops enormous advantages in firepower over the western Indians.”<sup>3</sup> In 1917, these characteristics found a smaller, more portable form in the Thompson submachine gun—also known as the tommy gun.<sup>4</sup> An accidental creation, the invention began as a pursuit to create an automatic rifle but upon reviewing the failed prototype, John Thompson purportedly exclaimed, “[w]e shall . . . instead build a little machine gun. A one-man, hand-held machine gun.”<sup>5</sup> The hand-held machine gun came in different models offering different capacities.<sup>6</sup> In the 1920s, “the civilian market” represented the bulk of sales.<sup>7</sup> Perhaps the public found appeal in advertising slogans such as “the gun that makes one man equal twenty.”<sup>8</sup>

Given the destructive function of the machine gun and its continuing evolution into more functional and portable devices, the issue of civilian use came to a head. Much of the 1920–1930 civilian sales of tommy guns

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1. Peter G. Kokalis, *The First Bren Gun: Birth of a Machinegun Masterpiece*, SHOTGUN NEWS, Apr. 1, 2015, at 10–11.

2. *Gatling Gun*, HIST. (Mar. 4, 2010), <https://www.history.com/topics/american-civil-war/gatling-gun> [<https://perma.cc/SL7L-PEH7>]; see also Mary Bellis, *History of the Gatling Gun*, THOUGHTCO. (Nov. 25, 2019), <https://web.archive.org/web/20210420090422/http://www.thoughtco.com/history-of-the-gatling-gun-1991839>.

3. *Gatling Gun*, *supra* note 2.

4. See Peter G. Kokalis, *3 Tommy Guns*, Shotgun News, Oct. 1, 2015, at 20, 22; BILL YENNE, TOMMY GUN: HOW GENERAL THOMPSON'S SUBMACHINE GUN WROTE HISTORY (2009).

5. Kokalis, *supra* note 4, at 22.

6. *Id.* at 22–23.

7. *Id.* at 23.

8. *The Gun That Makes One Man Equal Twenty*, 7 NAT'L POLICE J. 1, 1 (1921) (cover advertisement).

consisted, unsurprisingly, of sales to gangsters.<sup>9</sup> “Those criminals from the mob took advantage of the rise of the portable machine gun, capable of firing multiple rounds of ammunition with the single pull of a trigger.”<sup>10</sup> Newspapers of the day exploited these sensational crimes and christened more than one notorious machine gun-wielding mobster with a “machine gun” nickname.<sup>11</sup> The public fascination and fear of the carnage caused by organized crime and machine guns helped push legislators in America to pass the first gun control law in 1934.<sup>12</sup> In the National Firearms Act of 1934 (“NFA”), Congress defined a machine gun as “any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger.”<sup>13</sup> The congressional record makes it apparent that Congress intended to broadly cover all potential machine guns in its definition.<sup>14</sup>

9. Kokalis, *supra* note 4, at 23. This does not necessarily imply that machine guns constituted a large proportion of gun ownership, just that organized crime comprised a substantial portion of civilian sales in the 1920s. See, e.g., Peter Suci, *Buying a Machine Gun Isn't 'Automatic': Navigating the NFA of 1934*, MIL. TRADER (Jan. 24, 2019), <https://www.militarytrader.com/military-vehicles/buying-a-machine-gun-isnt-automatic> [<https://perma.cc/JS9R-QVDD>] (“The truth is that Thompson submachine guns weren’t all that widely used by gangsters or by most bank robbers.”).

10. *Prohibition-Era Gang Violence Spurred Congress to Pass First Gun Law*, NPR (June 30, 2016, 4:25 PM), <https://www.npr.org/2016/06/30/484215890/prohibition-era-gang-violence-spurred-congress-to-pass-first-gun-law> [<https://perma.cc/G4X2-3PLH>].

11. See George “Machine Gun” Kelly, FBI, <https://www.fbi.gov/history/famous-cases/machine-gun-kelly> [<https://perma.cc/AJF3-NB6C>] (last visited Oct. 4, 2021); “Machine Gun” Jack McGurn – St. Valentine’s Day Massacre, AM. MAFIA HIST. (June 29, 2015), <https://americanmafiahistory.com/machine-gun-jack-mcgurn/> [<https://perma.cc/L28B-MYDX>]; see also Jack Kelly, *Gangster City*, 46 AM. HERITAGE 65 (1995) (“Police and reporters were mystified by the volume of fire and by the orderly rows of pockmarks on the building. . . . [T]hat evening introduced the Thompson submachine gun into the beer wars and into the world’s imagination.”).

12. See ATF *National Firearms Handbook*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES 1 (2009), <https://www.atf.gov/firearms/docs/guide/atf-national-firearms-act-handbook-atf-p-53208/download> [<https://perma.cc/6KK4-7M3U>] (“As the legislative history of the law discloses, its underlying purpose was to curtail, if not prohibit, transactions in NFA firearms. . . . firearms [posing] a significant crime problem because of their frequent use in crime, particularly the gangland crimes of that era such as the St. Valentine’s Day Massacre.”); Suci, *supra* note 9 (identifying the machine guns used in the St. Valentine’s Day Massacre of 1929 as one of two events in the 1920s to early 1930s that attracted the attention of lawmakers); *Prohibition-Era Gang Violence*, *supra* note 10.

13. National Firearms Act of 1934, Pub. L. No. 73–474, § 1(b), 48 Stat. 1236, 1236 (1934).

14. Congress modified the definition of “machine gun” from the original version of the bill that defined it as “any weapon designed to shoot automatically or semiautomatically twelve or more shots without reloading.” *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways and Means*, 73d Cong. 1 (1934). The testimony of Mr. Karl Frederick, president of the National Rifle Association, included an alternative definition of machine gun that more closely resembled the definition eventually adopted in the Act and the back-and-forth with legislators provided helpful insight into congressional intent. *Id.* at 41. See also *To Regulate Commerce in Firearms: Hearing on S. 885 and S. 2258 Before a Subcomm. of the Comm. on Com. U.S. Sen.*, 73d Cong. 89 (1934) [hereinafter *NFA Senate Subcomm. Hearings*].

The definition continued to evolve and expand, incorporating “*any combination of parts* designed and intended for use in converting a weapon into a machinegun,” and later Congress expanded this definition further by adding “*any part* designed and intended solely and exclusively . . . for use in converting a weapon into a machinegun.”<sup>15</sup> While the definition continued to expand, Congress did not actually prohibit the possession or transfer of machine guns until 1986, and even then, the law applied only prospectively to machine guns manufactured on or after 1986 (and subject to certain exceptions).<sup>16</sup>

Just as the violence and public pressure surrounding machine guns pushed the legislature to enact the first gun control measures, public pressure after the 2017 Las Vegas mass shooting pushed the executive branch to reassess its interpretation of the term “machine gun” and invite public comment.<sup>17</sup> President Donald Trump formally tasked the Attorney General with “dedicat[ing] all available resources to . . . propose for notice and comment a rule banning all devices that turn legal weapons into machineguns.”<sup>18</sup> The Department of Justice then sought to clarify its interpretation of “machine gun” in several regulations and signaled its intent to enforce this interpretation as applying to bump-stocks.<sup>19</sup> While a

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15. Firearm Owners’ Protection Act, Pub. L. No. 99-308, § 109(a), 100 Stat. 449, 460 (1986) (emphasis added).

16. *Id.* § 102(9). In 1934, the Senate subcommittee considered at least two bills (S. 2258 and S. 885) at the same time it held hearings on the National Firearms Act, both of which contemplated a ban on the importation and transfer of machine guns. *NFA Senate Subcomm. Hearings, supra* note 14, at 4 (“It shall be unlawful for any person to ship in interstate or foreign commerce, or import, any machine gun, or to receive, conceal, store, barter, sell, or dispose of any machine gun so shipped or imported.”). It is a common misconception that Congress banned machine guns in 1934. *See, e.g., S. REP. NO. 103-124, at S12566* (1994) (Conf. Rep.) (“Mr. MURKOWSKI. Now, a machine-gun is an automatic weapon. But automatic weapons have been banned in this country by law since 1934.”). Not only did the NFA not prohibit machine gun ownership, but the U.S. Supreme Court, in *Haynes v. United States*, 390 U.S. 85 (1968), rendered the NFA unenforceable for law prosecution purposes. *ATF National Firearms Handbook, supra* note 12, at 1.

17. *See* Application of the Definition of Machinegun to ‘Bump Fire’ Stocks and Other Similar Devices, 82 Fed. Reg. 60,929, 60,930 (proposed Dec. 26, 2017) (to be codified at 27 C.F.R. pts. 478, 479).

18. *Department of Justice Announces Bump-Stock-Type Devices Final Rule*, DEP’T OF JUST. (Dec. 18, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-bump-stock-type-devices-final-rule> [<https://perma.cc/NAQ8-CGVT>].

19. The Department of Justice filed a notice of proposed rulemaking in the Federal Register to add to the definition of “machine gun” in the regulations at 27 C.F.R. §§ 447.11, § 478.11, and § 479.11. Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,457 (proposed Mar. 29, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11). The agency indicated it intended to clarify “‘automatically’ as it modifies ‘shoots,’ et al., as ‘functioning as the result of a self-acting or self-regulating mechanism that allows the firing of multiple rounds through a single function of the trigger,’ to clarify ‘single function of the trigger’ as ‘a single pull of the trigger,’ and to clarify ‘machinegun’ as ‘includ[ing] a bump-stock-type device.’” *Id.*

published 2006 ATF Ruling interpreted the NFA's definition of "machine gun" as applying to coiled spring bump-stock devices, thereby prohibiting their manufacture under the Gun Control Act of 1968 ("GCA"), the 2006 Rule remained silent as to *other* bump-stock devices.<sup>20</sup> After issuing the 2006 Rule, the agency issued several private letter rulings ("PLRs") permitting the manufacture of *other* bump-stock devices.<sup>21</sup> These PLRs were not formally published and the Department of Justice and ATF have since justified these "classification decisions" as "not include[ing] extensive legal analysis relating to the definition of 'machinegun.'"<sup>22</sup> Nevertheless, these private letter rulings enabled the manufacture of and thus the Las Vegas shooter's "*legal*" acquisition of these *other* bump-stock devices, which the shooter used to modify more than half of his rifles in taking 58 lives, wounding 413 people, and inciting hysteria that injured over 400 more.<sup>23</sup> Witnesses present during the shooting described the gunfire as getting "faster and faster, almost like it was an automatic rifle" and "sound[ing] like a machine gun."<sup>24</sup> Following the rulemaking procedures under Section 553 of the Administrative Procedure Act ("APA") with the authority of the relevant enabling statutes within the NFA and GCA, the Department of Justice promulgated a rule ("Bump-Stock Rule") clarifying the interpretation of "machine gun," classifying

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20. ATF Rul. 2006-2 (Dec. 13, 2006), <https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire/download> [<https://perma.cc/M5EN-8862>].

21. See *Lane v. United States*, No. 3:19-CV-01492-X, 2020 WL 1513470, at \*3 (N.D. Tex. Mar. 30, 2020) ("Between 2008 and 2017, the Bureau classified bump stocks without springs as not machine guns."); CONG. RSCH. SERV., IN10801, GUN CONTROL: "BUMP-FIRE" STOCKS 1 (2017), <https://crsreports.congress.gov/product/pdf/IN/IN10801> [<https://perma.cc/U69H-2884>]. For reference as to what constitutes a non-coiled spring bump stock ("*other* bumpstock"), the ATF provides the archived Slidefire bump stock sale website. Bump-Stock-Type Devices, 83 Fed. Reg. at 13,451 n.15. The Violence Policy Center posted several PLRs issued by the ATF approving bump stocks and one denial PLR on their website. *Bump-Fires and Similar Devices*, VIOLENCE POL'Y CTR., <https://vpc.org/regulating-the-gun-industry/bump-fires-and-similar-devices/> [<https://perma.cc/T3R7-QXEH>] (last visited Oct. 6, 2021). The manufacturer's (Slidefire's) website no longer provides access to the PLR issued by the ATF but a copy can be found on the Violence Policy Center site.

22. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

23. See Regina Garcia Cano & Ken Ritter, *AP Explains: Where Things Stand in Vegas Shooting Aftermath*, AP NEWS (Oct. 1, 2018), <https://apnews.com/article/nv-state-wire-north-america-us-news-las-vegas-shootings-d9de75f480494327a2d51295130917db> [<https://perma.cc/6PVD-4N6J>] (emphasis added) ("Authorities determined all the weapons were *legally* purchased, most within the previous year.")

24. Andrew Blankstein, Pete Williams, Rachel Elbaum & Elizabeth Chuck, *Las Vegas Shooting: 59 Killed and More Than 500 Hurt Near Mandalay Bay*, NBC NEWS (Oct. 2, 2017, 9:33 PM), <https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-police-investigating-shoot-ing-mandalay-bay-n806461> [<https://perma.cc/HR6W-KJU7>].

bump-stocks consistent with this interpretation, and enforcing the GCA prohibition on machine guns prospectively.<sup>25</sup>

## II. LOOKING AT THE NFA, GCA, AND BUMP-STOCK RULE THROUGH THE FOGGY LENS OF ADMINISTRATIVE LAW

As the government anticipated, bump-stock owners immediately challenged the Bump-Stock Rule upon its publication.<sup>26</sup> Rooted in administrative law principles, the challengers argued that the ATF violated the APA in promulgating the Bump-Stock Rule, that the agency lacked the authority to promulgate a rule taking away their bump-stocks, and that the constitutional issues at stake required the court to construe the statute without deference to the interpretation imposed by the agency.<sup>27</sup> An analysis of these legal questions must begin with an understanding of the statutes at issue.

### *The GCA Prohibits the Possession or Transfer of Machine Guns.*

The Firearm Owner's Protection Act of 1986 amended the GCA by prohibiting, in relevant part, the transfer or possession of machine guns (subject to exceptions).<sup>28</sup> Congress excepted from this blanket prohibition the "lawful transfer or lawful possession of a machinegun" manufactured before the effective date of the Act.<sup>29</sup> Thus, machine guns manufactured before the effective date of the 1986 Act avoided the prohibition, but the GCA generally prohibited all parts and devices manufactured after the 1986 Act that satisfy the definition of "machine gun." To administer and enforce the provisions of the GCA, Congress delegated power to the Attorney General to prescribe "only such rules and regulations as are necessary to carry out the provisions."<sup>30</sup> Most significantly, the GCA

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25. Bump-Stock-Type Devices, 83 Fed. Reg. 13,442, 13,446 (proposed Mar. 29, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

26. *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 120 (D.D.C.), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019); *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1149 (D. Utah 2019), *aff'd*, 958 F.3d 969 (10th Cir. 2020), *reh'g en banc granted, judgment vacated*, 973 F.3d 1151 (10th Cir. 2020), *and opinion reinstated sub nom. Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021).

27. See *Guedes*, 356 F. Supp. 3d at 120–21.

28. Firearm Owners' Protection Act, Pub. L. No. 99–308, § 102(9) 100 Stat. 449, 452–53 (1986) ("Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.").

29. 18 U.S.C. § 922(o)(2)(B).

30. *Id.* § 926(a).

incorporated by reference the definition of machine gun found in the NFA.<sup>31</sup>

*The NFA Defines “Machine Gun.”*

Because the GCA incorporated the definition of machine gun by reference from the NFA, any statutory ambiguity in the definition (potentially triggering *Chevron*) substantially depends upon the operative language of the NFA. The NFA primarily provides for the taxation and registration of regulated firearms, thus Congress codified the NFA at Chapter 53 of Title 26 (the Internal Revenue Code).<sup>32</sup> In addition to providing for taxation, the NFA prohibits the making of any firearm (defined under Section 5845(a) and including a machine gun) without the advance, formal approval of the Attorney General.<sup>33</sup> The NFA currently defines a machine gun as:

[A]ny 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 function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.<sup>34</sup>

The NFA not only makes it unlawful to make these regulated firearms without approval, but also to transfer, receive, or possess a firearm made in violation of Chapter 53.<sup>35</sup> Consistent with the NFA’s express restriction on the “making” of regulated firearms without approval, the ATF’s NFA Handbook states that the “ATF will not approve the making of a machine gun it determines would violate 18 U.S.C. § 922(o),” of the Gun Control Act.<sup>36</sup> Given the necessity of reviewing and approving applications for the making and/or manufacturing of these regulated firearms, plus the need to enforce the penalties, which include fines of up to \$10,000 and potential

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31. *Id.* §§ 922(a)(4), (b)(4), (o)(1), (o)(2)(B).

32. 26 U.S.C. § 5812(a), § 5841(a).

33. *Id.* § 5822; *id.* § 7801(a)(2)(A)(i) (indicating that “Attorney General” should replace “Secretary” where used in Chapter 53 for the administration and enforcement of such provisions).

34. *Id.* § 5845(b).

35. *Id.* § 5861(e).

36. *ATF National Firearms Handbook, supra* note 12, at 23; 26 U.S.C. § 5822 (“Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.”).

imprisonment of up to ten years,<sup>37</sup> Congress tasked the Attorney General with the administration and enforcement of the provisions of Chapter 53.<sup>38</sup> Congress further designated the ATF as the agent of the Attorney General for purposes of administration and enforcement.<sup>39</sup> Thus, Congress empowered both the Attorney General and the ATF to administer and enforce the NFA.

*Chevron and the Bump-Stock Rule.*

All courts in reviewing the Bump-Stock Rule raised the question of whether they should accord *Chevron* deference to the Bump-Stock Rule's interpretation of the NFA. When *Chevron* deference applies, a court gives the agency's construction of the statute much broader deference than would otherwise be accorded.<sup>40</sup> Before courts can answer if the Bump-Stock Rule merits *Chevron* deference based upon the test set out in *Chevron*, courts must first determine whether the *Chevron* test even applies—*Chevron* step zero.<sup>41</sup> If the Bump-Stock Rule satisfies the threshold requirements of *Chevron* step zero, then the test in *Chevron* applies unless an exception applies or the Bump-Stock Rule otherwise fails to be valid.

*a. Chevron Step Zero.*

An agency action satisfies the threshold requirement of *Chevron* step zero if (1) "Congress delegated authority to the agency generally to make rules carrying the force of law" and (2) the agency promulgated the rule "in the exercise of that authority."<sup>42</sup> This essentially asks whether the agency had the power to act legislatively and if the agency acted legislatively in the action at issue.<sup>43</sup> If Congress intended the agency to have the power to speak with the force of law and the court characterizes

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37. 26 U.S.C. § 5871.

38. *Id.* § 7801(a)(2)(A)(i).

39. *Id.* § 7801(a)(2)(A)(i)-(ii).

40. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 17 (D.C. Cir. 2019).

41. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

42. *Id.*

43. *Aposhian v. Barr*, 958 F.3d 969, 979 (10th Cir.), *reh'g en banc granted, judgment vacated*, 973 F.3d 1151 (10th Cir. 2020), *and opinion reinstated sub nom. Aposhian v. Wilkinson*, 989 F.3d 890 (10th Cir. 2021) ("Initially, the applicability of *Chevron* depends on what kind of rule the Final Rule represents. There is a 'central distinction' under the APA between legislative rules and interpretive rules.").



the agency action as legislative in character, then the valid action has the force of law and is generally subject to the test established under *Chevron*.<sup>44</sup>

- i. Congress delegated rulemaking authority having the force of law under the NFA and GCA.

In support of the administrative and enforcement power expressly provided to the Attorney General, the Internal Revenue Code (“I.R.C.”) authorizes the prescription of “all needful rules and regulations for the enforcement” of Title 26.<sup>45</sup> The Attorney General delegated this power to the Director of the ATF subject to the direction of both the Attorney General and Deputy Attorney General.<sup>46</sup> Because Congress authorized the Attorney General to make all needful rules and regulations to enforce the NFA, and the Attorney General delegated this responsibility to the ATF subject to his direction, the ATF and the Attorney General have the power to promulgate all needful rules and regulations to enforce the NFA. All regulations relating to the ATF were promulgated under the Department of the Treasury (“Treasury”) until the Department of Justice assumed authority over the ATF, at which point the Department of Justice assumed all existing regulations relating to the ATF.<sup>47</sup>

On the surface, the delegations of power (1) under I.R.C. § 7805(a) to promulgate all needful rules and regulations and (2) under the GCA to prescribe only such rulings and regulations as are necessary, satisfy the generally accepted standards for the first prong of *Chevron* step zero. The first prong of *Chevron* step zero looks at whether Congress intentionally “delegated authority to the agency generally to make rules carrying the force of law.”<sup>48</sup> Generally, language expressly delegating the power to

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44. *Mead*, 533 U.S. at 232 (explaining that *Chevron* generally applies to legislative rules but interpretive rules “enjoy no *Chevron* status as a class.”).

45. 26 U.S.C. §§ 7801(a)(2)(A)(ii), 7805(a).

46. 28 C.F.R. § 0.130 (2021).

47. The Department of Justice assumed authority over the ATF from the Department of the Treasury in 2002 without disturbing existing regulations previously promulgated by the Department of the Treasury. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(a)(1), 116 Stat. 2135, 2274; 28 C.F.R. § 0.133(a)(2) (2021).

48. *Mead*, 533 U.S. at 226–27. *Compare* *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (holding Congress did not authorize the agency to promulgate rules and regulations, thus “courts properly may accord less weight to such guidelines than to administrative regulations which Congress has declared shall have the force of law.”), *with* *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (“Deference under *Chevron* to an agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”).

promulgate rules and regulations satisfies this threshold requirement.<sup>49</sup> The requirement of “a relatively formal administrative procedure tending to foster the fairness and deliberation” akin to a legislative action typically indicates an intent to delegate the power to promulgate legislative rules.<sup>50</sup> Furthermore, ambiguity in a statute generally implies a congressional delegation of authority to the agency for filling in the gaps in order for the agency to fulfill enforcement functions.<sup>51</sup> Even where Congress delegated regulatory authority only for enforcement and administration, a court will find that Congress intended for the agency to resolve a statutory ambiguity within the gap filling authority of the agency.<sup>52</sup> Thus, the existence of ambiguity in a statute, the delegation of informal rulemaking power for purposes of administration and enforcement, and enabling language that requires a relatively formal administrative procedure, all strongly favor a judicial finding that Congress intended the agency to speak with the force of law in addressing statutory ambiguities.

With the Bump-Stock Rule, the Attorney General and ATF sought to clarify the meaning of “single function of the trigger” and “automatically,” terms contained within the definition of “machinegun” in the NFA.<sup>53</sup> The ATF sought to codify the meaning because “these terms are not defined in the statutory text.”<sup>54</sup> The Bump-Stock Rule, however, states that the agency’s interpretation of these terms constitutes nothing more than an

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49. *Mead*, 533 U.S. at 226–27. *Cf.* *Chrysler Corp. v. Brown*, 441 U.S. 281, 308 (1979) (“This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued.”).

50. *Mead*, 533 U.S. at 230; *see also* *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57, 263 (1995).

51. *See* *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159. *Compare* *Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (“The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”), *with* *Gonzales v. Oregon*, 546 U.S. 243, 245 (2006) (“*Chevron* deference is not accorded merely because the statute is ambiguous and an administrative official is involved. A rule must be promulgated pursuant to authority Congress has delegated to the official.”).

52. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 58 (2011) (“We have explained that ‘the ultimate question is whether Congress would have intended, and expected, courts to treat [the regulation] as within, or outside, its delegation to the agency of gap-filling authority.’”) (alteration in original) (internal quotation marks omitted) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007)).

53. *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,514 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

54. *Id.*

articulation of their plain meaning.<sup>55</sup> While a lack of statutory ambiguity is not necessarily fatal at this stage of the analysis, it would be fatal to satisfying the *Chevron* test, which perhaps explains why the Bump-Stock Rule states alternatively that if ambiguous, the Bump-Stock Rule only reasonably construes them “as part of implementing the provisions of the NFA and GCA.”<sup>56</sup> Because Congress intended the agency to promulgate gap-filling rules to administer and enforce the NFA and GCA, and the Bump-Stock Rule helps the agency implement the NFA and GCA, the agency exercised the kind of gap-filling authority that Congress intended. The Bump-Stock Rule also added bump-stocks to the regulatory definition of machine guns for the NFA and all statutes that incorporate the definition contained in the NFA by reference.<sup>57</sup> Because the agency must inform before it can enforce, the agency needed to promulgate the Bump-Stock Rule in order to fulfill its administrative and enforcement mandate. In promulgating the Bump-Stock Rule, the Attorney General, ATF, and Department of Justice acted under the express authority of the enabling clauses of the NFA and GCA.<sup>58</sup> The statutory grant of informal rulemaking authority to address a statutory ambiguity strongly favors a judicial finding that Congress intended the agency to have the power to speak with force of law.

ii. The Bump-Stock Rule is procedurally valid.

In the second prong of *Chevron* step zero, the agency must exercise the granted legislative authority by acting legislatively.<sup>59</sup> This implies two requirements: (1) a legislative rule that is (2) procedurally valid as a legislative rule. If the rule fails to satisfy the procedural requirements,<sup>60</sup> then *Chevron* cannot apply because procedural failures render the rule invalid.<sup>61</sup> Although Congress delegated the power to make rules with the

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55. *Id.* at 66,527.

56. *Id.*

57. *Id.* at 66,519, 66,554.

58. *Id.* at 66,515.

59. *Gonzales v. Oregon*, 546 U.S. 243, 255–56 (2006) (positing that an interpretation of an ambiguous statute *may* receive “substantial deference” under *Chevron* but only when it satisfies the threshold requirements set out in *Mead*: the agency interpretation claiming deference was promulgated in the exercise of delegated authority to make rules carrying the force of law); *Aposhian v. Barr*, 958 F.3d 969, 979–80 (10th Cir. 2020) (“A legislative rule is one that is promulgated pursuant to a direct delegation of legislative power by Congress and . . . changes existing law, policy, or practice.”) (internal quotation marks omitted).

60. *See generally* 5 U.S.C. § 553.

61. *See, e.g.*, *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“[W]e

force of law by expressly granting regulatory authority under I.R.C. § 7805(a) and under the GCA, additional requirements such as the APA and the Regulatory Flexibility Act limit the agency's regulatory authority.<sup>62</sup> Part of the second prong of *Chevron* step zero thus requires that the Bump-Stock Rule satisfy all substantive procedural requirements and otherwise prove valid.<sup>63</sup> Because the Bump-Stock Rule followed notice-and-comment procedures, the issue of whether the rule fails for want of the requisite formalities does not apply. One challenge to the validity of the Bump-Stock Rule arose, however, because of the transition of power to Acting Attorney General Matthew Whitaker, who signed the final Bump-Stock Rule after Attorney General Jeff Sessions commenced notice-and-comment procedures and nearly completed the process.<sup>64</sup> The challengers of the Bump-Stock Rule claimed that an acting director lacked the statutory and constitutional authority to execute the final Bump-Stock Rule.<sup>65</sup> Even if Attorney General Barr's subsequent ratification of the Bump-Stock Rule had not resolved this contention, the signing of the Bump-Stock Rule by Acting Attorney General Whitaker did not invalidate the Bump-Stock Rule because (1) Congress statutorily authorized the interim appointment, and (2) President Trump had the constitutional power to make the interim appointment.

First, Congress consented to the acting appointment when it authorized such appointments under the Federal Vacancies Reform Act ("FVRA"). Because Congress authorized the interim appointment, Acting Attorney General Whitaker possessed the statutory power to act within the authority granted to the Attorney General. The authority to promulgate the Bump-Stock Rule resides in the Attorney General because Congress delegated authority to the Attorney General.<sup>66</sup> The Attorney General also delegated this power to the Director of the ATF subject to the direction of both the Attorney General and Deputy Attorney General.<sup>67</sup> Namely, the

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conclude that the failure to disclose to interested persons the scientific data upon which the FDA relied was procedurally erroneous."). *Cf. United States v. Fla. E. Coast Ry. Co.*, 410 U.S. 224, 241–42 (1973) (holding that the agency satisfied the procedural requirement for a "hearing" where the agency followed informal rulemaking procedures despite having no oral testimony, oral argument, or cross examination).

62. The ATF addressed these and other procedural requirements in the Bump-Stock Rule. *Bump-Stock-Type Devices*, 83 Fed. Reg. at 66,552–53.

63. *Aposhian*, 958 F.3d at 979–80.

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

65. *Id.* at 9, 11.

66. 28 C.F.R. § 0.130(a)(2)–(3) (2021).

67. *Id.*

Attorney General holds the power as the Director of the Department of Justice, the institution under which the rules are promulgated.<sup>68</sup> In the event of a vacancy, the Attorney General Act provides for a line of succession, starting with the Deputy Attorney General.<sup>69</sup> The FVRA authorizes the President to appoint “an officer or employee of such Executive agency” in an interim “acting capacity.”<sup>70</sup> When President Trump terminated the appointment of Attorney General Sessions, he appointed an *Acting* Attorney General outside the line of succession, the former Chief of Staff to the Attorney General. Acting Attorney General Whitaker’s tenure satisfied the interim time limits imposed by the FVRA.<sup>71</sup> Because Congress authorized the President’s action through the FVRA and because the duration of the interim appointment of Acting Attorney General satisfied the statutory limitations, Congress consented to the interim appointment. Therefore, Acting Attorney General Whitaker had the power to act with the authority Congress delegated to the Attorney General during his interim appointment.

The District Court in *Guedes* extensively analyzed the historical evolution and interaction between the FVRA and the Attorney General Act and found that they did not conflict because the FVRA expressly articulated that it is the exclusive authority for temporary presidential appointments of executive officers requiring Senate confirmation.<sup>72</sup> The Court of Appeals for the District of Columbia Circuit (“D.C. Court of Appeals”) noted the “unless” clause found in the FVRA, which creates an exception to the exclusive authority given to the President in the case of a statutory provision for an office-specific vacancy, such as the Attorney General Act.<sup>73</sup> In addition to the extensive discussion at the district court level,<sup>74</sup> a statutory construction argument can be made for why the FVRA and the Attorney General Act coexist without conflict. Because the vacancies section of the Attorney General Act lacks language to construe it as the exclusive or mandatory authority for such vacancies and a plain

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68. Homeland Security Act of 2002, Pub. L. No. 107-296, § 1111(a)(1), 116 Stat. 2135, 2274; 28 C.F.R. § 0.133(a)(2) (2021).

69. 28 U.S.C. § 508.

70. 5 U.S.C. § 3345(a)(3).

71. The FVRA authorizes service in an acting capacity for less than 210 days. *Id.* § 3346(a)(1). Acting Attorney General Whitaker held the interim position from November 7, 2018 through February 14, 2019. *See* S. Res. PN17, 116th Cong. (2019); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 356 F. Supp. 3d 109, 120–21 (D.D.C.), *aff’d*, 920 F.3d 1 (D.C. Cir. 2019).

72. *Guedes*, 356 F. Supp. 3d at 125–26; *see also* 5 U.S.C. § 3347(a).

73. *Guedes*, 920 F.3d at 11.

74. *Guedes*, 356 F. Supp. 3d at 124–26.

construction of the language of the section indicates that it functions as a default contingency to avoid a vacuum caused by a vacancy *or absence*, it can be read as applying where no replacement appointment yet exists or where an appointment might not even be required.<sup>75</sup> With such precatory language as “the Deputy Attorney General *may* exercise all the duties of that office” in the event of an absence, incapacity or vacancy, the Act neither addresses the President’s appointment power nor does it *mandate* interim appointment consistent with the Acts succession provision.<sup>76</sup> The bump-stock owners argued that the appointment of Whitaker violated the Attorney General Act.<sup>77</sup> This position seems to advocate that Congress requires the President to appoint *only* the Deputy Attorney General to the vacancy in an interim capacity under the Attorney General Act, and if also vacant, then and *only* then, the next in line of succession under the vacancy statute. Disregarding the precatory language in the Attorney General Act, if the bump-stock owners’ contention were true, then that might potentially subject the Act itself to attack on the basis of a separation of powers issue different from the one discussed below. Fortunately, that issue requires no discussion because the Supreme Court denied an unrelated petition for the particular issue of Whitaker’s appointment.<sup>78</sup> In addition to all of the arguments asserted by the District Court in *Guedes*, the “unless” clause in the FVRA arguably does not interfere with the validity of the interim appointment of Acting Attorney General Whitaker. Thus, the President’s actions in appointing Acting Attorney General Whitaker likely fulfilled the statutory requirements for a valid appointment.

Second, the President possesses the constitutional authority to appoint his executive officers and Congress consented to interim appointments through the FVRA, thus the bump-stock owners erred in claiming that an acting director lacks constitutional authority to sign the final Bump-Stock Rule. The Constitution vests the power in the President to appoint executive officers with the advice and consent of the Senate.<sup>79</sup> The District Court in *Guedes* did not find persuasive the bump-stock owners’ argument that the interim appointment of an official on an acting basis to a principal

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75. 28 U.S.C. § 508(a) (stipulating the section applies “[i]n case of a vacancy in the office of Attorney General, or of his absence or disability”).

76. *Id.* (emphasis added).

77. *Guedes*, 920 F.3d at 9 (“[T]he Firearms Policy Coalition . . . and Codrea argued that Acting Attorney General Whitaker lacked the legal authority to promulgate the Rule because his designation as Acting Attorney General violated the Attorney General Act, 28 U.S.C. § 508, and the Appointments Clause of the Constitution, Article II, Section 2, Clause 2.”).

78. *Michaels v. Whitaker*, 139 S. Ct. 936 (2019).

79. U.S. CONST. art. II, § 2, cl. 2.

office violated the Appointments Clause of the Constitution.<sup>80</sup> Additionally, the court found the statutory history and language clear enough in the FVRA to hold that Congress intended to allow the President to appoint the Acting Attorney General.<sup>81</sup> Also, the FVRA contains reasonable limits to the appointment of acting principals and the Supreme Court has upheld such a longstanding course of legislative authorization and executive practice.<sup>82</sup> Tangentially, President Trump's self-confessed, intentional, and persistent use of acting directors as an alternative to the appointments process could arguably warrant review for abuse of the longstanding norms and constitutional requirements for appointments.<sup>83</sup> Despite the potential statutory conflict and the fact that the Attorney General is a principal officer for which an appointment constitutionally requires Senate approval, the appointment of Acting Attorney General Whitaker was not the hill upon which to make this stand because the brief interim appointment before the formal appointment and Senate confirmation of Attorney General William Barr pales in comparison to the egregious examples of President Trump's bootstrapping of the FVRA in circumvention of appointment requirements.<sup>84</sup>

RATIFICATION. Even if the Bump-Stock Rule were subject to

80. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 356 F. Supp. 3d 109, 146 (D.D.C.) ("Important as this debate may be, it has long been settled by Supreme Court precedent and historical practice."), *aff'd*, 920 F.3d 1 (D.C. Cir. 2019).

81. *Guedes*, 356 F. Supp. 3d at 143 ("Congress spoke clearly enough in the text of the FVRA.")

82. *See generally* 5 U.S.C. § 3345(a)(2)–(3); *Guedes*, 356 F. Supp. 3d at 145–52. *But see* VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH. SERV., LSB10217, WHO CAN SERVE AS ACTING ATTORNEY GENERAL 1, 3 (2018), <https://sgp.fas.org/crs/misc/LSB10217.pdf> [<https://perma.cc/GE4T-LT88>] ("Some legal scholars have questioned whether the Vacancies Act does, in fact, authorize Whitaker to serve as Acting AG.")

83. *See, e.g.*, Jay Willis, *Trump's Acting Cabinet Is Accountable Only to Trump*, GQ (July 15, 2019), <https://www.gq.com/story/the-trump-interim-cabinet> [<https://perma.cc/3YDQ-JA2R>] ("Trump's willingness to test the FVRA's outer limits is not an accident. 'I sort of like acting,' he told reporters in January, admitting that he was in 'no hurry' to name permanent replacements to his Cabinet. 'It gives me more flexibility.'"); Brian Naylor, *An Acting Government For The Trump Administration*, NPR (Apr. 9, 2019, 5:01 AM), <https://www.npr.org/2019/04/09/711094554/an-acting-government-for-the-trump-administration> [<https://perma.cc/3Q4D-8UVZ>] ("To have so many people in acting positions . . . puts off that public review and vetting."); Natasha Bach, *All the Acting Heads of Trump's Presidency*, FORTUNE (Nov. 27, 2019, 4:00 AM), <https://fortune.com/2019/11/27/trump-acting-heads-cabinet-presidency/> [<https://perma.cc/LF9J-42C7>]; Aaron Blake, *Trump's Government Full of Temps*, WASH. POST (Feb. 21, 2020, 5:30 AM), <https://www.washingtonpost.com/politics/2020/02/21/trump-has-had-an-acting-official-cabinet-level-job-1-out-every-9-days/> [<https://perma.cc/VWE7-R5RR>].

84. *E.g.*, Willis, *supra* note 83 ("Trump responded to this preemptive rejection with a clever bit of legal maneuvering: Instead of putting Cuccinelli [a man who had never held any position in the federal government] up for the job on a permanent basis, Trump created a new position in USCIS whose officeholder is eligible to become acting director under the FVRA, hired Cuccinelli into it, and then made him the agency's 'acting' director.")

collateral attack on the basis of the appointment of Acting Attorney General Whitaker, the subsequent actions by duly confirmed Attorney General William Barr foreclosed these issues. Attorney General Barr took action one month after his appointment to formally ratify the Bump-Stock Rule.<sup>85</sup> In this action he acknowledged that opponents of the Bump-Stock Rule used Acting Attorney General Whitaker's appointment as a basis for challenging the Bump-Stock Rule's validity.<sup>86</sup> With this in mind, Attorney General Barr disclosed for the record that he had reviewed the rulemaking record and had independently evaluated the entire process and findings before concluding that the Bump-Stock Rule merited ratification.<sup>87</sup> As a duly appointed Attorney General with no cloud over his authority, his ratification of the Bump-Stock Rule fully disposed of the issue. At least one of the plaintiffs in *Guedes* conceded the validity of this ratification.<sup>88</sup> The D.C. Court of Appeals held that the ratification cured any potential defect caused by Acting Attorney General Whitaker's involvement in the Bump-Stock Rule.<sup>89</sup> The ensuing dispute over whether res judicata principles or mootness governs the resolution of the issue (by ratification) is irrelevant where the parties lack standing in either case.<sup>90</sup>

Either because Acting Attorney General Whitaker possessed the authority to sign the final Bump-Stock Rule into effect, or because Attorney General William Barr's subsequent and methodical ratification of the Rule cured any defect surrounding the initial signature, the Bump-Stock Rule became a procedurally valid rule.

### iii. The majority approach to characterizing agency regulatory action

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85. Bump-Stock-Type Devices, 84 Fed. Reg. 9239 (Mar. 14, 2019) (codified at 27 C.F.R. pts. 447.11, 478.11, and 479.11).

86. *Id.* at 9240.

87. *Id.* ("Having now familiarized myself with the rulemaking record that was before the Acting Attorney General and having reevaluated those materials without any deference to his earlier decision, I have personally come to the conclusion that it is appropriate to ratify and affirm the final rule as it was published at 83 FR 66514, and I hereby do so.")

88. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 7 (D.C. Cir. 2019).

89. *Id.* at 13.

90. Arguendo, if the resolution avoids qualifying as a resolution on the merits and the bump stock owners correctly asserted that Attorney General Barr's ratification of the Bump-Stock Rule merely rendered the issue moot, the petitioners still lack standing because no exception to the mootness bar applies, namely: (1) the adoption of a formally promulgated rule by an acting Attorney General, who was appointed outside of the line of succession and on an interim basis, fails to qualify as a claim capable of repetition but evading review; and (2) the voluntary cessation doctrine does not apply because the issue is not one in which the government could cease alleged illegal conduct in the face of litigation only to resume upon dismissal. *See id.* at 14–15.



favors a finding that the Bump-Stock Rule is legislative.

Distinguishing legislative from interpretive rules depends on the nuances of the jurisdiction and the perspective that a court chooses to take on the rule. Naturally, it “turns out to be quite difficult and confused.”<sup>91</sup> Although courts utilize different methods or weigh factors differently (even across different cases within the same jurisdiction) to characterize an agency action, the foundational precepts are absolute: “[a] substantive or legislative rule has the force of law; an interpretative rule is merely a clarification or explanation of an existing statute or rule.”<sup>92</sup> A characterization of an agency action as legislative can place additional burdens on the agency and delay public certainty by requiring procedural formalities.<sup>93</sup> Likewise, a characterization of an agency action as interpretive can deprive an action of *Chevron* deference.<sup>94</sup>

In identifying legislative versus interpretive rules, most courts focus on the substantive effect as the “touchstone for distinguishing those rules.”<sup>95</sup> Put another way, this method weighs “the actual legal effect” on the regulated parties as “[t]he most important factor.”<sup>96</sup> Where characterizing a rule as legislative consequently means the rule has the force of law, the logic seems a bit circular if the first step of analysis requires looking at the legal effect to determine the rule’s character, especially where the agency, such as the ATF, cannot “redefine or create exceptions to Congressional statutes.”<sup>97</sup> Therefore, the “substantive” inquiry concentrates on how the rule impacts regulated parties relative to their presumptions of the status quo, asking if the rule “change[s] existing

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91. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

92. *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 664 (D.C. Cir. 1978).

93. *Hoctor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (“[T]he agency would be stymied in its enforcement duties if every time it brought a case on a new theory it had to pause for a bout, possibly lasting several years, of notice and comment rulemaking.”).

94. Courts do not necessarily deny *Chevron* deference to interpretive rules, but it is true “that interpretive rules ‘often do not’ receive *Chevron* deference.” *Guedes*, 920 F.3d at 17 (citing *Nat’l Mining Ass’n*, 758 F.3d at 251).

95. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (holding that substantive rules are those “affecting individual rights and obligations,” resulting from a valid congressional grant of legislative authority and satisfying APA requirements); *see also Nat’l Mining Ass’n*, 758 F.3d at 252 (“The most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.”).

96. *Nat’l Mining Ass’n*, 758 F.3d at 252.

97. *United States v. Dodson*, 519 F. App’x 344, 349 (6th Cir. 2013) (“The ATF does not have the ability to redefine or create exceptions to Congressional statutes.”).

law, policy, or practice.”<sup>98</sup> Under this method, an interpretive action such as a general policy statement “merely explains how the agency will enforce a statute or regulation.”<sup>99</sup> Focusing on enforcement discretion of existing rules, such as “how [the agency] will exercise its broad enforcement discretion or permitting discretion under some extant statute or rule,” the key is that general policy statements cannot impose new legally binding requirements or obligations but they may, for example, “signal *likely* future” agency action.<sup>100</sup> In contrast, other courts might characterize as interpretive an action that issues “an interpretation of existing law, issued to facilitate compliance by the public, not create new law.”<sup>101</sup> Thus the “substantive” method paints agency activities with a broad legislative brush, encompassing actions that other courts might call interpretive. Indicators that form the basis of finding a substantive or actual legal effect on regulated parties include: actions that restrict an agency’s discretion such as those that have a binding effect on the agency and/or those that eliminate discretion to follow or not to follow a general policy in an individual case, or the creation of a “norm.”<sup>102</sup> Because statutory interpretation for agencies is “unavoidably continuous” with the constant development of new technologies, establishing a rule’s substantive effect as the touchstone for classification can place additional burdens on the agency and delay public certainty.<sup>103</sup>

Similarly, courts can take a reliance-based approach, holding that if the agency led regulated parties to believe that nonconformance with guidance would result in negative consequences, then the action created a binding legislative rule.<sup>104</sup> Even a straightforward interpretation of a

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98. *Rocky Mountain Helicopters, Inc. v. F.A.A.*, 971 F.2d 544, 546–47 (10th Cir. 1992) (emphasis added).

99. *Nat’l Mining Ass’n*, 758 F.3d at 251–52.

100. *Id.* at 252 (emphasis added).

101. *Dodson*, 519 F. App’x at 349 n.4 (“[I]nterpretative rulings . . . are distinguishable from ‘legislative’ agency actions that ‘put [ ] new criminal liability on the acts or omissions of regulated persons,’ under authority delegated by statute.”) (quoting *United States v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009)).

102. *See United States v. Mead Corp.*, 533 U.S. 218, 233 (2001) (treating the failure to bind third parties beyond the transaction as a significant factor for whether an agency action has the force of law); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983) (“Generally, whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes ‘a binding norm.’”); *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978).

103. *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996).

104. *E.g.*, *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 863–64 (8th Cir. 2013); *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); *see also Sec. Indus. & Fin. Mkts. Ass’n v. U.S. Commodity Futures Trading*

statute, however, can result in negative consequences to those who do not want the statute to apply to them. The publication of an interpretation, especially with an indication of strict enforcement or mandatory language combined with the agency's obligation of enforcement, would reasonably lead parties to believe nonconformance would result in negative consequences. Assuming the action satisfies procedural formalities, the agency's act of informing the public can convert an otherwise interpretive act into a binding legislative rule. Because this method, in effect, gives the force of law to an interpretation that creates an expectation in regulated parties, this method also paints agency activities with a broad legislative brush. Labeling such actions as legislative ensures that the public receives notice through the accompanying requisite procedural formalities. Although, under less sweeping characterization methods, interpretive rules cannot always escape the requirement of following APA rulemaking procedures, as for example, if the agency "adopted a new position *inconsistent* with any of the Secretary's *existing regulations*."<sup>105</sup> Under the reliance standard, the act of following rulemaking procedures likely leads regulated parties to believe that nonconformance would result in negative consequences, thus making the act legislative. Whereas other courts may find that an agency action is not invariably legislative just because the agency "does the public a favor if it announces the interpretation in advance of enforcement, whether the announcement takes the form of a rule or of a policy statement."<sup>106</sup>

In yet another vein of reasoning, Chief Judge Posner articulated for the Eleventh Circuit the cleanest, albeit most draconian, method for distinguishing legislative from interpretive actions in *Hector*. As compared to the other two approaches mentioned above, *Hector* offers the most conservative characterization of legislative actions. In *Hector*, the court held that when Congress authorizes an agency's *creation* of standards, "it is delegating legislative authority," as compared to when Congress sets the standard for the agency to "particularize through interpretation."<sup>107</sup> Recognizing the overlap between interpretive and legislative, the court looked at the distinction through the spectrum of

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Comm'n, 67 F. Supp. 3d 373, 419 (D.D.C. 2014). *But see Hector*, 82 F.3d at 167 ("It would be no favor to the public to discourage the announcement of agencies' interpretations by burdening the interpretive process with cumbersome formalities.")

105. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 88 (1995) (emphasis added).

106. *Hector*, 82 F.3d at 167. *But see Guardian Fed. Sav. & Loan Ass'n*, 589 F.2d at 665 (declining to characterize a rule as interpretive rule where it changes the course of agency policy).

107. *Hector*, 82 F.3d at 169.

interpretive actions. In terms of setting the goal posts for interpretive rules, one extreme consists of rules based “on arbitrary choices” that equate to legislative action because “arbitrary (not in the ‘arbitrary or capricious’ sense) rules,” for example, set a number (like an eight foot fence) or create standards (like setting a statute of limitations, which creates a standard based on an arbitrary choice).<sup>108</sup> At the other end of the interpretation spectrum lies the general understanding of “interpretation” as the “ascertainment of meaning,” encompassing acts “uniquely appropriate to, and in that sense derivable from, the duty” imposed by the statute.<sup>109</sup> Interpretive action includes acts that are “merely spelling out what is in some sense latent in a statute.”<sup>110</sup> Compared to the other theories, *Hoctor* characterizes substantially fewer acts as legislative acts. The reasoning in *Hoctor* also draws the brightest lines and offers the easiest and most consistent application. As it fails to be the standard used in any Supreme Court cases, it may prove more useful when trying to distinguish the character of nonregulatory actions than in a case like the Bump-Stock Rule where the regulatory action itself creates a binding effect.

How the approach to I.R.C. § 7805 changed in the last decade might partly explain why *Hoctor* is not the general standard. The law on § 7805 began with strong nondelegation principles, reflecting, in part, the significance the Founders gave to the power of the purse and an historical reticence to permit delegation of the substantial taxing power.<sup>111</sup> Because

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108. *Id.* at 170 (“At the other extreme from what might be called normal or routine interpretation is the making of reasonable but arbitrary (not in the ‘arbitrary or capricious’ sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation.”).

109. *Id.* at 170.

110. *Id.* at 171.

111. *See generally* CALVIN H. JOHNSON, *RIGHTEOUS ANGER AT THE WICKED STATES: THE MEANING OF THE FOUNDERS’ CONSTITUTION* (2005) (looking at the original intent of the U.S. Constitution as first giving power to debtors seeking to restore their credit rating after fighting a revolution, with the expectation that the taxing power would be necessary for future wars, and the consequent Federalist/Anti-Federalist tension). Perhaps in keeping with this historical magnitude, many older tax decisions did not recognize the power of Congress to delegate rulemaking power having the force and effect of law. *See* *Manhattan Gen. Equip. Co. v. Comm’r*, 297 U.S. 129, 134 (1936) (“The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.”). Although subsequently incorporating administrative law principles, the body of tax law built upon and attempted to accommodate prior precedent, in particular stressing that retroactively applying rulings and regulations (later limited by the Taxpayer Bill of Rights 2) supported the interpretive nature of the delegation of authority by Congress under 26 U.S.C. § 7805. *See* *Dixon v. United States*, 381 U.S. 68, 71–73, 80 (1965) (“[T]he Commissioner is empowered retroactively to

of this history, actions by the IRS under § 7805 qualified as substantial authority,<sup>112</sup> but were presumed to be interpretive in nature.<sup>113</sup> Similar to *Hector*, specific grants of regulatory authority under individual I.R.C. sections (not the general delegation provision of § 7805) were construed as legislative delegations.<sup>114</sup> This proved to be a distinction without a difference where the substantive effect of a regulation exists whether promulgated under Section 7805 or other individual sections. After *Mayo Foundation for Medical Education and Research v. United States*, general administrative law principles apply for determining the nature of an exercise of the authority delegated in I.R.C. § 7805(a).<sup>115</sup> Thus, “interpretive” regulations promulgated purely under the authority of § 7805 no longer warrant a presumption that they are interpretive for *Chevron* purposes. Congress did not bifurcate its intent in enacting I.R.C. § 7805, therefore, the precept applies equally to regulations relating to the Internal Revenue Service and the ATF. This might seem odd

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correct mistakes of law in the application of the tax laws . . . even where a taxpayer may have relied to his detriment on the Commissioner’s mistake. . . . This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws, The [sic] Commissioner’s rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law.”); see also Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101, 110 Stat. 1452, 1468 (1996) (codified as amended in scattered sections of 26 U.S.C.). Regarding *Chevron* deference, tax decisions used to rely on a different analysis. See, e.g., Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX REV. 51, 54–55 (1996) (“Decisions reviewing tax regulations, however, offer a significant and promising variation on current *Chevron* doctrine.”). The Court changed this, however, refusing to “carve out an approach to administrative review good for tax law only.” *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011) (“To the contrary, we have expressly ‘[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.’”) (alterations in original) (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

112. See Treas. Reg. § 1.6662-4(d)(3)(iii) (2021); 27 C.F.R. § 70.701(d)(1) (2021); 28 C.F.R. § 0.133(a)(2) (2021).

113. See, e.g., John Bunge, *Statutory Protection From IRS Reinterpretation of Old Tax Laws*, TAX ANALYSTS (Apr. 3, 2015), <http://www.taxhistory.org/www/features.nsf/Articles/74AD054161BE2D0C85257E1B004C82EF?OpenDocument> [<https://perma.cc/EX9J-DVNZ>] (“[A] regulation made purely under section 7805(a) is sometimes called an interpretive rather than legislative regulation.”).

114. See, e.g., Irving Salem, Ellen P. Aprill, Linda Galler, Mary Lou Fahey, Kenneth W. Gideon, Richard C. Stark, Mark L. Yecies & Matthew J. Zinn, *ABA Section of Taxation Report of the Task Force on Judicial Deference*, 57 TAX LAW. 717, 760–61, 777 n.110 (2004) (“[R]egulations promulgated under a grant of regulatory authority in a specific substantive section of the Code are generally referred to as legislative regulations, and those promulgated under the general authority of section 7805(a) are generally referred to as interpretive. In other areas of law, regulations promulgated pursuant to language such as that in section 7805(a) are characterized as legislative regulations because the agency’s regulatory authority derives from an explicit statutory grant.”).

115. See Patrick J. Smith, *Omissions from Gross Income and Retroactivity*, 151 TAX NOTES 57, 57, 68 (2011); Bunge, *supra* note 113 (synthesizing the effect of *Mayo* as confirming “that *Chevron* applies to all Treasury regulations, whether interpretive or legislative,” and substantially expanding rulemaking discretion).

notwithstanding the ATF's investigatory beginnings under the Department of the Treasury, since the ATF ultimately functions as a law enforcement agency under the Department of Justice, with expanded jurisdiction beyond tax matters and distinct from the Internal Revenue Service.<sup>116</sup> Nevertheless, the same substantive effect inquiry applies to both agencies. Consequently, the judicial determinations as to whether promulgating the Bump-Stock Rule constituted an exercise of interpretive or legislative authority overlooked any interpretive presumptions formerly attributable to § 7805(a).<sup>117</sup>

In reviewing the Bump-Stock Rule's legislative or interpretive character for the purposes of determining *Chevron* step zero, the D.C. Court of Appeals found the Department of Justice intended to promulgate a legislative rule based on factors such as (1) the agency's explicit invocation of "general legislative authority," (2) the publication of the Rule in the Federal Register, (3) the intent for the Rule to have a substantive effect on bump-stock owners, and (4) the prospective effective date of the Rule.<sup>118</sup> In the review of the Bump-Stock Rule by the Court of Appeals for the Tenth Circuit, the court looked at similar factors under the lens of the agency's intent and the Bump-Stock Rule's substantive effect.<sup>119</sup> Both courts of appeals held the Bump-Stock Rule is legislative; unsurprisingly, neither court applied an analysis similar to that found in *Hoctor* in deriving their holding.<sup>120</sup> The lower court, however, in

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116. See *ATF History Timeline*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/our-history/atf-history-timeline> [<https://perma.cc/PEF2-79KE>] (last visited Oct. 8, 2021); *About the Bureau of Alcohol, Tobacco, Firearms and Explosives*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/> [<https://perma.cc/GHA7-UWW5>] (last visited Oct. 8, 2021) ("ATF is a law enforcement agency in the United States' Department of Justice that protects our communities from violent criminals, criminal organizations, the illegal use and trafficking of firearms, the illegal use and storage of explosives, acts of arson and bombings, acts of terrorism, and the illegal diversion of alcohol and tobacco products."); see also *Eliot Ness*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/our-history/eliot-ness> [<https://perma.cc/KG7G-MEM7>] (last visited Oct. 8, 2021), (describing the conflict between ensuring tax compliance and fighting violent crime as reflected in the pre-ATF agencies and the history of these enforcement agencies vacillating between the Departments of Treasury and Justice).

117. See, e.g., *Aposhian v. Barr*, 958 F.3d 969, 979–80 (10th Cir. 2020) (applying general administrative law principals in determining whether the Bump-Stock Rule was legislative for *Chevron* standards); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 17–18 (D.C. Cir. 2019).

118. *Guedes*, 920 F.3d at 17–19.

119. *Aposhian*, 958 F.3d at 980 ("First, the Final Rule demonstrates that ATF intended to change the legal rights and obligations of bump-stock owners.").

120. *Id.* ("[I]t is evident that the Final Rule intends to speak with the force of law."); *Guedes*, 920 F.3d at 18 ("The Rule unequivocally bespeaks an effort by the Bureau to adjust the legal rights and obligations of bump-stock owners—i.e., to act with the force of law.").

*Aposhian v. Barr*, held the Bump-Stock Rule was merely interpretive.<sup>121</sup>

INTENT. Both courts of appeals looked to “intent” in discerning the character of the Bump-Stock Rule and both came to the same conclusion favoring a legislative finding. The lens through which the D.C. Court of Appeals reviewed the legislative or interpretive character of the Rule focused on “whether the agency ‘intended’ to speak with the force of law” in the Bump-Stock Rule.<sup>122</sup> The court analyzed whether the agency intended for the Rule to have a substantive effect.<sup>123</sup> In its intent analysis, the court concentrated on the “language actually used by the agency.”<sup>124</sup> Much like with the reliance method and the substantive effect method, finding intent in the Bump-Stock Rule’s mandatory language, general application, and procedural formalities combined with the agency’s enforcement obligation invariably points to a legislative determination. Likewise considering the substantive effect, the Tenth Circuit looked at how the Bump-Stock Rule demonstrated the ATF’s intent to alter “the legal rights and obligations of bump stock owners.”<sup>125</sup> Both courts looked at how the agency’s invocation of the delegated authority under I.R.C. § 7805 and under the GCA enabling clause manifested the necessary intent.<sup>126</sup> Both courts also discounted the government’s assertion in litigation that the Rule was interpretive.<sup>127</sup> Finally, both courts looked at the agency’s discussion of *Chevron* in the responses to public comments contained in the Bump-Stock Rule, finding these references indicative of intent to promulgate a legislative rule eligible for *Chevron* deference.<sup>128</sup>

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121. 374 F. Supp. 3d 1145, 1150 (D. Utah 2019) (finding that Bump-Stock Rule “does no more than interpret undefined statutory terms”).

122. *Guedes*, 920 F.3d at 18 (quoting *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2122 (2016)).

123. *Id.* (The court found the language of the Rule “embod[ies] an effort to ‘directly govern[ ] the conduct of members of the public, affecting individual rights and obligations.’”) (second alteration in original) (quoting *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 172 (2007)).

124. *Id.* at 18 (quoting *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (per curiam)).

125. *Aposhian*, 958 F.3d at 980 (“[T]he Final Rule demonstrates that ATF intended to change the legal rights and obligations of bump-stock owners.”).

126. *Id.* (“[T]he Final Rule expressly invoked two separate delegations of legislative power, one under the NFA, 26 U.S.C. § 7805, and one under the GCA, 18 U.S.C. § 926(a).”); *Guedes*, 920 F.3d at 18 (“We also consider . . . ‘whether the agency has explicitly invoked its general legislative authority.’”) (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)).

127. *Aposhian*, 958 F.3d at 980 (“But ‘[t]he agency’s own label for its action is not dispositive.’”); *Guedes*, 920 F.3d at 18 (“The character of a rule depends on the agency’s intent when issuing it, not on counsel’s description of the rule during subsequent litigation.”) (citing *Encino Motorcars*, 136 S. Ct. at 2122).

128. *Aposhian*, 958 F.3d at 980 (“ATF, when promulgating the Final Rule, ‘further evinced its

The objective intent of the agency would be irrelevant if the rule spoke for itself. Had either court applied the method outlined in *Hector*, the characterization would likely be different. Because an interpretive regulation (meaning here an interpretation that follows the regulatory process of notice and comment) derives authority from the same enabling statutes invoked in the Bump-Stock Rule, then invoking it would not tip the scales towards finding a legislative action.<sup>129</sup> The Bump-Stock Rule primarily interprets the meaning of “single function of the trigger” and “automatically,” terms not defined in the statute; therefore, the ATF’s interpretation was uniquely appropriate to, and in that sense derivable from, the administration and enforcement duties imposed by the NFA and GCA. Especially because the surrounding language in the definition of machine gun such as “any part” and “combination of parts” manifest intent to include devices trying to circumvent the machine gun definition, the Bump-Stock Rule merely spelled out what was in some sense latent in the NFA. Furthermore, the 2006 ATF Ruling already expressed the agency interpretation that “a single function of the trigger” means “a single pull of the trigger,” thus the Bump-Stock Rule arguably did not alter existing policy.<sup>130</sup> Admittedly, rulings “do not have the force and effect of . . . [r]egulations” even though they are reported in the quarterly Bulletin.<sup>131</sup> The question is whether an interpretive action assumes a legislative character by following procedural formality. The District Court in *Aposhian* found procedural formality irrelevant because it did not convert the Bump-Stock Rule’s interpretive action into a legislative one.<sup>132</sup>

PUBLICATION. Both courts of appeals found publication of the Bump-Stock Rule in the Code of Federal Regulations (“CFR”) as indicative of the agency’s intent for the Bump-Stock Rule to speak with the force of law.<sup>133</sup> The Tenth Circuit further added that under 44 U.S.C. § 1510, “administrative rules published in the CFR are limited to those

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intent to exercise legislative authority by expressly invoking the Chevron framework and then elaborating at length as to how Chevron applies to the [Final] Rule.”) (quoting *Guedes*, 920 F.3d at 18–19); see also 5 U.S.C. § 553 (requiring the agency to state the legal basis to issue a rule).

129. See, e.g., *Akins v. United States*, 312 F. App’x 197, 198 (11th Cir. 2009) (“Congress delegated authority to the Bureau to interpret and enforce the Act. 27 C.F.R. § 479.”).

130. ATF Rul. 2006-2 (Dec. 13, 2006), <https://www.atf.gov/firearms/docs/ruling/2006-2-classification-devices-exclusively-designed-increase-rate-fire> [<https://perma.cc/343S-TE4M>]; see also *Akins*, 312 F. App’x at 200.

131. 27 C.F.R. § 70.701(d)(1) (2021). Although this regulation appears inconsistent with agency practice, issues of the ATF Quarterly Bulletin issued after 2002 are nowhere to be found.

132. *Aposhian v. Barr*, 374 F. Supp. 3d 1145, 1150 (D. Utah 2019) (explaining that the use of notice-and-comment procedures “does not alter the Final Rule’s interpretive character”).

133. *Aposhian*, 958 F.3d at 980; *Guedes*, 920 F.3d at 18.



‘having general applicability and legal effect.’”<sup>134</sup> The Tenth Circuit’s interpretation of the statute as *limiting* the types of documents eligible for publication in the Federal Register strains the actual language of the subsection, which provides for the publication of documents of the ATF “having general applicability and legal effect . . . and are relied upon by the agency as authority,” but not expressly excluding others documents, such as Notices, for example.<sup>135</sup> Because the ATF publishes all regulations in the Code of Federal Regulations (“CFR”),<sup>136</sup> such an expansive reading of § 1510 erases the distinction between legislative and interpretive regulations.<sup>137</sup> If publication in the CFR is conclusive, then it renders discussion of all of these other factors futile.<sup>138</sup> In that event, a court need only verify that the agency followed the authorized notice-and-comment procedures correctly in promulgating a regulation or in publishing a rule to hold that it satisfies the second prong of *Chevron* step zero. A consequence of such a holding would be to enable agencies use of notice-and-comment as a means of bypassing *Chevron* step zero for purely interpretive acts, a foreclosure with which the judiciary might not be comfortable. On the other hand, fulfillment of the extensive procedural requirements for informal rulemaking might justify a blanket policy of recognizing such actions as generally legislative because no meaningful distinction exists in their substantive effect if (1) both interpretive and legislative regulations are regulations and therefore the ATF must publish both in the CFR and (2) in order to be published in the CFR, they must have general applicability and legal effect.

**BINDING EFFECT.** If determining whether the agency action has the force of law depends upon the binding effect of the authorized acts, then the binding effect of the Bump-Stock Rule favors a finding that it has the force of law.<sup>139</sup> The Bump-Stock Rule binds the agency by eliminating

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134. *Aposhian*, 958 F.3d at 980 (citing 44 U.S.C. § 1510).

135. 44 U.S.C. § 1510(a).

136. 27 C.F.R. § 70.701(d)(1) (2021).

137. This may be consistent with *Mayo Foundation for Medical Education & Research v. United States*, 562 U.S. 44 (2011).

138. It seems unlikely that publication of regulations automatically gives them the force of law because an agency ostensibly could publish a regulation interpreting other regulations and could potentially be limited to *Auer* deference. See generally *Auer v. Robbins*, 519 U.S. 452 (1997).

139. See *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001); *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983) (“The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criterion.”); *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Corp.*, 589 F.2d 658,

any discretion previously available, thus it also has a substantive effect on regulated parties because they are affected by the loss of discretion. According to the ATF's website and the Code of Federal Regulations, ATF rulings do not have the same force and effect as a statute or regulation.<sup>140</sup> In reference to past practices of the agency using guidance documents and other instruments including private letter rulings to bind parties in circumvention of rulemaking procedures, a memorandum issued by the Department of Justice provided that agency actions have the force and effect of law where: (1) the agency has the constitutional and congressional authority and (2) the agency went through notice-and-comment rulemaking procedures unless the APA does not require such formalities.<sup>141</sup> The memorandum did not state, however, that procedural formality (such regulations properly following notice-and-comment rulemaking procedures) necessarily indicates that a regulation has the force of law. In contrast, the memorandum clearly intended to curtail any implication that alternative documents, in comparison to notice-and-comment rulemaking, could have the force of law. Specifically, the Department of Justice prohibited the use of guidance and other similar documents from "creat[ing] binding standards by which the Department will determine compliance with existing regulatory or statutory requirements."<sup>142</sup> Likewise, "[g]uidance documents should clearly state that they are not final agency actions, have no legally binding effect," and should avoid mandatory language.<sup>143</sup> Based on the agency's self-imposed standard, rules and regulations that the agency promulgates with appropriate procedural formality and that contain mandatory language rise above the level of guidance and have a substantial and likely binding effect upon the agency.<sup>144</sup>

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666 (D.C. Cir. 1978).

140. *Rulings*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, <https://www.atf.gov/rules-and-regulations/rulings> [<https://perma.cc/CEQ9-X4UE>] (last visited Oct. 7, 2021); *see also* 27 C.F.R. § 70.701(d)(1) (2021) ("Rulings and procedures reported in the Bulletin do not have the force and effect of Department of the Treasury Regulations, but they may be used as precedents.").

141. Memorandum by Attorney General Jefferson B. Sessions III on Prohibition of Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/NPY6-6J8A>].

142. *Id.*

143. *Id.*; *see also* *Farrell v. Dep't of Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002) (particularizing that the agency need only intend to bind itself, not the public, and can include nonregulatory actions if intended to be binding); *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (noting that "the choice between the words 'will' and 'may'" can be the decisive factor in finding a binding norm and legislative rule).

144. *See Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Before the [agency] may extinguish the

Attorney General Jeff Sessions signed the Department of Justice memorandum in November 2017, and at the direction of Attorney General Sessions in December of the same year, the Department of Justice and ATF initiated informal rulemaking procedures for promulgating the Bump-Stock Rule.<sup>145</sup> The expectations and self-imposed standards outlined in the memorandum were thus fresh in mind when the agency undertook the Bump-Stock Rule. The Bump-Stock Rule clearly labels the action as a “final rule,” contains mandatory language, and amends regulations interpreting the definition of “machinegun.”<sup>146</sup> The Bump-Stock Rule likewise imposes an effective date upon which the agency will enforce compliance with the new rule.<sup>147</sup> The pervasive reach of the Bump-Stock Rule (not limited to just one machine-gun owner or manufacturer) likewise indicates the binding effect on the agency. By the agency’s own standards, these actions rise above the level of guidance, and all of these characteristics combined elevate the Bump-Stock Rule above a mere ruling, indicating it very likely has a binding effect upon the agency.

**RETROACTIVITY.** The D.C. Court of Appeals found the prospective effective date for the enforcement of the Bump-Stock Rule to be inherently legislative because, it reasoned, if the Rule was interpretive, then possessors of bump-stocks “have been committing a felony the entire time,” but the Rule only prohibited future conduct, thus it legislatively prohibited conduct after the effective date.<sup>148</sup> The court erred in this logic. Unless the fact that the Bump-Stock Rule took regulatory action defines it as legislative, courts should not extract any implications from the prospective application of the Bump-Stock Rule because I.R.C. § 7805 prohibits retroactive regulations or regulatory administrative determinations and the Ex Post Facto Clause in the U.S. Constitution

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entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.”). *Cf. Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983) (“As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm.”).

145. See Press Release, U.S. Dep’t. of Just., 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/Q6TG-QEED>].

146. Bump-Stock-Type Devices, 83 Fed. Reg. 66514 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

147. *Id.* at 66530 (“Current possessors of bump-stock-type devices will have until the effective date of the rule (90 days from date of publication in the Federal Register) to comply.”).

148. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 19 (D.C. Cir. 2019).

prohibits retroactively criminalizing conduct.

Regarding the power of the ATF to prescribe regulations, the I.R.C. generally prohibits the retroactive application of a regulation.<sup>149</sup> This general prohibition resulted from the Taxpayer Bill of Rights 2, enacted by Congress in 1996 and effective “with respect to regulations . . . enacted on or after the date of the enactment of this Act.”<sup>150</sup> Prior to enacting the Taxpayer Bill of Rights 2, Congress granted the agency the power to prescribe rules and regulations relating to the internal revenue laws and determine their retroactive effect.<sup>151</sup> Accordingly, the ATF applied at least “all rulings issued under the Internal Revenue Code . . . retroactively” unless otherwise specified.<sup>152</sup> Under the current version of I.R.C. § 7805, authorized agencies lack the power to issue retroactive *regulations* affecting the Internal Revenue Code unless one of the exceptions apply.<sup>153</sup> One exception, § 7805(b)(8), provides some insight into the operation of the retroactivity prohibition. The exception under § 7805(b)(8) allows the agency to “prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination *other than by regulation*) relating to the internal revenue laws shall be applied without retroactive effect.”<sup>154</sup> By specifically excluding administrative determinations made by regulation, this reinforces the general rule prohibiting retroactive regulations.

Two courts of appeals addressed the scope of and limitations on the agency’s retroactive power while reviewing an ATF ruling that classified a device as a “machinegun.” The courts addressed the issue of whether a ruling could exempt the devices manufactured after a certain date (as opposed to past *possession* of the devices). The Seventh Circuit interpreted I.R.C. § 7805(b)(8) as giving the Secretary the discretion to collect any *tax* under Chapter 53 retroactively but held that in order to exempt devices manufactured before the date of the Ruling as not subject

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149. 26 U.S.C. § 7805(b); *see also* H.R. REP. NO. 104-506, at 44 (1996) (explaining that retroactive regulations are generally inappropriate).

150. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1101, 110 Stat. 1452, 1468 (1996).

151. Bunge, *supra* note 113 (discussing the historical presumption of retroactivity and iterations of the Tax Code prior to 1996 that presumed or explicitly authorized retroactive regulations under I.R.C. § 7805).

152. *See* ATF Rul. 94-1 (Mar. 1, 1994), <https://www.atf.gov/firearms/docs/ruling/1994-1-usas-12-shotgun-nfa-weapon/download> [<https://perma.cc/2VFH-3PJY>].

153. 26 U.S.C. § 7805(b)(1). In particular, the Department of Justice lacks a legislative grant from Congress authorizing it to prescribe an effective date with respect to any regulation. *See* 26 U.S.C. § 7805(b)(6).

154. *Id.* § 7805(b)(8) (emphasis added).

to the requirements and laws of Chapter 53, Congress must expressly authorize such power.<sup>155</sup> In analyzing the same Ruling, the Sixth Circuit started by distinguishing between rulings and regulations, because “[u]nlike regulations, rulings—being interpretations of existing law—will ordinarily be applied retroactively.”<sup>156</sup> This would seem to be consistent with the opinion of the D.C. Court of Appeals in *Guedes*, however, the court only started here. The Sixth Circuit concluded that the prohibition on retroactivity in § 7805(b)(1) likely applies to “both taxing and regulatory” power delegated to the ATF regarding the NFA because the entire act is under the I.R.C.<sup>157</sup> This recognized the parallel language in the enabling clause (§ 7805(a)) and the retroactivity clause (§ 7805(b)(1)) that defines the outermost limits of this delegated authority as applying to all of Title 26, including Chapter 53.<sup>158</sup> Furthermore, because the agency cannot apply *regulations* retroactively, and can conditionally elect whether to apply *rulings* retroactively, the code authorizes the ATF to retroactively, but not prospectively, exempt *noncompliance* from the application of regulations and laws under the I.R.C. implicated by a new interpretation.<sup>159</sup> This reflects the general intent behind the Taxpayer Bill of Rights 2 to protect from retroactive burdens and harmonizes with Ex Post Facto concerns that would otherwise arise from retroactively

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155. *United States v. Cash*, 149 F.3d 706, 707 (7th Cir. 1998) (“[N]othing in the firearms statutes gives the Secretary of the Treasury (or the Bureau of Alcohol, Tobacco and Firearms) the power to make exemptions to § 5845(b) and associated legal obligations . . . . The ruling does not—and cannot—excuse compliance with criminal laws applicable at the time of [] transfers [that were made after the effective date of the statute].”).

156. *United States v. Dodson*, 519 F. App’x 344, 348 (6th Cir. 2013); *see also* Rev. Proc. 89–14, 1989–1 C.B. 814.

157. *Dodson*, 519 F. App’x at 348. The Sixth Circuit reasoned:

Although § 7805 is restricted to matters “relating to the internal revenue laws,” the entire National Firearms Act, including its registration requirements, is codified within Title 26. It is plausible, therefore, that § 7805 may limit the retroactive application of all provisions of the National Firearms Act, both taxing and regulatory. As a result, the ATF does have the authority to retroactively excuse a class of weapons for failure to comply with registration requirements.

*Id.* (citations omitted). Likewise, the court points out that “[w]hile the ATF may retroactively exempt certain weapons from tax and regulation requirements, it cannot exempt those same weapons from prospective application of the law.” *Id.* at 349.

158. The enabling clause limits the ATF’s authorization to all “needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue”—this title being the Internal Revenue Code. 26 U.S.C. § 7805(a) (emphasis added). The retroactivity clause prohibits retroactive regulations “relating to the internal revenue laws.” 26 U.S.C. § 7805(b)(1) (emphasis added).

159. *Dodson*, 519 F. App’x at 348.

prosecuting violators of the GCA because of a change in the interpretation of “machinegun” under the NFA.<sup>160</sup> Finally, retroactive exemption of noncompliance by machine-gun owners does not mean that the machine guns themselves are exempt from prospective application of the interpretation.<sup>161</sup>

This construction of I.R.C. § 7805 directly applies to the Bump-Stock Rule. First, the retroactivity clause applies to the delegation by Congress to the ATF of both taxing and regulatory power because the retroactivity prohibition applies to all of Title 26, including all of the NFA. The general prohibition in I.R.C. § 7805(b)(1) means that the parts of the Bump-Stock Rule promulgated under the authority of § 7805(a) as a regulatory action, to which no exceptions under § 7805(b) apply, must adhere to the strict general prohibition on the retroactive application of regulations relating to the NFA.<sup>162</sup> Likewise, consistent with the holding of the Seventh Circuit, the Bump-Stock Rule cannot prospectively exempt *existing* bump-stock devices made before the rule and qualifying as machine guns because Congress did not expressly delegate the power to exempt legal obligations. The ATF does have the power, however, to retroactively exempt past noncompliance with a ruling. In other words, the statute gives the ATF discretion to apply interpretations retroactively only if they do not rise to the level of regulatory action. Furthermore, while no express provision prevents retroactive application of regulatory action under the GCA, the Department of Justice made the Bump-Stock Rule prospectively effective, giving consideration to Ex Post Facto concerns.<sup>163</sup> Therefore, the Department of Justice correctly limited the Bump-Stock Rule prospectively to (1) the current and future possessors who cannot possess

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160. See, e.g., Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66525–26 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

161. *Dodson*, 519 F. App'x at 349 (“Although there are plausible ‘taxpayer reliance’ arguments for applying tax and economic laws prospectively, such policies are wholly inapplicable in the public-safety context.”) (citations omitted).

162. This analysis only applies to the exercise of regulatory power granted under 26 U.S.C. § 7805(a) as limited by the retroactivity prohibition in 26 U.S.C. § 7805(b)(1). The ATF takes the view that it otherwise generally has retroactive authority for rulings. *Rulings*, *supra* note 140 (“Rulings represent ATF’s guidance as to the application of the law and regulations to the entire state of facts involved, and apply retroactively unless otherwise indicated.”). As to regulations, however, prohibitions against retroactivity exist even without 26 U.S.C. § 7805(b)(1). See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”).

163. See Bump-Stock-Type Devices, 83 Fed. Reg. at 66525 (“Although regulating past possession of a firearm may implicate the Ex Post Facto Clause, regulating the continued or future possession of a firearm that is already possessed does not.”).

weapons either made in violation of Chapter 53 or meeting the definition of “machinegun” and (2) the makers who must cease unauthorized manufacturing of the “machineguns.”<sup>164</sup> Because regulations cannot apply retroactively, the fact that the Bump-Stock Rule does not apply retroactively means nothing more than that it is consistent with the scope of the enabling clause.

Manifest in these decisions is a general confusion as to the doctrine of retroactivity and the conflation of conduct (such as past or future possession) with the prohibited machine gun (which is generally prohibited if manufactured after 1986). Possession of a machine gun violates the GCA. If the interpretation of the statute is correct and a bump-stock falls under the intentionally broad but tailored statutory definition of machine gun, then the statute never protected the ownership of a bump-stock.<sup>165</sup> No ATF regulation alters statutory obligations because the ATF lacks such authority.<sup>166</sup> The law in I.R.C. § 7805(b)(1) distinguishes between past conduct—bump-stock possession to which a regulation cannot retroactively apply, and future conduct—continued possession of a bump-stock. Under the substantive effect method, the Bump-Stock Rule imposes a mandatory interpretation that arguably alters an existing policy (if the PLRs constitute a policy overriding the 2006 ATF Ruling), thus making the Rule legislative in effect. The effective date of the Bump-Stock Rule is a non-factor. Under the reliance method, the language of mandatory, strict enforcement articulated in the Bump-Stock Rule combined with negative statutory consequences for noncompliance by bump-stock owners makes the Rule legislative. Whether or not the ATF intended to promulgate a legislative Bump-Stock Rule, § 7805 controls the effective date of regulations and permits the ATF discretion to retroactively exempt past conduct in rulings, thus the D.C. Court of Appeals erred in factoring the effective date.

Under general administrative law principles, which all courts seem to apply to the ATF, because Congress granted the Department of Justice the power to generally promulgate rules and regulations, Congress delegated the authority to promulgate rules having the force of law. As to whether

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164. *See id.* at 66538 (“The Department has considered the effect that this rule will have on these manufacturers, employees, and families and acknowledges that they will no longer be able to manufacture bump-stock-type devices.”).

165. *E.g.*, *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 19–20 (D.C. Cir. 2019).

166. *Dodson*, 519 F. App’x at 349 (“The ATF does not have the ability to redefine or create exceptions to Congressional statutes.”).

the Bump-Stock Rule reflects the agency's exercise of this authority, the answer is yes. Based on the trend of Supreme Court decisions, the Bump-Stock Rule satisfies the procedural requirements under the APA and has a binding effect on bump-stock owners.<sup>167</sup> The mandatory language of the Bump-Stock Rule, the fulfillment of notice-and-comment requirements for promulgating regulations, and the agency's own standards indicating that regulations bind the agency, combined with precedent that compels the agency to follow its own standards, all strongly favor a finding that the agency intended the Rule to have the force of law.

The substantive effect on bump-stock owners and the owners' reliance on the PLRs might prove a source of concern (whether a court articulates these reasons or not) and disincline the judiciary to grant *Chevron* deference.<sup>168</sup> If the Court wanted to avoid *Chevron* deference altogether without invoking an exception, the Court has a path for classifying the Bump-Stock Rule as interpretive. The analysis provided in *Hoctor* permits a finding that the Bump-Stock Rule is interpretive while leaving *Chevron* unassailed because the bubble concept at issue in *Chevron* would still be a legislative rule under the *Hoctor* analysis.<sup>169</sup> Based on the judicial trend, however, the test in *Chevron* for determining deference applies to the Bump-Stock Rule unless an exception applies.

*b. Exceptions to the Application of Chevron.*

Several limitations rebut the presumption of the applicability of the *Chevron* test. One exception to applying the *Chevron* test involves situations where "the Executive seems of two minds," such as by submitting competing briefs.<sup>170</sup> A second exception limits the imputation of authority to resolve statutory ambiguities notwithstanding Congress's delegation of regulatory authority.<sup>171</sup> A finding of extraordinary or "major

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167. See *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 60 (2011); *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

168. See, e.g., *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020).

169. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (analyzing the agency-created bubble concept that created an arbitrary method of measuring emissions not mentioned in any statutory language and permitting offsets and setting a dual definition of the statutory term "source").

170. See *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

171. See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 123 (2000) ("In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."); *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic



agency rules” rebuts the presumption that the *Chevron* test applies where, as articulated by now-Supreme Court Justice Kavanaugh in a dissent from the D.C. Court of Appeals, it is necessary “to preserve the separation of powers and . . . check . . . expansive and aggressive assertions of executive authority.”<sup>172</sup> This exception appears to target truly legislative action beyond the scope of delegated and/or delegable authority. For many of these exceptions, *Chevron* step zero is the threshold step before analyzing the exception because a court must first (attempt to) characterize the agency action in order to decide that (1) it will characterize the rule without deference to the agency because the executive is of two minds or (2) *Chevron* applies but the court declines to apply it nonetheless because of the “major rules” exception.<sup>173</sup> A third possibility of waiver of *Chevron* deference is also discussed.

i. The executive is “of two minds” exception.

Whether or not the executive is truly “of two minds,” courts may apply this doctrine to estop the government when it becomes a moving target in litigation.<sup>174</sup> This policy demands that the executive branch be accountable for its action before the court grants deference to its acts.<sup>175</sup> From a practical standpoint, beyond the underlying nondelegation and representation principles supporting the policy, the issues of consolidating cases where the government took contradictory positions favors this policy. An almost collateral estoppel to *Chevron*, this seems highly relevant where the underlying executive policy choices are unclear and not, as with the Bump-Stock Rule, where the government underwent notice and comment in promulgating a final rule with a clear position.<sup>176</sup> The garble of the government’s changing positions in litigation becomes

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and political significance.”) (internal quotation marks omitted).

172. See *U.S. Telecom Ass’n v. F.C.C.*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

173. See *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 88 (1995) (“*Interpretive rules* do not require notice and comment, although they also *do not have the force and effect of law and are not accorded that weight in the adjudicatory process.*”) (emphasis added).

174. See *Epic Sys. Corp.*, 138 S. Ct. at 1630 (“[W]hatever argument might mustered . . . surely it becomes a garble when the Executive speaks from both sides of its mouth, articulating no single position on which it might be held accountable.”).

175. *Id.*

176. E.g., *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question, on the ground that ‘Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.’”).

irrelevant because the rule speaks for itself.<sup>177</sup> Ultimately, the agency's action, not the lawyer's characterization, is at issue. Thus where the agency undertook procedural formality, the agency held itself accountable directly to the public before government attorneys could attempt post hoc rationalizations.<sup>178</sup> Here the Bump-Stock Rule explicitly invoked *Chevron* in its responses to public comments, a clear statement of intent.<sup>179</sup> Any subsequent contradictions in litigation regarding the government's classification of the Bump-Stock Rule necessitates a judicial review of the nature of the Bump-Stock Rule, a task the court must undertake regardless. The lawyer's characterization of the Bump-Stock Rule in court merely aids the court in this review. The D.C. Court of Appeals took just that approach with *Guedes*.<sup>180</sup> Denial of *Chevron* deference for statutory construction is not appropriately wielded as a judicial sanction, however repugnant a litigation strategy may be, where the agency's action speaks for itself.

Finally, if the doctrine necessitates stalwart accountability by executive branch *officials* who take ownership of the policy choices, then President Trump satisfied this burden first by publicly and formally charging the Attorney General to promulgate the Bump-Stock Rule by memorandum and, secondly, by not subsequently altering his policy stance on the Bump-Stock Rule. As an elected official, the President bears direct accountability to his electorate. For all of these reasons, if *Chevron* applies, then this doctrine should not prevent its application to the Bump-Stock Rule.

- ii. The government cannot waive *Chevron* deference if it is a standard of review for the agency's statutory interpretation.

Tangential to the question of the application of the "two minds" exception is whether an agency can waive *Chevron* even if it applies. The

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177. See *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 22 (D.C. Cir. 2019) ("Chenery instructs that the proper subject of our review is what the agency actually did, not what the agency's lawyers later say the agency did.").

178. *Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156–57 (1991) ("Our decisions indicate that agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court.").

179. "ATF, when promulgating the Final Rule, 'further evinced its intent to exercise legislative authority by expressly invoking the *Chevron* framework and then elaborating at length as to how *Chevron* applies to the [Final] Rule.'" *Aposhian v. Barr*, 958 F.3d 969, 980 (10th Cir. 2020) (quoting *Guedes*, 920 F.3d at 18).

180. *Guedes*, 920 F.3d at 22.

answer should be no. *Chevron* is a standard of review, a deference given by courts based on both the expertise of the agency and the statutory delegation of authority that Congress gave to the agency; or alternatively phrased: *Chevron* is “a doctrine about statutory meaning.”<sup>181</sup> *Chevron* is not a defense that the agency or its lawyers may either raise or waive by failing to raise it in a proceeding.<sup>182</sup> Additionally, the negative implications of permitting waiver of *Chevron* where it applies further support the inappropriateness of waiver in the *Chevron* context. Similar to the “of two minds” exception, the agency cannot reclassify an action in litigation through waiver because “a legislative rule qualifying for *Chevron* deference remains legislative in character even if the agency claims during litigation that the rule is interpretive.”<sup>183</sup> Permitting waiver would allow the government to become an unaccountable moving target. Likewise, *Chevron* deference is not a privilege available to the agency, rather the courts choose to apply the doctrine based upon the agency’s actions because “it is the expertise of the agency, not its lawyers, that underpins *Chevron*.”<sup>184</sup> Consequently, the D.C. Court of Appeals correctly disregarded the government’s request to waive *Chevron* if it applied to the Bump-Stock Rule.<sup>185</sup>

Supreme Court Justice Gorsuch would likely disagree with this analysis. When on the Tenth Circuit of Appeals, Justice Gorsuch issued a dissenting opinion that criticized the application of *Chevron* where the parties failed to fully brief the issue.<sup>186</sup> In fairness, it is less clear whether Justice Gorsuch took umbrage with the unsolicited granting of *Chevron*, or with the interpretation forwarded by the government and accepted by the majority, which he found particularly unreasonable.<sup>187</sup> The bulk of his brief dissent focused on his skepticism as to the existence of any statutory ambiguity and the unreasonable interpretation proffered by the agency, not

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181. *Id.*

182. *See id.*

183. *Id.* at 22–23 (“A waiver regime . . . would allow an agency to vary the binding nature of a legislative rule merely by asserting in litigation that the rule does not carry the force of law.”).

184. *Id.* at 22 (internal quotation marks omitted).

185. *Id.*

186. Only one party referenced *Chevron* in a footnote in their brief to the court and only with regards to statutory ambiguity, wholly failing to also discuss the reasonableness requirement in the *Chevron* test. *TransAm Trucking, Inc. v. Admin. Rev. Bd.*, U.S. Dep’t of Lab., 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting) (“We don’t normally make arguments for litigants (least of all administrative agencies), and I see no reason to make a wholly uninvited foray into step two of *Chevron* land.”).

187. *Id.* (referring to the majority’s deference as permitting an “unusual result” of reading of a statutory phrase “to encompass its exact opposite.”).

the doctrine of waiver as it relates to *Chevron*. The facts of that case indicate that Justice Gorsuch accepts the notion of an implicit waiver of *Chevron* by the government. Additionally, the recent statement by Justice Gorsuch indicates his belief that the government can expressly waive *Chevron*, notwithstanding the fact that the Bump-Stock Rule itself discussed the application of *Chevron* in the event that it applies.<sup>188</sup> Now that the door has been cracked, the issue of whether *Chevron* deference can be waived requires an answer.

Because the Court tends to decide cases on the narrowest grounds, it could avoid this question by finding *Chevron* does not apply to the Bump-Stock Rule. If waiver is an option, then that indicates waiver is a discretionary privilege that opens up more uncertainty in the law—particularly for regulated persons. It also leads to more questions as to the extent of waiver. Additionally, allowing waiver would chip away at the Court’s established standard in *Mayo* of maintaining a uniform approach to judicial review of administrative action. These factors favor a prediction that if given the opportunity, the Court would avoid the question as to whether *Chevron* can be waived. Thus, whether *Chevron* can be waived likely requires more litigation in which the government takes such a concerted action as well as a circuit split before the question may be resolved.

- iii. The “major rules” exception and why courts should still apply a standard of deference to ATF interpretive regulations, not the rule of lenity, if *Chevron* deference does not apply.

Whether the Bump-Stock Rule falls under the “major rules” exception depends upon how the Supreme Court chooses to view the Bump-Stock Rule. Justice Gorsuch penned a demonstrably fervent, lone statement after the Court denied a writ of certiorari for injunctive relief, which parties had sought in their preemptive challenges to the Bump-Stock Rule.<sup>189</sup> Wholly discounting the facts that the GCA already makes the act of possessing a machine gun manufactured after 1986 a crime and that the agency went through rulemaking prior to classifying *other* bump-stock devices as “machine guns” based on its interpretation of the statutory language of the NFA, Justice Gorsuch lambasted the application of *Chevron* by the D.C.

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188. *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020).

189. For support on why “fervent” appropriately describes the tone of Justice Gorsuch’s statement, compare *Guedes*, 140 S. Ct. 789 with *TransAm Trucking, Inc.*, 833 F.3d at 1215–17 (Gorsuch, J., dissenting).

Court of Appeals and the Bump-Stock Rule generally, in part because “courts may send people to prison” without an independent judgment on what the law actually means.<sup>190</sup> He punctuated this premise with the exposition that “[t]hat’s why this Court has ‘never held that the Government’s reading of a criminal statute is entitled to any deference.’”<sup>191</sup> This tends to indicate that he thinks the Bump-Stock Rule falls under something akin to the “major rules” exception. Although the facts contained in the cited authority differ substantially from those surrounding the Bump-Stock Rule, rendering the application suspect, Justice Gorsuch’s statement implicates some poignant, unanswered issues regarding the constitutional scope of the ATF’s authority and, consequently, the nature of the Bump-Stock Rule.

In the decision to which Justice Gorsuch cited as authority for the premise that the Bump-Stock Rule is not entitled to any deference, the APA did not apply, a fact highly relevant to deference. In the referenced case, the Court engaged in statutory construction of a federal military trespass statute while disregarding opinions in some executive branch documents that were nonbinding.<sup>192</sup> Although not mentioned in the opinion, the APA provides exemptions for activities involving a “military function,” a term which is construed broadly.<sup>193</sup> This may explain why the Court never discussed the APA in the opinion. Furthermore, the disregarded executive branch documents lacked any notice-and-comment procedures and originated from internal guidance sources such as an attorney’s manual.<sup>194</sup> In other words, the cited case did not involve an action necessarily falling under the APA, did not involve a rule that underwent notice-and-comment, and did not apply *Chevron* deference to nonbinding, internal guidance documents that would not have been subject to such deference if the APA had applied. Finally, the statute at issue expressly authorized the base commander to define the scope of trespass, and the Court upheld his authority as superseding that of the nonbinding internal guidance documents.<sup>195</sup> The Court deferred to the statutory grant of authority to the base commander and accordingly gave his decisions broad latitude, including his designation of a trespass which had criminal

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190. *Guedes*, 140 S. Ct. at 790.

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

192. *Apel*, 571 U.S. at 359.

193. Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 6 J. NAT’L ASS’N ADMIN. L. JUDICIARY 109, 118–20 (1986).

194. *Apel*, 571 U.S. at 368–69.

195. *Id.* at 364–66, 370–72.

consequences. Therefore, the statement that the Court has *never* held that the Government's reading of a criminal statute is entitled to *any* deference seems suspect both on the facts of the cited case and on its relevance to the Bump-Stock Rule where the agency acted under a broad statutory grant of authority, underwent notice and comment in promulgating a public (not internal) rule, and is subject to the APA. Perhaps the Supreme Court has *never* held that the government's reading of a criminal statute is entitled to *any* deference;<sup>196</sup> nevertheless, where the APA does apply, many agencies promulgate regulations having criminal consequences and courts, including the Supreme Court, have granted the agencies deference, often *Chevron* deference.<sup>197</sup>

Justice Gorsuch's objection as to whether *Chevron* deference can apply in the case of a *legislative* rule having criminal consequences implicates a broader question of whether the ATF lacks the power to promulgate legislative rules because of the criminal consequences. At least some believe that it does,<sup>198</sup> although none of the appellate courts adjudicating the Bump-Stock Rule concur.<sup>199</sup> In contrast, the ATF believes that Congress vested the agency with the power to promulgate legislative rules.<sup>200</sup> Arguably, the ATF could lack legal authority to promulgate truly legislative rules, under the logic of the "major rules" exception because either (1) Congress failed "to speak *clearly* [that] it wished to assign to the [Attorney General or ATF] decisions of 'vast

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196. *But see* Babbitt v. Sweet Home Chapter of Cmty. for a Great Or., 515 U.S. 687 (1995).

197. *See, e.g., id.* at 703–04, 704 n.18 (applying *Chevron* in reviewing a regulatory interpretation of a term in a statute that carried both civil and criminal implications); *United States v. Dodson*, 519 F. App'x 344, 349 n.4 (6th Cir. 2013) ("As a general matter, regulatory agencies may interpret general provisions in their statutes, even though criminal sanctions may result."); John G. Malcolm, *Criminal Law and the Administrative State: The Problem with Criminal Regulations*, HERITAGE FOUND. (Aug. 6, 2014), <http://report.heritage.org/lm130> [<https://perma.cc/6VTV-2DBS>] (asserting courts should "accord less deference (often referred to as *Chevron* deference)" to the proliferating number of criminal regulations).

198. *See* Press Release, New Civil Liberties Alliance, ATF Admits It Lacked Authority to Issue Legislative Rule, NCLA Condemns the Agency's Attempt to Ban Bump Stocks Anyway (Sept. 16, 2019), <https://nclalegal.org/2019/09/atf-admits-it-lacked-authority-to-issue-legislative-rule-ncla-condemns-the-agencys-attempt-to-ban-bump-stocks-anyway/> [<https://perma.cc/68TZ-DV5R>] ("The agency lacks legal authority to issue a so-called legislative rule, but a mere interpretive rule is not legally allowed to bind any third parties outside the government. By ordering half a million bump stock owners to surrender their devices—or face prosecution—ATF has acted in a completely unconstitutional fashion."); *Bump-Stock-Type Devices*, 83 Fed. Reg. 66514, 66526–27 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

199. *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1 (D.C. Cir. 2019).

200. Press Release, U.S. Dep't of Just., Prohibition of Improper Guidance Documents (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/NS6J-C4CR>].

economic and political significance,”<sup>201</sup> or (2) Congress cannot delegate such authority.<sup>202</sup> The former opens up questions of how much clearer Congress needs to be for the ATF to interpret statutory terms. The latter seems especially unlikely because the courts treat agencies homogenously,<sup>203</sup> and if courts wanted to particularize the ATF, they have had opportunities to address the issue of Congress’ inability to delegate the authority of legislatively regulating Second Amendment rights where the consequences are criminal.<sup>204</sup> Finally, the real specter of overreach might be the truly legislative rules described in *Hoctor* that set arbitrary standards, an issue not raised by the Bump-Stock Rule’s interpretation of statutory terms despite its legislative effect as a regulation.

The “major rules” exception does not apply because neither possibility fits the facts of the Bump-Stock Rule. While the Court expects that Congress speak directly on “the elements of a criminal offense” because federal crimes “are solely creatures of statute,”<sup>205</sup> the Court has also stated that the key to the enforcement of the NFA is that it cannot be ambiguous.<sup>206</sup> Holding that Congress cannot delegate legislative authority to the ATF for promulgating statutory interpretations would render the statute unenforceable. It also seems unlikely that the issue of delegability arises where the Bump-Stock Rule merely filled in the gaps under the authority of I.R.C. § 7805(a) and under the GCA after undergoing notice-and-comment rulemaking procedures, but again, this largely depends on how the Court chooses to view the Rule. If viewed as a gap-filler, then as Chief Justice Marshall held in 1825, “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”<sup>207</sup>

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201. *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014) (emphasis added) (quoting *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

202. *See generally* Bump-Stock-Type Devices, 83 Fed. Reg. at 66521–25.

203. *See, e.g.*, *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011) (discussing the courts’ continuing recognition of the significance of a uniform approach to judicial review of administrative action).

204. *See, e.g.*, *Akins v. United States*, 312 F. App’x 197, 199 (11th Cir. 2009).

205. *Staples v. United States*, 511 U.S. 600, 604 (1994) (saving the statute by implying a mens rea requirement).

206. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517 (1992) (“The key to resolving the ambiguity lies in recognizing that although it is a tax statute that we construe now in a civil setting, the NFA has criminal applications that carry no additional requirement of willfulness.”).

207. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 44 (1825) (“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”); *see also* *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (“If the administrator’s reading fills a gap or defines a term in a way that is reasonable in light of the legislature’s revealed design, we give

If the Bump-Stock Rule fails to be legislative because of either (1) Congress' failure to *clearly* articulate specific intent that the ATF's delegated authority included the agency's power to speak with the force of law when defining undefined terms within the NFA, or (2) other nondelegation principles already mentioned, then the Court should characterize it as interpretive.<sup>208</sup> Ultimately, by denying the ATF legislative authority, the Court would be saying such acts can only be interpretive although likely still requiring procedural formalities—that is, legislative but without the deference. If the agency lacks the power to promulgate legislative rules because Congress only delegated (or could only delegate) authority to promulgate interpretive rules, then this limitation only reduces the extent of the agency's authority, not the validity of the statutory grant to the extent it could and did grant power to the agency.<sup>209</sup> A finding that a rule is incapable of being characterized as legislative does not necessarily invalidate the rule. If a rule cannot be legislative but satisfies the lower standards required of interpretive action, courts should adopt a saving construction, where reasonable, and characterize the rule as interpretive.<sup>210</sup> For the same reasons that *Chevron* gives deference to an agency's legislative action in statutory construction, a rule that could qualify as interpretive and cannot be legislative ought to be preserved, at least where, as here, no procedural impediment prevents the Rule's existence as interpretive and the agency otherwise consciously

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the administrator's judgment 'controlling weight.'").

208. Construing the Bump-Stock Rule as interpretive to save it should not implicate standing issues for parties challenging the Rule as for obtaining a determination that the Rule is interpretive. *See Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (discussing the predicament of pre-enforcement review where the parties dispute whether the Final Guidance at issue is a general statement of policy (not subject to pre-enforcement review) or a legislative rule). *See generally* JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., R44468, GENERAL POLICY STATEMENTS: LEGAL OVERVIEW, (2016), <https://sgp.fas.org/crs/misc/R44468.pdf> [<https://perma.cc/6B4H-LE5V>] ("Unlike legislative rules, which may be immediately reviewable once they are finalized, policy statements often cannot be challenged until the agency takes further action to implement or enforce the policy.").

209. *Cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) ("That an agency regulation is 'substantive,' however, does not by itself give it the 'force and effect of law.' . . . [T]he exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.").

210. *See generally* *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (holding that the Court has "a duty to construe a statute to save it, if fairly possible" when all else fails). The congressional act of delegating authority to the Attorney General relating to the ATF warrants preserving. Although the Court in *Sebelius* only referred to the Court's saving of a statutory act of Congress, not an agency's regulatory action, the same logic could be applied to a legislative rule promulgated with congressional authority. The valid authority to promulgate interpretive rules remains available to the agency, regardless of the agency's intent for the interpretive act to have the force of law.



treated the rule as significant by undergoing notice and comment.<sup>211</sup> Finally, the delegations of congressional authority for the administration and enforcement of the NFA and GCA inherently require interpretation of both Acts, thus if not given the force of law, such interpretive, regulatory acts should stand as independently authorized interpretive regulations, just with less deference. In this case, the Bump-Stock Rule might not receive *Chevron* deference, but if viable, it could still stand as a general statement of policy and warrant some deference when enforced.

INTERPRETIVE DEFERENCE. If the Bump-Stock Rule is interpretive, then the broad assertion that it is not “entitled to *any* deference” remains suspect for several reasons. If the Bump-Stock Rule is interpretive, then whether the ATF constitutionally lacks the power to promulgate legislative rules is irrelevant to the Bump-Stock Rule. If the Bump-Stock Rule is deemed interpretive because it cannot be legislative, then the issue becomes: what deference, if any, will a court give when the agency seeks to enforce the Rule? An interpretive rule promulgated by the ATF and binding on the ATF but lacking the force of law upon third parties still reflects the expertise of the agency on the subject. The APA still applies to the Bump-Stock Rule and precedent dictates that deference still applies unless unreasonable.<sup>212</sup> Deference is not unreasonable for the Bump-Stock Rule for many reasons. First, procedural formality permitted public participation and transparency, particularly after undergoing notice and comment. Second, the agency’s interpretation carries the weight of factual findings, all of which create a record upon which the agency is accountable to the public and which exceeds the ability of courts to compile. Third, the agency initiated the procedural formalities at the publicized direction of President Trump, in harmony with strong

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211. See *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256 (1995) (“It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute.”) (internal quotation marks omitted). See generally *Hocor v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996) (“When it is an executive or administrative agency that is doing the interpreting it brings to the task a greater knowledge of the regulated activity than the judicial or legislative branches have, and this knowledge is to some extent a substitute for formal fact-gathering.”). Cf. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (finding the conscious choice of the Secretary *not to treat* “an extremely significant” rule affecting rights of third parties, *as a legislative-type rule*, rendered it ineffective in extinguishing those rights).

212. “Under the Administrative Procedures Act, we defer to the decision of the Bureau unless it (1) exceeds the Bureau’s statutory authority, (2) violates a constitutional right, or (3) constitutes an arbitrary or capricious action, or an abuse of discretion or an action otherwise not in accordance with law.” *Akins v. United States*, 312 F. App’x 197, 200 (11th Cir. 2009) (internal quotation marks omitted) (quoting *Gun S., Inc. v. Brady*, 877 F.2d 858, 861 (11th Cir. 1989)).

bipartisan support from Congress.<sup>213</sup> The action thus urged by the political branches merits its own degree of deference. Fourth, although courts may deny *Chevron* deference to interpretive rules,<sup>214</sup> *Skidmore* deference may still apply.<sup>215</sup> Interpretive rules with criminal sanctions are no exception to the general grant of deference. For example, when courts considered tax regulations (which carry criminal sanctions) as strictly interpretive when the Internal Revenue Service promulgated them under I.R.C. § 7805(a) (before *Mayo*),<sup>216</sup> courts awarded deference.<sup>217</sup> For these non-exhaustive reasons, a blanket denial of *any* deference seems suspect.

**RULE OF LENITY.** Even in the most conservative scenario, a denial of deference should not result in an application of the rule of lenity to construing “automatically” and “single function of the trigger” or its application to bump-stocks. The rule of lenity should not apply where the statutory construction contained in the Bump-Stock Rule underwent procedural formalities with the authority of Congress to promulgate rules for the purposes of enforcement and administration of the NFA and GCA. The rule of lenity also does not apply here because when the Supreme Court has discussed the rule of lenity in relation to the NFA, they have either declined to apply it,<sup>218</sup> or applied it in light of more fundamental

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213. Meagan Flynn, *Bump-Stock Ban Enacted by Trump Administration Can Stand*, *Federal Judge Rules*, WASH. POST (Feb. 26, 2019), <https://www.washingtonpost.com/nation/2019/02/26/bump-stock-ban-enacted-by-trump-administration-can-stand-federal-judge-rules/> [<https://perma.cc/FP58-S5D7>] (“Trump moved to ban bump stocks in the wake of the Las Vegas shooting with loud bipartisan support from Congress and anti-gun-violence advocates.”).

214. *But see* *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“Of course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation.”).

215. *See* *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001) (“We agree that a tariff classification has no claim to judicial deference under *Chevron*, there being no indication that Congress intended such a ruling to carry the force of law, but we hold that under *Skidmore v. Swift & Co.*, the ruling is eligible to claim respect according to its persuasiveness.”) (citations omitted); *Christensen*, 529 U.S. at 587 (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v. Swift & Co.*, but only to the extent that those interpretations have the ‘power to persuade.’”) (citations omitted).

216. *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44, 55 (2011).

217. *See* Mark E. Berg, *Judicial Deference to Tax Regulations: A Reconsideration in Light of National Cable, Swallows Holding, and Other Developments*, 61 *TAXLAW* 481, 532–33 (2008) (“One possibility, which focuses on the differences in the language used in section 7805(a) and the various purpose and provision delegations, is that Congress believes that the delegation in section 7805(a) authorizes regulations dealing only with such “enforcement” matters as the assessment and collection of tax and the imposition of civil penalties and criminal sanctions, and thus that purpose and provision delegations are necessary to give the Treasury Department broader regulation-writing authority than this. Another possibility, which focuses instead on giving meaning to both section 7805(a) and the various purpose and provision delegations, is to conclude that Congress intended purpose-authority regulations and provision-authority regulations to be accorded a higher level of deference than section 7805(a) regulations.”).

218. *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994) (quoting *Smith v. United States*, 508

issues of due process where statutory ambiguity existed and no regulatory interpretation applied.<sup>219</sup> In the latter case, no rule or regulation spoke to the particular issue in the case and even the agency rulings failed to speak directly to the issue, thus the Court had to construe the statute itself.<sup>220</sup> This also arguably supports giving at least some deference to the Bump-Stock Rule, at least in terms of it preventing the application of the rule of lenity. The rule of lenity applies in the absence of any ATF rule defining ambiguous terms through which a court can give the statute meaning; because absent a clear law, enforcement of the NFA against a gun owner is unconstitutional.<sup>221</sup> The rule of lenity protects people and therefore people's past conduct where the law failed to fully inform the public of what constitutes criminal conduct; it does not protect the bump-stocks themselves.<sup>222</sup> This concept resembles the logic inherent in the retroactivity restriction of I.R.C. § 7805(b) that protects individuals from the retroactive application of regulations. Thus, the rule of lenity does not apply where a properly promulgated rule undergoes public notice and comment and observes the restrictions already present in I.R.C. § 7805, avoiding the retroactive application to past conduct.

While none of the exclusions raised by Justice Gorsuch or bump-stock owners in their litigation against the Bump-Stock Rule likely apply, these conclusions can only draw support from existing precedent and past signals in Supreme Court opinions. The changing composition of the Court and the perspective they choose to take on the Bump-Stock Rule can tip the scales, with potentially watershed implications. At least one Justice seems to argue for this. If, however, the status quo remains unaltered, then the final step in the analysis is whether the Bump-Stock Rule, having satisfied *Chevron* step zero, merits *Chevron* deference.

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U.S. 223, 239 (1993)) (holding rule of lenity *unnecessary*, "under which an ambiguous criminal statute is to be construed in favor of the accused" because it only applies when "left with an ambiguous statute" after using all other available tools of construction).

219. *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.9 (1992) (plurality opinion) ("The Government has urged us to defer to an agency interpretation contained in two longstanding Revenue Rulings. Even if they were entitled to deference, neither of the rulings goes to the narrow question presented here . . . . We do not read the Government to be relying upon Rev. Rul. 54-606, which was repealed as obsolete in 1972 and which contained broader language that 'possession or control of sufficient parts to assemble an operative firearm . . . constitutes the possession of a firearm.'") (citations omitted).

220. *Id.* at 518.

221. *See, e.g., United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416, 419 n.3 (6th Cir. 2006).

222. A regulatory taking argument can be made, but this does not affect the application of the rule of lenity.

*c. The Bump-Stock Rule Easily Satisfies the Chevron Test.*

If the Bump-Stock Rule satisfies the two prongs of *Chevron* step zero and no exceptions apply, then the *Chevron* test asks (1) whether the statute is ambiguous and (2) if the agency's interpretation is reasonable.<sup>223</sup> Once a court completes a *Chevron* step zero analysis, however, it has practically answered the *Chevron* test, unless, as here, the conductor of the analysis reserves for the *Chevron* test both parts of the ambiguity inquiry (inherent in prong one of *Chevron* step zero which includes whether a statutory ambiguity constitutes congressional intent) and the reasonableness analysis (inherent in both prongs of *Chevron* step zero and in the analysis of any exceptions to applying the *Chevron* test). Applying the traditional *Chevron* test to the Bump-Stock Rule, *Chevron* deference applies because of (1) the latent ambiguity of the undefined terms and (2) the reasonable interpretation applied by the ATF drawing from legislative history, congressional intent, judicial interpretation and its own policy. Both courts of appeals, which reviewed the challenges raised by bump-stock owners to the Bump-Stock Rule for their likelihood of success, held that *Chevron* deference likely applied.<sup>224</sup> Although both courts only reviewed the cases for their likelihood of success in order to determine the issue of the lower court's denial of injunctive relief, their detailed analysis and conclusions still indicate the very likely outcome for the Bump-Stock Rule. The *Chevron* step of the analysis was also the easiest administrative law question before the courts based on settled precedent.

i. Latent ambiguity exists in how the terms “automatically” and “single function of the trigger” operate in the definition of “machine gun.”

In step one of the *Chevron* test, a court asks whether statutory ambiguity exists, starting with the plain meaning of the statute.<sup>225</sup> Already partially addressed in *Chevron* step zero, this inquiry is necessarily tied up with the inquiry of whether Congress intended for the agency to resolve

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223. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (“Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

224. *Aposhian v. Barr*, 958 F.3d 969, 984–85 (10th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 23–25 (D.C. Cir. 2019).

225. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005) (“At the first step, we ask whether the statute’s plain terms ‘directly address[s] the precise question at issue.’”) (quoting *Chevron*, 467 U.S. at 843).

such an ambiguity.<sup>226</sup> The fact that a statute lacks a definition for a term is insufficient, on its own, to make the term ambiguous.<sup>227</sup> But, “where a statute’s plain terms admit of two or more reasonable ordinary usages, the [agency’s] choice of one of them is entitled to deference.”<sup>228</sup> Even the Supreme Court’s plain meaning approach allows for consideration of latent ambiguities by considering common usage, industry usage, the context of the term, and all of the usual trappings of statutory construction.<sup>229</sup> In a run-on sentence like the NFA’s definition of “machinegun,” with multiple modifiers and subordinate clauses and a laundry list of prohibitions, combined with the apparent legislative intent to broadly cover anything that could be or become a machine gun, a lay person may find a reasonable amount of ambiguity in discerning its meaning.

In the Bump-Stock Rule, the agency clarified the meaning of two terms in the NFA definition of machine gun: “automatically” and “single function of the trigger.” The agency already defined the latter in rulings and judicial precedent accepted this definition, but the agency found it necessary to formally promulgate this definition.<sup>230</sup> Latent ambiguity surrounds both terms because the broadly-encompassing intent of both terms used by legislators who first drafted the statute in 1934 differs from the literal, narrowly-tailored definition that parties attempting to make an end-run around the statute argue as the plain meaning.<sup>231</sup> From reading the legislative history and committee hearings, legislators in 1934 did not

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226. *E.g.*, *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996) (“We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”).

227. *TransAm Trucking, Inc. v. Admin. Rev. Bd., United States Dep’t of Lab.*, 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting) (“[R]espectfully, my colleagues do not cite any precedent for the notion that the absence of a statutory definition is enough to render a statutory term ambiguous—and I am aware of none. In fact, there are countless cases finding a statute unambiguous after examining the dictionary definition of its terms.”).

228. *Nat’l Cable*, 545 U.S. at 989; *see also Verizon Commc’ns, Inc. v. F.C.C.*, 535 U.S. 467, 498–501 (2002) (deferring to agency’s interpretation of the term “cost”).

229. *See, e.g., Nat’l Cable*, 545 U.S. at 990 (“Even if it is linguistically permissible to say that the car dealership ‘offers’ engines when it offers cars, that shows, at most, that the term ‘offer,’ when applied to a commercial transaction, is ambiguous about whether it describes only the offered finished product, or the product’s discrete components as well.”); *Verizon*, 535 U.S. at 500 (“The fact is that without any better indication of meaning than the unadorned term, the word ‘cost’ in § 252(d)(1), as in accounting generally, is ‘a chameleon,’ . . . a ‘virtually meaningless’ term.”)(citations omitted).

230. 27 C.F.R. §§ 447.11, 478.11, 479.11 (2021).

231. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,527 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

pretend to be firearms experts; in fact they sought assistance in formulating a broad definition of machine gun and used “single function of the trigger” and “single pull of the trigger” interchangeably.<sup>232</sup> Congress did not intend for “single function of the trigger” to limit “automatically,” but rather used the terms to distinguish machine guns from other guns that, although automatically chambering the next round, fire only one shot with “a single pull of the trigger” and require the shooter to “release the trigger and pull it again for the second shot to be fired.”<sup>233</sup> One Congressman even voiced concern that “one function of the trigger” limited the scope of the definition until it was put in this context:

Mr. HILL. The point I am making is, why include in your definition the phrase, “with one function of the trigger”?

Mr. FREDERICK. Because that is the essence of a machine gun. Otherwise you have the ordinary repeating rifle. You have the ordinary shotgun which is in no sense and never has been thought of as a machine gun.<sup>234</sup>

In other words, Congress contemplated all automatic weapons in its definition of machine gun in 1934.<sup>235</sup>

Whether this constitutes actual ambiguity or just a good reason to ensure public notice of the original meaning (in which case, the regulation merely articulates the law itself), potential ambiguity still arises with these terms as they relate to the later additions to the definition of machine gun. The 1934 drafters looked at devices the way they were advertised in the day, as weapons that could turn one man into twenty.<sup>236</sup> As the definition of machine gun expanded and continued to cover enterprising manufacturers, Congress added to the definition of machine gun: “any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a

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232. “A gun, however, which is capable of firing more than one shot by a single pull of the trigger, a single function of the trigger, is properly regarded, in my opinion, as a machine gun.” *National Firearms Act: Hearings before the Comm. on Ways and Means, H.R., on H.R. 9066*, 73d Cong. 40 (1934); see also *NFA Senate Subcomm. Hearings, supra* note 14, at 89.

233. *National Firearms Act: Hearings before the Comm. on Ways and Means, H.R., on H.R. 9066*, 73d Cong. 41 (1934).

234. *Id.*

235. Committee members even indicated that it accepted that this definition was not overbroad and that it was “desirable” to encompass everything they understood to be a machine gun within their definition. *Id.*

236. See *The Gun That Makes One Man Equal Twenty, supra* note 8.

machinegun.”<sup>237</sup> Arguably, no ambiguity arises because the language of the rule clearly conveys an intent to cover bump-stock devices, but intent is a tool of construction just like *ejusdem generis* and *expressio unius est exclusio alterius*. Thus, the Bump-Stock Rule clarified that automatically “mean[s] 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.”<sup>238</sup> The ATF based this on the legislative history and the 1934 definition of the terms.<sup>239</sup> The ATF also ensured the definition was consistent with the interpretation set forth by the Seventh Circuit Court of Appeals, deferring to judicial interpretation of the statute where it preceded regulatory interpretation.<sup>240</sup> Both of these sources constitute a factor for the reasonableness of the interpretation, while also indicating that perhaps modern gun experts colloquially understand these terms differently than their original or actual meaning, thus triggering ambiguity within the regulated class.

Because of the tension between the spirit of the law and Second Amendment rights, the ATF faced an impediment in fulfilling its duty of enforcement of the NFA and GCA without these clarifications.<sup>241</sup> Where enforcement here of criminal conduct requires *mens rea*,<sup>242</sup> the ATF created their own problem by issuing PLRs to manufacturers that ultimately enabled consumer access to non-coil spring bump-stock devices. The ATF cannot “redefine or create exceptions to Congressional statutes,”<sup>243</sup> therefore the ATF had to take action to correct an apparent a mistake of fact regarding bump-stocks, permitted by its own PLRs, that was inconsistent with the NFA’s definition of machine gun. These PLRs created arbitrary distinctions between bump-stock devices with insufficient analysis and no procedural formality. The privately issued, unpublished PLRs are a defense to prosecution for past conduct, but they lack the force of law to protect future conduct that violates the NFA and GCA. Even so, ambiguity may be found in the statute itself because reasonable minds differed, including the minds within the ATF that issued

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237. Firearm Owners’ Protection Act, Pub. L. No. 99-308, § 109(a), 100 Stat. 449, 460 (1986).

238. 27 C.F.R. §§ 447.11, 478.11, 479.11 (2021) (internal quotation marks omitted).

239. Bump-Stock-Type Devices, 83 Fed. Reg. 66,514, 66,519 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11, 479.11).

240. *Id.*; *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009) (finding that “automatically” contemplated a self-acting mechanism “set in motion by a single function of the trigger”).

241. *See, e.g.*, *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505 (1992); *United States v. One TRW, Model M14, 7.62 Caliber Rifle*, 441 F.3d 416 (6th Cir. 2006).

242. *See Staples v. United States*, 511 U.S. 600, 600 (1994).

243. *United States v. Dodson*, 519 F. App’x 344, 349 (6th Cir. 2013).

the earlier PLRs and the later minds within the ATF that issued the Bump-Stock Rule.

ii. The Bump-Stock Rule's interpretation of the ambiguous terms is reasonable.

If the court finds the definition of machine gun ambiguous, then the final question is whether the agency's interpretation is reasonable and therefore due *Chevron* deference.<sup>244</sup> The standard for reasonableness requires that the agency provide a reasonable explanation for why the regulations serve their authorized objectives.<sup>245</sup> This low threshold for reasonableness explains this whole article—because “reasonableness” is such a deferential standard, once a court gets to this prong of the analysis, the agency likely receives *Chevron* deference. Thus, while many factors make an agency interpretation reasonable, reasonableness sets such a low bar that in cases like the Bump-Stock Rule, it amounts to a foregone conclusion.<sup>246</sup>

Several factors favor a reasonableness finding. First, the ATF promulgated no other rules having the force of law in the past that are contrary to the Bump-Stock Rule. Even the 2006 ATF Ruling classifying the Akins accelerator as a machine gun did not exclude other bump-stocks from being classified as such. Second, courts already approved or interpreted same or similar meanings of the terms defined in the rule.<sup>247</sup> Third, agency inconsistency in the PLRs does not alone suggest unreasonableness.<sup>248</sup> Fourth, legislative history favors the Bump-Stock Rule's interpretation of the terms not defined in the NFA.<sup>249</sup> Fifth, courts upheld the reclassification of coiled spring bump-stock devices as machine

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244. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”).

245. *Id.* at 863.

246. *See, e.g.*, *Aposhian v. Barr*, 958 F.3d 969, 985 (10th Cir. 2020); *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 29 (D.C. Cir. 2019).

247. *Akins v. United States*, 312 F. App'x 197, 200 (11th Cir. 2009) (“The interpretation by the Bureau that the phrase ‘single function of the trigger’ means a ‘single pull of the trigger’ is consonant with the statute and its legislative history.”); *United States v. Olofson*, 563 F.3d 652, 658 (7th Cir. 2009).

248. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.”).

249. *See National Firearms Act: Hearings before the Comm. On Ways and Means, H.R., on H.R. 9066, 73d Cong. 41 (1934)*; *see also NFA Senate Subcomm. Hearings, supra note 14, at 89.*



guns after ruling twice that the Akins accelerator was not a machine gun.<sup>250</sup> Sixth, the Bump-Stock Rule stays within the interpretive limits of its authority for enforcing and administering the NFA and GCA; it neither exceeds the scope of its authority by establishing arbitrary standards nor does it stray from the spirit of the NFA's definition of machine gun. The NFA defines machine gun in such terms as to make it evident that attempts to make end-runs around the law are prohibited, including attempts to use parts and combinations of parts in order to convert a weapon into a machine gun. Finally, although not exclusive of other reasons, three Attorneys General reviewed and approved the Bump-Stock Rule, two of whom obtained their appointment through Senate vetting and confirmation.

One factor weighing strongly against reasonableness is the potential issue of the regulatory taking of the bump-stocks without just compensation, a property law thicket into which this administrative law article does not wade. Whether or not the acquisition was lawful, bump-stock owners purchased the devices under the mistaken belief that they were lawful. On the other hand, the Akins accelerator underwent a similar history before the ATF interpreted it as a machine gun and the Supreme Court denied the petition for writ of certiorari challenging the ruling, which allowed the consequences to stand.<sup>251</sup> Likewise, the dangerous nature of machine guns and the consistent public policy in protecting the public by generally prohibiting them since 1986 create a compelling reason to find the interpretation reasonable.<sup>252</sup> In the context of *Chevron* reasonableness, courts will likely continue to find the Bump-Stock Rule is reasonable.

## CONCLUSION

To summarize this dream case and all of its relevant administrative law parts is to walk through the steps of a *Chevron* analysis. Starting with

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250. See *Akins*, 312 F. App'x at 198–99; David Sherfinski, *William L. Akins, Akins Accelerator Bump Stock Inventor, Warns Owners Against Waiving Rights*, WASH. TIMES (Mar. 24, 2019), <https://www.washingtontimes.com/news/2019/mar/24/william-l-akins-akins-accelerator-bump-stock-inven/> [<https://perma.cc/G6WP-3EBG>] (“Twice during the Bush years the ATF ruled his device was not a machine gun before reversing itself in 2006.”).

251. *Akins v. United States*, 557 U.S. 942 (2009).

252. See, e.g., *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 526 (1992) (Stevens, J., dissenting) (“This is a field that has long been subject to pervasive governmental regulation because of the dangerous nature of the product and the public interest in having that danger controlled.”); *United States v. Dodson*, 519 F. App'x 344, 349 (6th Cir. 2013) (“Although there are plausible ‘taxpayer reliance’ arguments for applying tax and economic laws prospectively, such policies are wholly inapplicable in the public-safety context.”) (citations omitted).

*Chevron* step zero, the Bump-Stock Rule satisfies this step because Congress delegated rulemaking authority having the force of law under the NFA and GCA to the agency by granting the power to promulgate rules and regulations for administration and enforcement and the agency promulgated a valid rule. Under existing precedent, Congress intended the ATF to have the power to speak with the force of law in promulgating rules like the Bump-Stock Rule. Congress can delegate that power to the ATF even where criminal consequences loom without violating the Constitution because the delegation only authorizes the ATF to fill in the gaps of existing statutes, not, for example, create elements for criminal conduct, which is inherently statutory. Because Congress expressly authorized the ATF to promulgate regulations for enforcement and administration, the first prong of *Chevron* step zero is satisfied. The Bump-Stock Rule satisfies the second prong of *Chevron* step zero because it is a procedurally valid legislative rule. The Rule is procedurally valid because it completed notice-and-comment procedures and Attorney General Barr ratified the Rule. Arguably, Acting Attorney General Whittaker possessed the authority to sign off the final rule into effect, but Attorney General Barr's ratification forecloses this issue. Finally, the agency promulgated the Bump-Stock Rule with the intent to bind both the agency and the public to its interpretation of bump-stock devices. Thus, the Bump-Stock Rule has the force of law and the Bump-Stock Rule satisfies the threshold requirements set out by the Supreme Court for *Chevron* step zero.

No exceptions prevent the application of *Chevron* to the Bump-Stock Rule. The exception applied where the executive is "of two minds" fails to apply to the Bump-Stock Rule because the formal, publicly promulgated Bump-Stock Rule clearly articulated a policy purpose rendering the agency and the president accountable to the public. Additionally, the Government cannot waive *Chevron* (if it applies) because the standard of review is not subject to election by the agency's attorneys but rather applied by courts based on the agency's expertise and the potential policy decisions of the political branches in construing a statute. Finally, the "major rules" exception does not apply to prevent the agency from interpreting the language of the statute where the agency utilized the plain meaning, the historical meaning, the intent of Congress and prior judicial determinations and promulgated the rule through notice-and-comment procedures. These reasons also build a case for the reasonableness of the Rule. Finally, the Bump-Stock Rule easily satisfies the test for *Chevron* deference because of the subtle ambiguity contained in the statute and the Rule's reasonable interpretation. The definition of "machinegun" in the

NFA contains latent ambiguity that Congress did not consider ambiguous when it enacted the statute in 1934. The language of the statute and its history makes it clear, however, that Congress intended to cover all automatic weapons and anything that can convert a weapon into something that creates the effect of a machine gun.

Because a bare recital of the holdings in *Guedes* and *Aposhian* requires little ingenuity, this article attempted to analyze the possible avenues for deviation from existing administrative law precedent at each step, while gaining a fuller understanding of the subject. Signals from Supreme Court Justices helped guide these forays into potential alternative outcomes. While *Guedes* may indeed prove a dream case for administrative law, all dreams must come to an end, and it will be interesting to see how this one ends.