TEXTUALISM, THE GUN CONTROL ACT, AND ATF'S REDEFINITION OF "FIREARM"

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The Supreme Court has granted the Attorney General's petition for a writ of certiorari in a case concerning agency authority to adopt regulations that expand the definitions found in the Gun Control Act of 1968, 18 U.S.C. § 921 *et seq.* ("the GCA"). In *VanDerStok v. Garland*, the Fifth Circuit decided that the regulations unlawfully expanded the reach of the GCA's criminal provisions and exceeded the powers that Congress delegated to the Bureau of Alcohol, Tobacco, Firearms & Explosives ("the ATF").[1] The Supreme Court will review the Fifth Circuit's decision during its 2024 Term.

In *VanDerStok*, the Court is poised to expand on the statutory interpretation jurisprudence that characterized its 2023 Term. First, *Loper Bright Enterprises v. Raimondo* reasserted the power of the judiciary to interpret the law and abrogated the *Chevron* deference doctrine.[2] Second, in *Garland v. Cargill*, the Court undertook a meticulous analysis of the GCA's definition of "machinegun" and held that the agency exceeded its powers by changing that definition.[3] These decisions represent a trend toward embracing the proper judicial role in statutory interpretation and away from outsourcing that role to administrative agencies.

The definition at issue in *VanDerStok* lies at the very heart of the GCA: what is a firearm? Numerous crimes are predicated on whether something is a "firearm." Under the auspices of the Department of Justice, the ATF enforces the GCA. In 2022, the ATF promulgated a Final Rule that expanded the list of items that are considered a "firearm."[4]

The *VanDerStok* challenge presents two questions.[5] First, may the statutory definition of "firearm" be expanded by regulation to include "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted" to fire a projectile?[6] Second, may the longstanding regulatory definition of a firearm's "frame or receiver" be expanded by a

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[1] 86 F.4th 179, 182 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024).

[2] 144 S. Ct. 2244, 2263 (2024).

[3] 602 U.S. 406 (2024).

[4] *See* 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified in relevant part at 27 C.F.R. § 478.11, 478.12(c)).

[5] *See* Petition for Writ of Certiorari, Garland v. VanDerStok, No. 23-852, 2024 WL 515619, at *1 (U.S. Feb. 2024).

[6] 27 C.F.R. § 478.11.

regulation to "include a partially complete, disassembled, or nonfunctional frame or receiver" that may be readily converted into a frame or receiver?[7]

In *VanDerStok*, the Fifth Circuit held that the Final Rule flouted the statutory text and exceeded the agency's authority.[8] It found the requirement of adherence to statutory text especially heightened because "the Final Rule purports to criminalize what was previously lawful conduct," which only Congress can do.[9]

In an earlier phase of the case, the district court vacated the Final Rule, but the Supreme Court stayed that order pending further disposition by the Fifth Circuit and disposition of a petition for a writ of certiorari.[10] The grant of the petition leaves the stay in place. The case is set for oral argument on October 8, 2024.

"Textualism, in its purest form, begins and ends with what the text says and fairly implies."[11] *Loper Bright* states that "every statute's meaning is fixed at the time of enactment."[12] This article asks whether the GCA text authorizes the Final Rule and answers that question in the negative.

I. A TEXTUAL ANALYSIS OF "FIREARM" AND THE ATF'S LIMITED REGULATORY AUTHORITY PRECLUDES THE FINAL RULE

A. The Plain Text Defines "Firearm"

Section 921(a) of the GCA states in relevant part: "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon . . . ."[13] The terms "is designed" and "may readily be converted" modify "weapon," not "frame or receiver."

"When Congress takes the trouble to define the terms it uses, a court must respect its definitions as 'virtually conclusive.'"[14] "When Congress includes particular language in one section of a statute and omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*)."[15]

Until the Final Rule in 2022, except for the definition that the Court overturned in *Cargill*,[16] the regulations defined "firearm" and the various weapon types exactly as enacted in

[7] 27 C.F.R. § 478.12(c).

[8] *VanDerStok*, 86 F.4th at 182.

[9] *Id.* at 195–96 & n.26.

[10] Garland v. VanDerStok, 144 S. Ct. 44 (2023). Four Justices would have denied the application for stay.

[11] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 16 (2012).

[12] *Loper Bright*, 144 S. Ct. at 2266 (internal citation omitted).

[13] 18 U.S.C. § 921(a)(3).

[14] Dep't. of Agriculture Rural Dev. Rural Housing Service v. Kirtz, 601 U.S. 42, 59 (2024) (citation omitted).

[15] Bittner v. United States, 598 U.S. 85, 94 (2023).

[16] *See* Garland v. Cargill, 602 U.S. 406, 413, 415 (2024) (noting that the ATF's "earlier regulations simply restated § 5845(b)'s statutory definition" and holding that the ATF "exceeded its statutory authority" by issuing a regulation that classified bump stocks as machineguns.).

the GCA.[17] And from 1968 until the Final Rule, the regulations defined "firearm frame or receiver" as the actual housing for the operating parts.[18]

B. The ATF's New Definition of "Firearm" Expands Criminal Liability

Section 922 of the GCA provides that "[i]t shall be unlawful" to commit various acts involving "firearms." In punishing these crimes, § 924 refers to violations of "this chapter" or a "subsection," or defines a crime.[19] Neither of these sections makes violation of an administrative regulation a crime. But the expanded definition of "firearm" in the Final Rule would expand criminal liability.

By contrast, a firearm involved in a willful violation of the GCA "or any rule or regulation promulgated thereunder" is subject to forfeiture.[20] A license to engage in the business of dealing in firearms may be granted if "the applicant has not willfully violated any of the provisions of this chapter or regulations issued thereunder,"[21] or may be revoked if the holder has "willfully violated any provision of this chapter or any rule or regulation prescribed by the Attorney General under this chapter . . . ."[22]

The GCA authorizes regulations in certain non-criminal contexts. For instance, licensed importers and manufacturers "shall identify by means of a serial number engraved or cast on the receiver or frame of the weapon, in such manner as the Attorney General shall by regulations prescribe," each firearm imported or manufactured.[23]

Finally, "[t]he Attorney General may prescribe *only* such rules and regulations as *are necessary* to carry out the provisions of this chapter . . . ."[24] This is quite unlike statutes that "'expressly delegate[]' to an agency the authority to give meaning to a particular statutory term."[25]

Loper Bright acknowledged that the Supreme Court had "sent mixed signals on whether *Chevron* applies when a statute has criminal applications."[26] No more. As noted by one of the cases it cites, "criminal laws are for courts, not for the Government, to construe," and that "ATF's old position [is] no more relevant than its current one—which is to say, not relevant at all."[27]

C. A "Weapon Parts Kit" is Not a "Firearm"

The Final Rule purports to add to the statutory definition of firearm "a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to

[17] *See* Final Rule, 33 Fed. Reg. 18555, 18557–59 (Dec. 14, 1968).
[18] *Id.* at 18558.
[19] 18 U.S.C. § 924.
[20] *Id.* § 924(d)(1).
[21] *Id.* § 923(d)(1)(C).
[22] *Id.* § 923(e).
[23] *Id.* § 923(i).
[24] *Id.* § 926(a) (emphasis added).
[25] *Loper Bright*, 144 S. Ct. at 2263 (citation omitted).
[26] *Id.* at 2269.
[27] Abramski v. United States, 573 U.S. 169, 191 (2014).

expel a projectile by the action of an explosive."[28] But the statute says an actual "weapon" is one that "is designed to or may readily be converted to expel a projectile."[29]

The Final Rule includes no definition of "weapon parts kit." The commentary states that some kits "contain all of the components necessary to complete a functional weapon," and others "include jigs, templates, and tools that allow the purchaser to complete the weapon . . . ."[30] But a statutory "firearm" is a far cry from raw material that requires fabrication to become a firearm—just as a spool of thread is a far cry from a dress.

D. "The Frame or Receiver Thereof" Refers to an Actual Frame or Receiver

Section § 921(a)(3) refers to "the frame or receiver of any such weapon." Adopted in 1968 and remaining in place until 2022, a regulation defined frame or receiver as "that part of a firearm which *provides housing* for the hammer, bolt or breechblock, and firing mechanism . . . ."[31] *Loper Bright* teaches that since the Founding, "respect was thought especially warranted when an Executive Branch interpretation was issued roughly contemporaneously with enactment of the statute and remained consistent over time."[32] That observation applies to the 1968 regulation, not the Final Rule promulgated over half a century later.

The Final Rule provides: "The terms 'frame' and 'receiver' shall include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver."[33] It adds that ATF "may consider any associated templates, jigs, molds, equipment, tools, instructions, guides, or marketing materials" that are available.[34] And it classifies a "billet or blank of a frame or receiver" sold with such items as a frame or receiver.[35] But the statute says "frame or receiver," not materials and information used to fabricate one.

II. THE STATUTORY AND ADMINISTRATIVE HISTORY OF "FIREARM" AND "FRAME OR RECEIVER" UNDERMINE THE FINAL RULE

A statutory provision must be read "in light of the history of the provision."[36] After analyzing the statutory text, a court may look at "the statutory history, which reinforces that textual analysis."[37] This part traces the statutory history of the meaning of "firearm" from the Federal Firearms Act of 1938 to the Gun Control Act of 1968, including its revision by Congress in the Firearm Owners' Protection Act of 1986.

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[28] 27 C.F.R. § 478.11.
[29] 18 U.S.C. § 921(a)(3).
[30] 87 Fed. Reg., *supra* note 4, at 24662 & n.44.
[31] 33 Fed. Reg., *supra* note 17, at 18,558 (emphasis added).
[32] *Loper Bright*, 144 S. Ct. at 2258.
[33] 27 C.F.R. § 478.12(c).
[34] *Id.*
[35] *Id.* (examples 1–3).
[36] Fischer v. United States, 144 S. Ct. 2176, 2186 (2024).
[37] Snyder v. United States, 144 S. Ct. 1947, 1955 (2024).

A. The Federal Firearms Act of 1938

The Federal Firearms Act of 1938 ("the FFA") was the first federal law to regulate interstate and foreign commerce in firearms.[38] It was preceded by the National Firearms Act of 1934 ("the NFA"), which taxed and required the registration of machine guns and other narrow classes of firearms.[39] Because many of the terms of the GCA are lineal successors to those in the FFA, the statutory and administrative history of the FFA provides insights into the meaning of definitions in the GCA.

The FFA stated: "The term 'firearm' means any weapon, by whatever name known, which is designed to expel a projectile or projectiles by the action of an explosive . . . , or any part or parts of such weapon."[40] A "manufacturer" was "any person engaged in the manufacture or importation of firearms."[41] A "dealer" was "any person engaged in the business of selling firearms," or "of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breech mechanisms to firearms . . . ."[42] A license was required for such businesses to transport, ship, or receive a firearm in interstate or foreign commerce.[43]

It was unlawful for a person who was convicted of a "crime of violence" to receive a firearm that had been transported in interstate or foreign commerce.[44] It was also unlawful to transport or receive "any firearm from which the manufacturer's serial number has been removed, obliterated, or altered . . . ."[45] However, manufacturers were not required to place serial numbers on firearms. (By contrast, the NFA required manufacturers and importers to identify restricted firearms like machine guns with a number.[46])

It was a crime to violate "this Act or any rules and regulations promulgated hereunder . . . ."[47] Further, the act provided that "[t]he Secretary of the Treasury may prescribe such rules and regulations as he deems necessary to carry out the provisions of this Act."[48]

B. The Regulatory Interpretation of "Firearm" and "Parts"

The first FFA regulations, promulgated by the Internal Revenue Service (the "IRS") in 1939, required manufacturers to record firearms disposed of, "including the serial numbers if such weapons are numbered . . . ."[49] Dealers were required to record firearms they acquired or disposed of.[50] Subsequent regulations required manufacturers and dealers to record "firearms

[38] Pub. L. No. 75-785, ch. 850, 52 Stat. 1250 (Jun. 30, 1938) (repealed 1968).
[39] Pub. L. No. 474, 48 Stat. 1236 (Jun. 26, 1934).
[40] 15 U.S.C. § 901(3); 52 Stat. at 1250.
[41] 15 U.S.C. § 901(4).
[42] *Id.* § 901(5).
[43] *Id.* § 902(a).
[44] *Id.* § 902(f).
[45] *Id.* § 902(i).
[46] 48 Stat. at 1329.
[47] 15 U.S.C. § 905.
[48] *Id.* § 907.
[49] 26 C.F.R. § 315.10(a)(1), I.R.S. Treasury Decision 4898, 1939-1 C.B. 364, 1939 WL 74413.
[50] *Id.* § 315.10(b).

in an unassembled condition," but "not including parts of firearms."[51] A complete firearm did not lose its character as such by being unassembled.

In 1955, the IRS issued a revenue ruling holding that "a barrel[ed] action comprised of the barrel . . . ; front and rear stock bands; receiver with complete bolt, trigger action, magazine, etc., is a weapon, complete except for the stock, which is capable of expelling a projectile or projectiles by the action of an explosive."[52] These words foretold the regulatory definition of a "firearm frame or receiver" adopted in 1968.

Judicial decisions about the FFA largely arose out of criminal cases, only one of which concerned the "part or parts" definition.[53] The defendant there had a conviction that prohibited him from shipping firearm parts.[54] Some parts were "Browning automatic rifle magazines"; since "such weapons could not be fired automatically without the magazines, . . . they were within the broad reach of the Act as 'parts' of a weapon . . . ."[55] There were also "firearm parts contained in 1,651 machine guns," which were "serviceable parts, thus bringing them within the scope of the Act."[56] Only useable parts counted.

C. The Requirement of Firearm Serial Numbers Did Not Begin until 1958

From the Founding until 1958, no federal requirement existed that a firearm (other than an NFA firearm) be marked with a serial number. In 1958, the IRS adopted a regulation requiring manufacturers and importers to "identify [firearms] by stamping . . . the name of the manufacturer or importer, and the serial number, caliber, and model of the firearm . . . . However, individual serial numbers and model designation shall not be required on any shotgun or .22 caliber rifle . . . ."[57]

The commentary to the Final Rule uses the politically charged term "ghost guns" 52 times.[58] Policy arguments about "ghost guns" ignore that all firearms were originally "ghost guns" in that serial numbers were not required on *any* firearms until the mid-20th century, and even then that requirement applied only to licensed manufacturers and importers. To date, Congress has never required hobbyists and other non-licensees to serialize the firearms that they make.

D. In the Gun Control Act of 1968, Congress Removed "Parts" from Regulation and Rejected Violation of a Regulation as an Offense

In 1963, a bill was drafted to amend the FFA with the following definition: "The term 'firearm' means any weapon . . . which will, or is designed to, expel a projectile or projectiles by

[51] 26 C.F.R. § 315.10(a), Final Rule, 13 Fed. Reg. 4383, 4386 (1948) (manufacturers); 26 C.F.R. § 315.10(b), Final Rule, 14 Fed. Reg. 7389 (1949) (dealers).

[52] Rev. Rul. 55-175, 1955-1 C.B. 562, 1955 WL 10177.

[53] *See* United States v. Lauchli, 371 F.2d 303, 313 (7th Cir. 1966).

[54] *See id.* In 1961, the FFA had been amended to delete "crime of violence" and to insert "crime punishable for imprisonment for a term exceeding one year." Pub. L. No. 87-342, 75 Stat. 757 (1961).

[55] *Lauchli*, 371 F.2d at 313–14.

[56] *Id.* at 314.

[57] 26 C.F.R. § 177.50; Final Rule, 23 Fed. Reg. 343 (Jan. 18, 1958).

[58] 87 Fed. Reg. 24,652 (Apr. 26, 2022).

the action of an explosive, the frame or receiver of any such weapon . . . ."[59] The Department of the Treasury opined:

> The present definition includes any "part" of a weapon within the term. It has been found that it is impracticable, if not impossible, to treat all parts of a firearm as if they were a weapon capable of firing. This is particularly true with respect to recordkeeping provisions since small parts are not easily identified by a serial number. Accordingly, there are *no objections to modifying the definition so that all parts, other than frames and receivers, are eliminated*.[60]

In 1966, a bill added the phrase "which may be readily converted to" expel a projectile,[61] explaining that it would "include specifically any starter gun designed for use with blank ammunition which will or which may be readily converted to expel a projectile . . . ."[62] Another bill inserted "any weapon (including a starter gun)" into the definition.[63]

By 1968, the definition of "firearm" was settled. A U.S. Senate report explained: "Under the present definition of 'firearm,' any part or parts of such a weapon are included. It has been found that it is impractical to have controls over each small part of a firearm. Thus, the revised definition substitutes only *the major parts* of the firearm; that is, frame or receiver for the words 'any part or parts.'"[64]

Bills that morphed into the Gun Control Act originally followed the FFA in making it a crime to violate an administrative regulation as well as the Act itself. As reported out of committee in 1968, Senate Bill 917 punished violation of "any provision of this chapter or any rule or regulation promulgated thereunder," and authorized the Secretary to "prescribe such rules and regulations as he deems reasonably necessary . . . ."[65]

In debate, Senator Robert P. Griffin (R., Mich.) objected that "we should not delegate our legislative power . . . in the area of criminal law," and that due process required that "we should spell out in the law what is a crime."[66] Senator Howard Baker (R., Tenn.) rejected "plac[ing] in the hands of an executive branch administrative official the authority to fashion and shape a criminal offense to his own personal liking . . . ."[67] The bill was then amended to delete the provision making it an offense to violate "any rule or regulation promulgated thereunder."[68]

The Omnibus Crime Control and Safe Streets Act of 1968 repealed the Federal Firearms Act and punished "[w]hoever violates any provision of this chapter," with no reference to regulations.[69] Before it became effective, that act was superseded by the Gun Control Act of 1968, which enacted the same penalty clause.[70]

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[59] Juvenile Delinquency: Hearings Before the Subcom. to Investigate Juvenile Delinquency, Sen. Jud. Com., 88th Cong., 1st Sess., 3412 (1963).

[60] *Id.* (emphasis added).

[61] S. Rep. No. 1866, at 24 (1966).

[62] *Id.* at 14.

[63] *Id.* at 43.

[64] S. Rep. No. 90-1097, at 110 (1968) (emphasis added).

[65] S. Rep. No. 1097, at 23–24 (1968).

[66] 114 Cong. Rec. 14792 (May 23, 1968).

[67] *Id.*

[68] *Id.* at 14793.

[69] Pub. L. No. 90-351, 82 Stat. 225, 233 (penalties), 234 (FFA repeal) (1968).

[70] Pub. L. No. 90-618, 82 Stat. 1213, 1226 (1968).

Under the GCA, all offenses were defined in terms of violations of "this chapter."[71] The term "firearm" had the same definition then as it has today.[72] Congress declared its intent not "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms," or "to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes . . . ."[73]

E. The Regulatory Definition of "Frame or Receiver" Adopted in 1968 Reflected Common Usage of These Terms

In 1968, the Treasury Department adopted regulations under the GCA that included the following definition: "*Firearm frame or receiver.* That part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward portion to receive the barrel."[74] Being "that part" that "*provides* housing" in the present tense excludes unfinished material that cannot provide such housing.

That definition reflected the common understanding of a "frame or receiver." The *Small Arms Lexicon* published in 1968 defined "frame" as "the basic structure and principal component of a firearm."[75] "Receiver" was defined as "the part of the gun that takes the charge from the magazine and holds it until it is seated in the breech."[76] It is "[s]pecifically, the metal part of a gun that houses the breech action and firing mechanism . . . ."[77] The *Lexicon* also defined each of the other parts mentioned in the regulation, such as defining "firing mechanism" as "those parts of a gun that cooperate to cause the propelling charge to fire."[78]

Under both the regulation and the *Lexicon*, a frame or receiver was the actual, serviceable housing of the firearm for the operating parts, to which the barrel and stock attached.

F. The Firearm Owner's Protection Act of 1986 Reduced the ATF's Regulatory Power and Left the Definitions Untouched

The Firearm Owners' Protection Act of 1986 (the "FOPA") reaffirmed the Second Amendment right to keep and bear arms and found it necessary "to correct existing firearms statutes and enforcement policies."[79] It provided that "[t]he Secretary may prescribe "*only* such rules and regulations as *are necessary* to carry out the provisions of this chapter" (chapter 44 of title 18), deleting his power to "prescribe such rules and regulations *as he deems reasonably necessary* . . . ."[80]

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[71] *Id.* at 1223–24.
[72] *Id.* at 1214.
[73] *Id.* at 1213–14.
[74] Final Rule, 33 Fed. Reg. 18555, 18558 (Dec. 14, 1968).
[75] CHESTER MUELLER & JOHN OLSON, SMALL ARMS LEXICON 87 (1968).
[76] *Id.* at 168.
[77] *Id.*
[78] *Id.* at 82.
[79] Firearm Owners' Protection Act, § 1(a), Pub. L. 99–308, 100 Stat. 449 (May 19, 1986).
[80] *Id*. § 106 (emphasis added).

In enacting the FOPA, Congress did not disturb the definition of "firearm" or modify ATF's definition of a frame or receiver adopted in 1968.[81] A letter from the Department of the Treasury stated: "Existing law regulates the principal part of a firearm, i.e., the frame or receiver, and we believe this is adequate."[82]

Further amendments to the GCA were enacted in 1993,[83] 1994,[84] and 2022[85] without touching the definition of "firearm" or questioning ATF's long-standing definition of "frame or receiver." "[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned."[86]

CONCLUSION

The Federal Firearms Act of 1938 defined a firearm as a weapon that is designed to expel a projectile or as a part or parts thereof. The Gun Control Act of 1968 added a weapon that may be readily converted to do so and changed "part or parts" to only a frame or receiver. Nothing in the statutory text or statutory history suggests that "firearm" includes a "weapon parts kit" that requires fabrication, rather than mere assembly, to become a weapon, or that "frame or receiver" includes material requiring fabrication to provide housing for the internal parts.

It remains to be seen how the Court will resolve *Garland v. VanDerStok*, and it is hazardous to predict the outcome of any case. But the Court's recent focus on statutory textualism and rejection of the *Chevron* deference rule do not bode well for the Final Rule.

[81] Final Rule, 33 Fed. Reg. 18555, 18558 (Dec. 14, 1968).
[82] 131 Cong. Rec. S9101-05, 1985 WL 714011, *125 (July 9, 1985) (letter inserted by Senator Hatch).
[83] Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).
[84] Public Safety & Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[85] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1327 (2022).
[86] United States v. Rutherford, 442 U.S. 544, 554 n.10 (1979) (citation omitted).