

HALF-COCKED: THE REGULATORY FRAMEWORK OF SHORT-BARREL FIREARMS

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INTRODUCTION

John Doe is a responsible citizen who desires to purchase his first firearm. After entering a federally-licensed gun store, an AR-15 catches John’s eye.¹ This popular firearm, a semiautomatic ver-

1. This Note will focus on the AR-15 as it is the easiest and most prominent example of a firearm having both rifle and pistol variants. Other firearms, including so-called “assault weapons,” have pistol variants with varying degrees of interchangeability. The AK-47 style of rifle, which is typically converted from a saiga or other firearm, has pistol variants available such as the Arsenal, Inc., SAM-7K Pistol or the Century Arms Zastava PAP M92. See *Arsenal Inc SAM7k-02 SAM-7k Pistol 7.62x39mm 10.5in 30rd Black*, TOMBSTONE TACTICAL, <https://www.tombstonetactical.com/catalog/arsenal/sam7k-02-sam-7k-pistol-7.62x39mm-10.5in-30rd-black/> [https://perma.cc/385V-43P7] (last visited Apr. 8,

sion of the rifle utilized by the United States Armed Forces, has become the quintessential tactical arm.² Due to size and weight considerations, John opts to purchase an AR-15 pistol, which has a barrel shorter than sixteen inches and lacks a buttstock. After clearing his background check and paying, John walks out the door and heads home with his pistol locked securely in his trunk. Once home, he begins to browse the Internet for attachments that can be added to the gun. He settles on a forward grip, which will increase stability, accuracy, comfort, and functionality. While an obvious buy, John's decision is fraught with peril. If he adds a vertical forward grip, he may be fined up to \$10,000, be forced to forfeit the firearm, and face up to ten years in prison for violating the National Firearms Act of 1934 ("NFA").³ However, if John adds an angled grip, which is simply a vertical grip fashioned at roughly a 45-degree angle, he has not violated the law.⁴

This quagmire is the result of regulations and interpretations promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF" or the "Bureau") over the past decade. The Bureau's efforts to implement the NFA have created a legal minefield requiring firearm owners to be well-versed in the law and agency regulation to avoid crushing fines and imprisonment. Some have unfortunately fallen prey to this regulatory scheme,

2017); *Century Arms HG3089CN Zastava PAP M92 7.62x39 10in 30rd Black, TOMBSTONE TACTICAL*, <https://www.tombstonetactical.com/catalog/century-arms/hg3089cn-zastava-pap-m92-7-62x39-10in30rd-black/> [https://perma.cc/2M2P-4GBR] (last visited Apr. 8, 2017).

2. The United States Court of Appeals for the Fourth Circuit provided a useful accounting of the popularity of AR-15 and similar rifles:

In 2012, semi-automatic sporting rifles accounted for twenty percent of all retail firearm sales For perspective, we note that in 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States.

Kolbe v. Hogan, 813 F.3d 160, 174 (4th Cir. 2016).

3. See National Firearms Act of 1934, §§ 7(a), 14, 26 U.S.C. §§ 5871, 5872(a) (2012); see also *United States v. Black*, 739 F.3d 931 (6th Cir. 2014) (defendant charged with making an unregistered "any other weapon" in violation of the NFA); *United States v. Fix*, 4 F. App'x 324 (9th Cir. 2001) (defendant convicted of keeping an unregistered pistol with a vertical fore-grip in violation of the NFA); Report of the Magistrate and Order of Dismissal, *United States v. Davis*, Cr. No. 8:93-cr-00106-GRA (D.S.C. June 21, 1993) (defendants charged with possessing unregistered pistols with attached vertical grips in violation of the NFA).

4. See U.S. Dep't of Justice, *Adding a Vertical Fore Grip to a Handgun* (Aug. 5, 2011), <https://www.atf.gov/firearms/docs/open-letter/all-ffls-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [https://perma.cc/6XB7-MY9B].

such as the defendants in *United States v. Davis*,⁵ *United States v. Fix*,⁶ and *United States v. Black*.⁷ For John, if he really wanted a firearm with a vertical fore-grip, the law requires him to either purchase another AR-15 in a rifle configuration or register his pistol as a short-barrel rifle.

These legal consequences stem from the federal government's first attempt to regulate firearms, an area traditionally regulated by the states.⁸ The NFA, signed into law on June 26, 1934, by President Franklin Roosevelt, enacted new regulations for manufacturers, transferors, and owners of (1) machine guns; (2) short-barrel rifles; (3) short-barrel shotguns; (4) "any other weapon[s];" (5) antique firearms; and (6) silencers.⁹ The law originally required individuals desiring to own one of these restricted firearms to be at least twenty-one years old, pass a background check, submit two copies of their fingerprints and two copies of a recent passport-sized picture to the ATF, seek approval by a Chief Law Enforcement Officer in the individual's jurisdiction, pay a \$200 tax stamp that must be kept with the firearm at all times, and register it with the ATF.¹⁰

Congress envisioned these restrictions and taxes as a means to deter the population at-large from seeking to own these firearms, while also ensuring that the government could track them. While some of these NFA-regulated firearms have discernable and legitimate operational differences from firearms not regulated by the NFA, short-barrel rifles, short-barrel shotguns, and "any other weapon[s]" have fallen prey to an arbitrary set of regulations rooted in fear, not fact.

5. Report of the Magistrate and Order of Dismissal, *United States v. Davis*, Cr. No. 8:93-cr-00106-GRA (D.S.C. June 21, 1993).

6. 4 F. App'x 324 (9th Cir. 2001).

7. 739 F.3d 931 (6th Cir. 2014).

8. State laws regulating or banning the carry of concealed firearms were common in the early Republic, mainly as a means for preventing slave rebellion. See CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC* 2-3 (1999).

9. 26 U.S.C. § 5845 (2012).

10. National Firearms Act of 1934, § 4, Pub. L. No. 73-474, 48 Stat. 1236, 1237-38; see also 26 U.S.C. § 5841. Prior to the ATF promulgation of new regulations in June 2016, another popular applicant for NFA-restricted firearms was a revocable trust. Under the new regulations, the fingerprint, picture, and background requirements are now imposed on *all* members of the trust. See 27 C.F.R. § 479(III)(A)(1) (2016). ATF regulations also now require only the notification of, but affirmative approval by, a Chief Law Enforcement officer in the applicant's jurisdiction. *Id.*

This Note presents two arguments. First, short-barrel firearms regulated by the NFA have no discernable operational differences from firearms excluded from the Act, and thus the NFA's registration, taxation, and notification requirements for short-barrel firearms are unconstitutional. Second, the ATF has added insult to injury by using administrative action to expand these regulations far beyond the scope Congress provided. By allowing these practices to continue, law-abiding citizens risk imprisonment for attempting to increase the stability and safety of their firearm.

This Note proceeds in three parts. It will begin by discussing the history of the NFA, including its subsequent amendments, related statutes, and judicial decisions. Next, the analysis will demonstrate that the NFA unconstitutionally restricts short-barrel firearms that are in "common use."¹¹ Finally, this Note will argue that the ATF's interpretations of the NFA and associated regulations with respect to firearms attachments have no persuasive logical basis. Such interpretations should not receive judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,¹² *Skidmore v. Swift & Co.*,¹³ or *Auer v. Robbins*,¹⁴ and regulations based upon them plainly exceed the authority granted to the Bureau by Congress.

I. HISTORY OF THE NATIONAL FIREARMS ACT OF 1934

The National Firearms Act of 1934 was enacted as part of President Roosevelt's effort to combat Prohibition-era violence.¹⁵ During the hearings of the Act before the House Com-

11. *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

12. 467 U.S. 837 (1984).

13. 323 U.S. 134 (1944).

14. 519 U.S. 452 (1997).

15. See 73 CONG. REC. 11,400 (1934) (statement of Rep. Robert L. Doughton) ("For some time this country has been at the mercy of gangsters, racketeers, and professional criminals."); *National Firearms Act: Hearing on H.R. 9066 Before the H. Comm. on Ways & Means*, 73rd Cong. 4, 4 (1934) [hereinafter *NFA Hearing*] (statement of Homer S. Cummings, Att'y Gen. of the United States) ("[T]here are more people in the underworld today armed with deadly weapons, in fact, twice as many, as there are in the Army and the Navy of the United States combined."); see also *Lomont v. O'Neill*, 285 F.3d 9, 11 (D.C. Cir. 2002) ("The emergence of organized crime as a major national problem led to the enactment of the National Firearms Act of 1934.") (internal citation omitted); *United States v. Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *11 (D. Utah Nov. 2, 2011) ("During the Great Depression, the nation faced the difficulty of controlling violence by gangsters.").

mittee on Ways and Means, Attorney General Cummings testified before Congress to highlight the need of the NFA to combat criminals who crossed state lines.¹⁶ Attorney General Cummings also postulated which machine guns or other arms were particularly suited for criminal use.¹⁷ Citing Article I's interstate commerce and taxing powers, the NFA required manufacturers of short-barreled rifles, short-barreled shotguns, machine guns, silencers, and "any other weapon" (collectively, "NFA items" or "NFA-regulated firearms") to register restricted firearms with the Department of Treasury.¹⁸ These registrations then had to be transferred to the individual purchasing the NFA item prior to his taking possession of the firearm. In so doing, Congress sought to restrict the free access to firearms preferred by criminals. The Act also required anyone owning these restricted firearms to register them with the Treasury Department prior to transferring it to anyone else, again in an effort to keep them from criminals.¹⁹ Finally, and as another deterrent for those seeking to own a restricted firearm, the Act

16. *NFA Hearing*, *supra* note 15, at 4 (statement of Homer S. Cummings, Att'y Gen. of the United States) ("We have gangs organized, as of course you all know, upon a Nation-wide basis and, on account of the shadowy area or twilight zone between State and Federal power, many of these very well instructed, very skillful, and highly intelligent criminals have found a certain refuge and safety in that zone, and there lies the heart of our problem—the roaming groups of predatory criminals who know, by experience, or because they have been instructed and advised, that they are safer if they pass quickly across a State line, leaving the scene of their crime in a high-powered car or by other means of quick transportation.").

17. *See id.* ("In other words, roughly speaking, there are at least 500,000 of these people who are warring against society and who are carrying about with them or have available at hand, weapons of the most deadly character."); *id.* at 6 ("A machine gun, of course, ought never to be in the hands of any private individual. There is not the slightest excuse for it, not the least in the world, and we must, if we are going to be successful in this effort to suppress crime in America, take these machine guns out of the hands of the criminal class."); *id.* at 11 ("I think [Colt Co.] is the only manufacturer now of the type of machine gun used by gangsters [the Thompson submachinegun]."); *id.* at 14 (stating that the Browning machine gun "is not easily transportable" and is a "large, cumbersome weapon that would probably not be used by the criminal class," an as such, "it is not absolutely necessary to bother with it" through the provisions of the NFA).

18. *See* National Firearms Act of 1934, § 2, Pub. L. No. 73-474, 48 Stat. 1236, 1237.

19. *See Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *11 ("Congress responded with a collection of legislation, including the National Firearms Act, targeting 'the roaming groups of predatory criminals who know . . . they are safer if they pass quickly across a state line.'" (quoting *NFA Hearing*, *supra* note 15, at 4 (statement of Homer S. Cummings, Att'y Gen. of the United States))).

directed the Secretary of the Treasury to levy a \$200 tax on the manufacture and transfer of most NFA items. When adjusted for inflation, this tax would be equivalent to \$3,582.19 in 2016.²⁰

The category of firearms considered NFA items is ambiguously and arbitrarily defined. The NFA originally defined short-barrel rifles and short-barrel shotguns as firearms “having a barrel or barrels of less than 18-inches in length [or] a weapon made from a [firearm] if such weapon as modified has an overall length of less than 26-inches or a barrel or barrels of less than 18-inches in length.”²¹ Congress settled on these length requirements based on the ability to conceal a firearm.²² Still, that logic does not hold true in all cases. For instance, a shotgun with a 17.5 inch barrel is just as concealable (which is not very concealable) as a shotgun with an 18 inch barrel. Additionally, a rifle with an overall length of twenty-five inches and a 16 inch barrel is not practically more concealable than a rifle with a 26 inch overall length and an 18 inch barrel, even though the latter is not subject to the NFA.

Further arbitrary regulation arises with firearms that do not neatly conform to categories of firearms in the NFA. There are numerous firearms that do not fall in the NFA’s definitions for short-barrel rifles, short-barrel shotguns, and non-regulated firearms,²³ and Congress believed the “space” between these statutory definitions could establish a safe harbor for dangerous weapons. As a result, the NFA creates another all-encompassing category of firearms labeled “any other weapon.” The statute defines “any other weapons” as:

[A]ny weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with a combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a sin-

20. See *Inflation Calculator*, BUREAU OF LABOR STAT. (Feb. 4, 2017), https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/3CPC-DLFR>].

21. National Firearms Act of 1934, § 1, 48 Stat. at 1236.

22. See H.R. REP. NO. 73-1780, at 2 (1934) (“The term ‘firearm’ is defined to mean a shotgun or rifle having a barrel of less than 18 inches in length [and] any other gun (except a pistol or revolver) if the gun may be concealed on the person.”).

23. For the purposes of this Note, a “non-regulated pistol” or “non-regulated firearm” constitutes a firearm not subject to the NFA, but may be regulated by other federal and state firearms regulations.

gle discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.²⁴

As written, this category aims to restrict concealable firearms that do not qualify as another category of arms and are not a pistol or revolver with a rifled bore or bores. Congress still feared these firearms, but they were hard to label in a consistent manner and were mainly sought after by collectors, not criminals.²⁵ Unfortunately, “any other weapon” has grown into a behemoth, manipulated by the ATF to include a wider array of firearms which are not neatly classified as rifles, pistols, or shotguns than Congress intended.

The tax and regulatory scheme for firearms qualifying as “any other weapon” demonstrates that Congress tentatively accepted that a legitimate use existed for some of these firearms.²⁶ Unlike the \$200 tax levied on other NFA-regulated firearms, “any other weapon[s]” are taxed at \$5 per gun.²⁷ In these and other regulatory provisions, Congress exerted a potentially deadly force upon this ambiguous class of firearms. By taxing manufacturers and transferors and imposing harsh registration requirements, Congress likely believed it could deter the mass-marketing and sale of firearms believed likely to perpetuate violence. Additionally, would-be manufacturers of firearms in this category are required to submit an application to the Secretary of the Treasury,²⁸ who must approve the application prior to manufacture.²⁹

Since the NFA was originally adopted, it has been amended a number of times. It was first amended in 1936 to exempt .22

24. 26 U.S.C. § 5845(e) (2012).

25. See STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 6:15 (2011); see also *United States v. Fogarty*, 344 F.2d 475, 477 (6th Cir. 1965) (“[I]t appears doubtful that criminal elements use these types of weapons to any significant extent in their criminal activities.” (internal citation omitted)).

26. See NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT 371 (2012) (citing HALBROOK, *supra* note 25, § 614).

27. See 26 U.S.C. § 5811(a).

28. This authority was later transferred to the Attorney General, who delegated it to the Director of the ATF. See ATF Noticed of Proposed Rulemaking: Machine Guns, Destructive Devices and Certain Other Firearms, 78 Fed. Reg. 55,014, 55,014 (Sept. 9, 2013).

29. See 26 U.S.C. § 5822.

caliber rifles with barrels 16 inches or more from NFA regulations.³⁰ This amendment was enacted so as to remove the discriminatory effect of the NFA on several “manufacturers of the ordinary small-caliber hunting or target rifles not employed by the criminal element.”³¹ In this respect, the 1936 amendment exacerbated the NFA’s tendency to draw arbitrary length restrictions between equally concealable firearms.

In response to the assassinations of Dr. Martin Luther King, Jr., and Robert F. Kennedy in 1968, Congress rewrote the NFA by enacting Title II of the Gun Control Act of 1968.³² Among other revisions to federal firearms laws, the Gun Control Act exempted rifles of all calibers from the NFA if the barrel was sixteen-inches in length or longer.³³ It did not lower the acceptable barrel length of a shotgun to below 18 inches, although Congress’s reasoning for deciding not to do so is not apparent.³⁴ The Act also defined a “handgun” as a firearm “which has a short stock and is designed to be held and fired by the use of a single hand.”³⁵ Additionally, the Gun Control Act of 1968 added revocable trusts and corporations to the list of entities that could purchase and possess NFA

30. See *United States v. Gonzalez*, 2011 U.S. Dist. LEXIS 127121, at *16–17 (D. Utah Nov. 2, 2011) (“The amended language stated the definition of ‘firearm’ did not include any rifle which is within the foregoing provisions solely by reason of the length of its barrel of the caliber of such rifle is .22 or smaller *and* if its barrel is sixteen inches or more in length.” (quoting Act of April 10, 1936, Pub. L. No. 74-490, 49 Stat. 1192, 1192) (emphasis added)).

31. *Id.* at *17–18 (internal citation omitted).

32. Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. § 921 (2012)). It is worth noting that neither of these assassinations involved a firearm regulated by the NFA. Sirhan Sirhan used a .22 caliber Iver-Johnson Cadet Revolver to assassinate Robert F. Kennedy, and James Earl Ray used a .30-06 Remington Gamemaster pump-action rifle to assassinate Dr. Martin Luther King, Jr. See James Nye, *The guns that killed the presidents: From Lincoln to Kennedy the chilling catalogue of assassins weapons over 148 years*, DAILY MAIL (Nov. 19, 2013, 8:24 PM), <http://www.dailymail.co.uk/news/article-2510306/From-Lincoln-JFK—variety-guns-used-assassinate-American-presidents.html> [https://perma.cc/E65V-YJ6N]; see NAT’L ARCHIVES, FINDINGS ON MLK ASSASSINATION 294, <https://www.archives.gov/research/jfk/select-committee-report/part-2a.html#ray> [https://perma.cc/V83B-ZUV7].

33. See *Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *18–19 (“The current language differs from the 1936 Amendment in that it removes the distinction between .22 caliber rifles and those of a greater caliber, and exempts all rifles with a barrel longer than sixteen inches from the Act.” (internal citation omitted)).

34. *Id.* at *16–17.

35. 18 U.S.C. § 921(a)(29).

items.³⁶ Finally, the Act restructured the NFA by shifting its enforcement authority from Treasury's Alcohol Tax Unit to its Alcohol and Tobacco Tax Division. In 1972, the tax and regulatory functions of the Alcohol and Tobacco Tax Division were separated, creating the ATF.³⁷

The NFA was again amended in 2002 by the Homeland Security Act,³⁸ which transferred the ATF from the Department of the Treasury to the Department of Justice.³⁹ The transfer was intended to accomplish greater efficiency in criminal prosecution by allowing the ATF to work more closely with the Attorney General to create and maintain NFA regulations, and to prosecute both criminal and civil violations.⁴⁰

Unfortunately, coherence in these regulations has become more difficult to maintain in recent years. As the firearm industry continues to make advancements in the technology, concealability, accuracy, ergonomics, and tactical functions of its products, the traditional lines separating the categories of what constitutes a rifle, pistol, or shotgun have become increasingly blurred. Long-settled NFA definitions are at risk of becoming obsolete.

II. CONSTITUTIONAL CHALLENGES TO THE NFA

The constitutional legitimacy of the NFA has rarely been reviewed by the courts, and never with careful or informed legal reasoning. The Supreme Court decided the preeminent case evaluating the NFA's constitutionality, *United States v. Miller*,⁴¹ under highly peculiar circumstances just four years after the statute was enacted. Jackson "Jack" Miller and Frank Layton, unsuccessful bank robbers, were stopped by the Arkansas and Oklahoma state police on April 18, 1938.⁴² After a brief search,

36. See 82 Stat. at 1222 (codified as amended at 18 U.S.C. § 923).

37. See *History of the Alcohol and Tobacco Tax and Trade Bureau*, DEP'T OF THE TREASURY (last accessed Feb. 4, 2017), <https://www.treasury.gov/about/history/Pages/ttb.aspx> [<https://perma.cc/46D7-WX2E>].

38. Homeland Security Act of 2002, § 1111, Pub. L. No. 107-296, 116 Stat. 2135, 2139 (codified at 6 U.S.C. § 101 (2012)).

39. See 28 U.S.C. § 599A(c)(1) (2012).

40. This Act provides the legal basis under which the ATF may promulgate regulations pursuant to the Administrative Procedure Act due to its specialized expertise in regulating firearms. *Id.*

41. 307 U.S. 174 (1939).

42. See Brian L. Frye, *The Peculiar Story of United States v. Miller*, 3 N.Y.U. J.L. & LIBERTY 48, 48 (2008).

the police discovered an unregistered short-barrel shotgun and charged Miller with attempting to “unlawfully, knowingly, willfully, and feloniously transport in interstate commerce” the firearm in violation of the NFA.⁴³ The District Court refused to accept the guilty plea of Miller and Layton and appointed Paul Gutensohn as pro-bono counsel.⁴⁴ The judge presiding over the case quashed the indictment, holding that the “NFA violates the Second Amendment by prohibiting the transportation of unregistered covered firearms in interstate commerce.”⁴⁵ Miller and Layton were permitted to leave as free men, but the constitutional issues were left unresolved.

On January 30, 1939, the government appealed *Miller* directly to the Supreme Court, which granted review.⁴⁶ Gutensohn, Miller’s appointed attorney, was embroiled in a controversy concerning an unrelated political appointment and was uninterested in continuing the case pro bono.⁴⁷ Gutensohn did not submit a brief on behalf of Miller and Layton, so the Court decided the case on the basis of the appellant’s brief alone, written by the Solicitor General’s office.⁴⁸ Without an attorney representing the respondent, the Court held:

[I]n the absence of any evidence tending to show that possession or use of a “shotgun having a barrel of less than eighteen inches in length” at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.⁴⁹

Put simply, the court did not have judicial notice that the firearm in question formed “any part of the ordinary military equipment or that its use could contribute to the common defense.”⁵⁰ For seventy years, *Miller* stood for the proposition that only those firearms which were used by the

43. *Id.* at 48–49; see also *United States v. Miller*, 307 U.S. 174, 175 (1939).

44. See Frye, *supra* note 42, at 59–60.

45. *Id.* at 60; see also *United States v. Miller*, 26 F. Supp. 1002 (W.D. Ark. 1938).

46. See Frye, *supra* note 42, at 65.

47. *Id.* at 65–66.

48. *Id.* at 66–67.

49. *United States v. Miller*, 307 U.S. 174, 178 (1939).

50. *Id.*

militia (except automatic firearms) are protected from federal regulation by the Second Amendment.⁵¹

When a proposition or fact is not within the judicial notice of a court, it is counsel's duty to present evidence justifying the point asserted. In *Miller*, Gutensohn had no interest in the controversy and failed to correct the Court's mistaken belief that short-barrel firearms have no military purpose.⁵² The Court's ignorance, whether willful or innocent, undermines its holding. Short-barrel firearms have played an integral role in military operations since firearms first appeared on the battlefield. One early example familiar to many is the blunderbuss. The blunderbuss is a flintlock shotgun, noted for its wide mouth and commonly associated with pirates.⁵³ Like modern shotguns, the blunderbuss propels multiple projectiles in a wide pattern when fired.⁵⁴ The first reference to this firearm was in Holland in 1598, "where it [was] described as a kind of gun useful for repelling boarders on ships."⁵⁵ These firearms, boasting very short barrels, were popular for self-defense and occasionally used by militaries, notably by navies as deck-sweepers.⁵⁶ Military units used these and improved versions of the short-barrel shotgun and short-barrel rifles through the Civil War.⁵⁷ In 1861,

51. *Id.* In *Heller*, Justice Scalia would eventually remove the militia requirement of *Miller*, deeming the Second Amendment an individual right. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

52. For these purposes, a "short-barrel firearm" refers to either a short-barrel rifle or a short-barrel shotgun, as they may be used interchangeably in many of the discussed situations. It is imperative to remember, however, that a shotgun not regulated by the NFA must have a barrel of at least eighteen inches, whereas a rifle requires a barrel of at least sixteen inches in length.

53. See Garry James, *Large-Mouth Brass: Barbar Blunderbuss Review*, GUNS AND AMMO (Nov. 1, 2013), <http://www.gunsandammo.com/reviews/large-mouth-brass-barbar-blunderbuss-review/> [https://perma.cc/RDE3-WVDL] ("[B]lunderbusses were basically nothing more than attenuated shotguns, the load followed the main portion of the bore, continuing on in a tight cluster even past where the bell flared in the manner of any other shotgun.").

54. See *id.* ("The pattern dispersion increased the farther away it was from the muzzle, just like any other shotgun. As most blunderbusses had very short barrels, this meant the spread would begin sooner than it would with a standard sporting arm, but that's about it" for differences between modern shotguns and blunderbusses.).

55. HAROLD L. PETERSON & ROBERT ELMAN, *THE GREAT GUNS* 56–57 (1971).

56. *Id.*

57. See BRUCE N. CANFIELD, *U.S. INFANTRY WEAPONS OF THE FIRST WORLD WAR 131* (2000) ("Short-barreled percussion shotguns were used (primarily by Confederate Cavalry) during the Civil War with awesome effectiveness on many occa-

“the Federal government purchased 10,000 Augustin carbines,” a short rifle initially used by cavalry units, with a 14.5 inch rifled barrel.⁵⁸ Even during the World Wars, shotgun barrels longer than eighteen inches were only tolerated to accommodate a larger magazine tube or to aid in attaching a bayonet; they provided no increased accuracy or ergonomic benefit.⁵⁹ The United States Military, indeed, adopted the 10.5-inch Thompson submachine gun in 1928.⁶⁰

Today, short-barrel firearms are an essential part of the military loadout. The United States Army issues 14.5-inch M4 carbines to its recruits.⁶¹ The United States Marine Corps, which had maintained a twenty inch barrel version of the M4, also recently opted to issue its infantry and security units the shorter M4 carbine.⁶² United States Marine Corps Commandant Robert Neller cited the shortened barrel, adjustable configuration, and reduction in weight to conclude that the 14.5-inch barrel M4 was tactically superior to other firearms.⁶³

The Supreme Court has not addressed the flaw at the root of its *Miller* decision, and the case remains good law with respect to the NFA’s barrel length provisions. Had the Court known about the common military use of short-barrel firearms, they would likely have upheld the NFA on other grounds or stuck down the NFA as it relates to short-barrel firearms because the militia used such firearms for the common defense.

Nevertheless, *Miller’s* analysis of the individual right to bear arms has been overridden by *Heller* and new standards for evaluating Second Amendment legislation have been established.⁶⁴ Namely, the Court in *Heller* held that statutes that encroach on the

sions. Some Cavalry troopers carried their pet double-barrel shotguns during the ‘Indian Wars’ as well.”).

58. FREDERICK P. TODD, *AMERICAN MILITARY EQUIPAGE 1851-1872*, at 134–35 (1980).

59. See BRIAN C. PUCKETT, *UNITED STATES V. MILLER AND SHORT-BARRELED SHOTGUNS* 39 (2003).

60. See *Thompson Submachine Gun*, *ENCYCLOPAEDIA BRITANNICA* (2008).

61. See U.S. ARMY, *UNIT AND DIRECT SUPPORT MAINTENANCE MANUAL (INCLUDING REPAIR PARTS AND SPECIAL TOOLS LIST) RIFLE, 5.56MM, M16 ET AL.*, at 1-4.2 (1991).

62. See Christian Beekman, *Here’s Why the US Military is Replacing the M16*, *BUS. INSIDER* (Oct. 28, 2015, 5:13 P.M.), <http://www.businessinsider.com/heres-why-the-us-military-is-replacing-the-m16-2015-10> [<https://perma.cc/N947-6KUS>].

63. *Id.*

64. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 622 (2008).

Second Amendment must be evaluated by some form of heightened scrutiny, as with other fundamental rights.⁶⁵ The Court, however, declined to determine when a certain level of scrutiny applies to a specific Second Amendment issue.⁶⁶ The Ninth Circuit, in the absence of instruction from the Supreme Court, has formulated a test for determining which level of scrutiny should apply.⁶⁷ Under this test, courts must first ask “whether the challenged law burdens conduct protected by the Second Amendment.”⁶⁸ If so, courts are “to apply an appropriate level of scrutiny.”⁶⁹ Applying this test to the NFA suggests that the statute’s barrel length provisions are unconstitutional.

A. *The First Prong of the Ninth Circuit’s Second Amendment Scrutiny Test*

The first prong of the Ninth Circuit’s scrutiny assessment test “asks whether the prohibited conduct ‘was understood to be within the scope of the right at the time of [the Second Amendment’s] ratification.’”⁷⁰ Conduct considered to be within to the scope of the right includes that which “touches on ‘pre-

65. *Id.* at 628 n.27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with separate constitutional provisions on irrational laws, and would have no effect.”).

66. There are typically three levels of constitutional scrutiny that apply: rational basis, intermediate scrutiny, and strict scrutiny. *See e.g.*, *Nebbia v. New York*, 291 U.S. 502 (1934) (formally applying rational basis review); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (applying intermediate scrutiny); *United States v. Windsor*, 191 U.S. 771 (2013) (applying strict scrutiny). Judges trying Second Amendment cases have begun to identify another level of scrutiny between the intermediate and strict scrutiny levels. This level, not discussed here, is applied according to the degree of severity of the impact of legislation on the right enumerated by the Second Amendment. *See Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *17–18 (D.N. Mar. I. Sept. 28, 2016) (citing *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011)). In such an instance, when the impact to the right comes close to implicating the core of the Second Amendment, the government is required to make a “rigorous showing” that does not quite rise to the level of strict scrutiny. *Id.*

67. *See United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). This test has been widely adopted by other circuits and presents a coherent method of analyzing the scope of Second Amendment protections. *See Heller v. Dist. of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011); *Ezell v. City of Chi.*, 651 F.3d 684 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

68. *Chovan*, 735 F.3d at 1136 (citing *Chester*, 628 F.3d at 680; *Marzzarella*, 614 F.3d at 89).

69. *Id.*

70. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *13.

serving the militia' or 'self-defense and hunting.'"71 If this conduct is restricted by the legislative enactment, the "Government must present evidence that the conduct fell outside of the scope of the right."⁷² If the inquiry produces evidence that "conclusively shows that the challenged conduct falls outside the scope of the Second Amendment . . . the analysis is over and the law stands."⁷³

This first prong can also be satisfied where the regulation is a "longstanding prohibition," which is "presumptively lawful."⁷⁴ The Court in *Heller* held that Second Amendment rights, like other fundamental rights, are not unlimited,⁷⁵ and cited several firearms restrictions that the Court sought not to overturn in its holding: "(1) [prohibiting the] 'the possession of firearms by felons and the mentally ill,' (2) 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,' and (3) 'laws imposing conditions and qualifications on the commercial sale of arms.'"76 Furthermore, courts have "acknowledged the traditional absence of any individual right to 'dangerous and unusual weapons.'"77 Fully automatic firearms, such as the M-16, "that are most useful in military service" are presumptively beyond the scope of individual rights enumerated in the Second Amendment despite their use-

71. *Id.* at *13–14 (citing *Dist. of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

72. *Id.*; see also *Chovan*, 735 F.3d at 680 (holding that the government failed to show that domestic violence misdemeanants have historically been restricted from bearing arms); *Ezell*, 651 F.3d at 703 ("[I]f the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected—then there must be a second inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." (emphasis in original)); *Marzzarella*, 614 F.3d at 95 (applying intermediate scrutiny because "we cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms").

73. *Id.* ("[T]he history relevant to both the Second Amendment and its incorporation by the Fourteenth Amendment lead to the same conclusion: The right of a member of the general public to carry a concealed firearm in public is not, and never has been, protected by the Second Amendment." (citing *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 929 (9th Cir. 2016))).

74. *Heller*, 554 U.S. at 626, 627 n.26.

75. See e.g., *Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol*, 700 F.3d 185, 200 (5th Cir. 2012) ("As the Supreme Court recognized in *Heller*, the right to keep and bear arms has never been unlimited." (citations omitted)).

76. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *14–15 (quoting *Heller*, 554 U.S. at 626–27).

77. *Id.* (quoting *Heller*, 554 U.S. at 627); see also *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014).

fulness to a modern militia.⁷⁸ Still, even if a particular law were found to be “longstanding and presumptively lawful, a plaintiff may rebut the presumption by showing that ‘the regulation [has] more than a de minimis effect upon his right.’”⁷⁹

Evaluation of the NFA under the first prong of the test is simple. Although modern “assault weapons” did not exist at the time of the ratification of the Second Amendment, arguments alleging that only flintlock and percussion firearms are protected by the Second Amendment have been deemed “bordering on frivolous.”⁸⁰ The requirement that the restricted conduct “touches” on protected Second Amendment rights, such as preserving the militia, hunting, and self-defense, is a low burden. But the NFA is undoubtedly a long-standing prohibition that is presumptively legal because it has stood firm since 1934. Therefore, a plaintiff would need to show that the registration, notification, and tax provisions of the NFA are more than a de minimis burden.⁸¹ This burden is likely satisfied considering that even a registration requirement that did not require an additional tax or other notification requirements was struck down in *Heller*.⁸²

78. *Heller*, 554 U.S. at 627–28.

79. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *15 (quoting *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011)); see also *Heller*, 670 F.3d at 1253 (holding that the District of Columbia’s registration requirements are “self-evidently de minimis, for they are similar to other common registration schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous”).

80. *Heller*, 554 U.S. at 582.

81. The registration requirement must be more burdensome than the District of Columbia scheme ultimately upheld by the D.C. Circuit, see *Heller*, 670 F.3d at 1253, but need not be as strict as the registration requirement struck down by the Court in *Murphy*.

82. See *Heller*, 554 U.S. at 635. The registration scheme before the Supreme Court in *Heller* prohibited the registration of handguns and forbade the carrying of a handgun without a license. See *id.* at 575. Although the NFA registration requirements do not legally forbid (in most states) the registration of short-barrel firearms, they very well may do so de facto. The NFA requires a tax stamp to be paid, burdensome wait times for registration, notification of the chief law enforcement officer in the county where the transferor lives, and submission of two copies of fingerprints and pictures, among other requirements. See 27 C.F.R. § 479(III)(A)(1) (2016). For the poor—and quite frankly for anyone without significant resources to navigate this federal labyrinth—these requirements can be insurmountable. Indeed, the NFA registration requirement is perhaps most similar to that of *Murphy*, which a district court decisively struck down. 2016 U.S. Dist. LEXIS 135684, at *18–21. Put simply, *Heller* cannot stand for the proposition that only a resulting *ban* on a class of firearms surpasses the de minimis threshold.

Although short-barrel firearms are not the most popular choice for self-defense or recreational shooters, these firearms are by no means the “dangerous and unusual weapons” that may be restricted according to *Heller*.⁸³ Short-barrel firearms, unlike modern “assault weapons,” *did* exist at the time of the Second Amendment’s drafting and ratification. It is likely that at least one of the Founding Fathers who served in the Continental or British Army would have encountered or used firearms like the blunderbuss. Today, short-barrel firearms also fail to meet the standard for “unusual.” The ATF reported that it processed 1,426,211 NFA items the transfer or manufacture of in the fiscal year of 2015.⁸⁴ For comparison, the Bureau only processed 147,484 NFA items in the fiscal year of 2005.⁸⁵ No data for 2016 is available.⁸⁶ Beyond the reach of the NFA, it is estimated that “[o]ut of the 57 million firearm owners in the United States . . . 5 million own AR-type rifles.”⁸⁷ Additionally, “[f]irearm industry analysts estimate that 5,128,000 AR-type rifles were produced in the United States for domestic sale, while an additional 3,415,000 were imported.”⁸⁸ These numbers do not even consider other platforms of “assault weapon” pistols. Even if short-barrel firearms are not the most popular arms chosen by citizens, these statistics prove they are by no means “unusual” and are therefore protected by *Heller*.⁸⁹

B. Second Prong of the Test for Second Amendment Scrutiny

Because the NFA burdens protected Second Amendment conduct (such as preservation of the militia and, to a lesser de-

83. *Heller*, 554 U.S. at 626.

84. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, DATA & STATISTICS, <https://www.atf.gov/resource-center/data-statistics> [<https://perma.cc/Z6P7-T2SS>]; see also Machine Guns, Destructive Devices and Certain Other Firearms; Background Checks for Responsible Persons of a Corporation, Trust or Other Legal Entity with Respect to Making or Transferring a Firearm, 78 Fed. Reg. 55014, 55016 (2013) (reporting that the number of applications to make or transfer an NFA item from legal entities that are “neither individuals nor Federal Firearms Licensees (FFLs) increased from approximately 804 in 2000 to 12,600 in 2009 and to 40,700 in 2012”).

85. See *id.*

86. See *id.*

87. *Friedman v. City of Highland Park*, 784 F.3d 406, 415 n.3 (7th Cir. 2015) (Manion, J., dissenting).

88. *Id.*

89. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

gree, self-defense) beyond the de minimis standard set forth in the first prong of the Ninth Circuit's scrutiny assessment test, a court would then proceed to the second step. The court must gauge "(1) 'how close the law comes to the core of the Second Amendment right', and (2) 'the severity of the law's burden on the right.'"⁹⁰ Laws that ban classes of firearms, such as the handgun bans at issue in *Heller* and *McDonald v. City of Chicago*⁹¹ or the "assault weapons" ban at issue in *Kolbe v. Hogan*,⁹² "are irredeemable regardless of how compelling a state's interest may be."⁹³ Laws that regulate the "manner in which the right may be exercised are subject to intermediate scrutiny."⁹⁴ If the NFA provisions regarding the registration and taxation of short-barrel firearms are to survive intermediate scrutiny, the NFA "must advance an important, significant, or substantial government interest. . . . [and] must reasonably fit that interest, although it need not be the least restrictive means of doing so."⁹⁵ A court evaluating the NFA under intermediate scrutiny has discretion to weigh the significance of government interests and its nexus to the enacted legislation.

1. Intermediate Scrutiny

The legislative history of the NFA shows that the purpose of the statute was to stem Prohibition-era violence.⁹⁶ Since the end of Prohibition, the government has also cited "public safety, crime prevention, and the need to keep firearms favored by criminals off the streets" as reasons for the NFA's continued existence.⁹⁷ While these interests are undoubtedly important,⁹⁸

90. *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *Ezell v. City of Chi.*, 651 U.S. 684, 703 (7th Cir. 2011)).

91. 561 U.S. 742 (2010).

92. 813 F.3d 160 (4th Cir. 2016).

93. *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *16 (D.N. Mar. I. Sept. 28, 2016).

94. *Id.* at *16; see also *United States v. Marzzarella*, 614 F.3d 85, 96–98 (3rd Cir. 2010) (characterizing the criminalization of the possession of a firearm with an obliterated serial number as merely a regulation of the manner of exercising the right to bear arms and applying intermediate scrutiny).

95. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *14.

96. See *supra* Section I.

97. *United States v. Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *25 (D. Utah Nov. 2, 2011).

98. See *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) ("[W]e find that reducing crime is a substantial government interest."); *United States v. Grif-*

the NFA registration scheme must nonetheless be “substantially related” to those interests.⁹⁹

A reasonable court presented with adequate information regarding the function, design, history, and statistics of the regulated firearms would likely be left little choice but to determine that the NFA’s registration and tax requirements do not advance the purpose of crime prevention. In *Murphy v. Guerrero*, a district court held that unlike individual licensing schemes, “which likely prevent[] felons from obtaining firearms,” registration provisions “only inform [the government] that a certain individual has a certain firearm.”¹⁰⁰ Such provisions do not “prevent dangerous individuals from getting their hands on firearms or otherwise safeguard public safety, and so [do] not further” the stated goals of crime prevention.¹⁰¹ Instead, “[b]ecause registration is a prerequisite to firearm possession . . . the effect of this provision is generally to prevent people” from possessing firearms.¹⁰²

Even under the balancing approach suggested by Justice Breyer in his dissent in *Heller*, registration requirements fail constitutional muster. The dissent suggests that the Court ask:

[H]ow the statute seeks to further the governmental interests that it serves, how the statute burdens the interests that the Second Amendment seeks to protect, and whether there are practical less burdensome ways of furthering those interests. The ultimate question is whether the statute imposes a burden that, when viewed in light of the statute’s legitimate objectives, are disproportionate.¹⁰³

Even though the statute is longstanding, the NFA’s registration requirements for short-barrel firearms are unlikely to prevent criminal activity. Unless the criminal uses a firearm that is reg-

fin, 7 F.3d 1512, 1517 (10th Cir. 1993) (“Important government interests include effective crime detection and prevention, and minimizing the risk of harm to officers and the public.”); *Gonzalez*, 2011 U.S. Dist. LEXIS 127121, at *25; *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1235 (D. Utah 2009) (finding the government has a compelling interest in “keeping firearms out of the hands of those . . . pos[ing] a prospective risk of violence to an intimate partner or child.”).

99. *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010); see *Gonzales*, 2011 U.S. Dist. LEXIS 127121, at *25.

100. 2016 U.S. Dist. LEXIS 135684, at *31–32 (D. N. Mar. I. Sept. 28, 2016).

101. *Id.* at *32.

102. *Dist. of Columbia v. Heller*, 554 U.S. 570, 693 (2008) (Breyer, J., dissenting).

103. *Id.*

istered to him, such a requirement only serves the purpose of identifying a stolen firearm registered to an innocent person. If the firearm is disposed of after a crime is committed, the registration requirement, without more, would prove useless. In such a situation, the firearm would merely be traced back to the original victim of the firearm theft, not the perpetrator of the crime. This consideration must be weighed against with the fact that short barrel firearms are ideal for self-defense in the home or elsewhere due to their size and capacity.

Additionally, these registration requirements are necessarily coupled with wait periods. For instance, the NFA imposes a registration requirement for each gun purchased within an entire class of firearms, which entails wait times of several months to a year.¹⁰⁴ The *Murphy* Court found that a similar registration requirement on non-restricted firearms that entailed only a fifteen-day wait period was unconstitutional.¹⁰⁵ Wait periods may be appropriate for background checks, but not for mere registration of a firearm.¹⁰⁶ Thus, due to the severity of the burden of long-lasting wait times of several months, the NFA's process of issuing stamps to persons wishing to own NFA-regulated firearms should be evaluated under intermediate scrutiny.

Furthermore, the underlying premise of crime prevention and public safety is dubious. The NFA's restriction on a subset of firearms does not actually reduce firearm violence, as illustrated by crime statistics that involve rifle and pistol variants of firearms, such as the AR-15. Although the ATF does not provide separate statistics of crimes committed with NFA-regulated firearms, such restricted firearms are included within their broader data set. First, the price of these non-NFA firearms—usually greater than \$1,000—presumably discourages their use for nefarious purposes, since other cheaper firearms exist that are more apt to be tossed away after a crime is committed. In fact, the ATF has noted that no variant of “assault weapon,” pistol or otherwise, ranks among the top ten firearms

104. See *Transfer Tracking*, NFA TRACKER (last visited Mar. 21, 2017), <http://www.nfatracker.com/nfa-transfer-time-tracking/> [https://perma.cc/39AE-FH2Z].

105. See *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *31–34 (D.N. Mar. I. Sept. 28, 2016).

106. See *id.*

seized as a result of criminal activity.¹⁰⁷ Additionally, according to the FBI Criminal Justice Information Services Division, there were 8,454 firearms-related homicides committed in 2013, only 285 of which were committed with rifles of any type, including short-barrel rifles.¹⁰⁸ The real impact of short-barrel rifle restrictions narrows even further since national statistics show that “[n]o more than .8% of homicides are perpetrated with rifles using military calibers.”¹⁰⁹ Indeed, only 4% of homicides were committed with any type of rifle.¹¹⁰

The category of military caliber rifles is misleading because many common types of rifles use calibers employed by the military. For instance, many bolt-action rifles use 5.56x45 NATO (commonly referred to as .223¹¹¹) or 7.62x51mm NATO cartridges (commonly referred to as .308 Winchester¹¹²). Many wilderness and self-defense rifles use 9mm or .45 ACP rounds.¹¹³ All these firearms are included in the .8% figure, despite many of these firearms not falling within the category of either short-barrel firearms or the broader category of “assault weapons.”¹¹⁴ In sum, of the hundreds of millions of firearms owned in the United States, only a portion of those are rifles of any type. Of rifles, only a portion utilize military calibers and even fewer are “assault weapons.” In this subset—firearms that

107. See Elaine Shannon, *America's Most Wanted Guns*, TIME (July 12, 2002), <http://content.time.com/time/nation/article/0,8599,320383,00.html> [<https://perma.cc/9RGY-GYC9>].

108. See FBI Criminal Justice Information Services Division, *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2010–2014*, https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/expanded-homicide-data/expanded_homicide_data_table_8_murder_victims_by_weapon_2010-2014.xls [<https://perma.cc/P5NT-829Z>].

109. David B. Kopel, *Rational Basis Analysis of “Assault Weapon” Prohibition*, 20 J. CONTEMP. L. 381, 410 (1994).

110. *Id.*

111. There is actually a slight, but important, difference between .223 ammunition and 5.56x45 NATO. A rifle chambered for 5.56x45mm NATO may safely fire .223 ammunition, but a rifle chambered for .223 cannot fire a 5.56x45mm NATO round without catastrophic failure—the rifle could explode—due to the higher pressure of the 5.56x45mm NATO cartridge.

112. See MICHAEL BUSSARD ET AL., AMMO ENCYCLOPEDIA FOR ALL RIMFIRE AND CENTERFIRE CARTRIDGES, PLUS SHOTSHELLS! 419–20 (2014).

113. See generally Brad Fitzpatrick, *11 Great Pistol Caliber Carbines*, GUNS AND AMMO (Aug. 3, 2015), <http://www.gunsandammo.com/shoot101/choosing-the-right-self-defense-ammo/> [<https://perma.cc/W4H3-DQ85>].

114. See Kopel, *supra* note 108, at 410.

are assault weapons that fire military calibers— exists another unknown quantity of rifles that are restricted by the NFA, which may have been used in a negligible amount of crime. While no court has yet ruled on this particular question, the fact that short-barrel firearms produce a seemingly nonexistent amount of crime despite their ever-increasing commonality favors striking the registration requirement.¹¹⁵

Additionally, despite claims to the contrary,¹¹⁶ “assault weapons” cannot be easily converted into automatic firearms.¹¹⁷ Even the Supreme Court has fallen prey to the mistaken belief that semi-automatic firearms can be easily converted into weapons of war through a careful filing away of the firing mechanism. In *Staples v. United States*,¹¹⁸ the Court held that the defendant could not be convicted of violating the NFA’s provision prohibiting possession of an unregistered machine gun because the ATF failed to prove that the defendant had knowledge that the firearm had been tampered with.¹¹⁹ Such a conversion would require a skilled machinist with sophisticated tools: an automatic firearm receiver (which could also be carefully drilled), an automatic sear and sear spring, an automatic disconnect, and possibly an automatic bolt carrier group and its associated springs, depending on the model of rifle.¹²⁰ Some of these parts, such as the automatic sear, are im-

115. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (“[T]he sorts of weapons protected were those ‘in common use at the time.’ We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” (citations omitted)). The rule in *Heller* that extends Second Amendment protection to weapons that are not dangerous or unusual makes the criminal statistics in this Section relevant. As discussed above, NFA firearms are not unusual. See *supra* notes 83–89 and accompanying text. Additionally, these firearms cannot be deemed unusually dangerous or more dangerous than other firearms that receive protection by the Second Amendment if they are not used in criminal activity. See *Kolbe v. Hogan*, 813 F.3d 160, 177 (4th Cir. 2016) (“[B]ecause all firearms are dangerous by definition, the State reasons that *Heller* must mean firearms that are ‘unusually dangerous’ fall altogether outside the scope of the Second Amendment.”).

116. See generally VIOLENCE POL’Y CTR., TEN KEY POINTS ABOUT WHAT ASSAULT WEAPONS ARE AND WHY THEY ARE SO DEADLY (2003), <http://www.vpc.org/studies/hoseone.htm> [<https://perma.cc/SU3B-7TRZ>].

117. See FULL AUTO: AR-15 MODIFICATION MANUAL 47 (1981).

118. 511 U.S. 600 (1994).

119. See *id.* at 602.

120. See FULL AUTO: AR-15 MODIFICATION MANUAL 47 (1981).

possible to buy on the unregulated civilian market since they are themselves regulated by the NFA.¹²¹

2. *Strict Scrutiny*

Even if these provisions of the NFA are found to satisfy intermediate scrutiny, they are very unlikely to overcome strict scrutiny. Strict scrutiny “asks whether the law is narrowly tailored to serve a compelling government interest.”¹²² The government must show that the policy is narrowly tailored, which often means using “the least restrictive means” to achieve the compelling interest.¹²³ Because of their size and tactical maneuverability, short-barrel firearms are ideal for self-defense. As “the inherent right of self-defense has been central to the Second Amendment,” strict scrutiny is likely applicable to the registration and tax provisions of the NFA.¹²⁴ These requirements are unlikely to withstand strict scrutiny.¹²⁵ Beyond self-defense, a secondary consideration of the Second Amendment in preserving the militia might also be implicated by these restrictions on short-barrel firearms.

Registration requirements simply do not serve the purpose of preventing crime. The same is true of tax schemes implemented on firearms or ammunition. After all, “the Second Amendment protects the right to armed self-defense, which includes the right to acquire such arms.”¹²⁶ Otherwise the right to bear arms would be rendered “useless.”¹²⁷ The United States District Court for the

121. See 26 U.S.C. § 5845(b) (2012); see also 18 U.S.C. § 922(o) (2012); ATF Rul. 81-4 (1981), <https://www.atf.gov/firearms/docs/ruling/1981-4-auto-sear/download> [<https://perma.cc/9WDT-QYRY>] (determining that an AR-15 auto sear is regulated by the NFA).

122. *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *17 (D.N. Mar. I. Sept. 28, 2016) (citing *United States v. Marzzarella*, 614 F.3d 85, 96 n.14 (3rd Cir. 2010)).

123. *Id.* (citing *Kolbe v. Hogan*, 813 F.3d 177, 179 (4th Cir. 2016)).

124. *Dist. of Columbia v. Heller*, 554 U.S. 570, 628 (2008).

125. See *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *17; *Kolbe*, 813 F.3d at 168 (holding that strict scrutiny applies to a state assault weapon and large-capacity magazine ban because it substantially burdens the core protection of the Second Amendment: self-defense).

126. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *78; see also *Teixeira v. Cnty. of Alameda*, 822 F.3d 1047, 1055–56 (9th Cir. 2016) (zoning restriction on gun shop burdened the Second Amendment by limiting firearm sales and training); *Jackson v. City & Cnty. of S.F.*, 746 F.3d 953, 968 (9th Cir. 2014) (ammunition sales are also protected).

127. *Murphy*, 2016 U.S. Dist. LEXIS 135684, at *78.

District of the Northern Mariana Islands, in *Murphy v. Guerrero*, is the latest to overturn a tax on firearms, and although the tax scheme in that case was more extreme, the case's reasoning still holds true for the NFA. In that case, the territory's local law applied a \$1,000 tax on all handguns.¹²⁸ Due to variability in handgun prices, the tax ranged from between 13% to 667% of the value of the handgun.¹²⁹ Although the NFA imposes a tax of only \$200 for short-barrel firearms, explosive devices, machine guns, and suppressors, and a five dollar tax for "any other weapon[s]," the existence of the tax may be considered more than a mere de minimis burden.¹³⁰ Using public safety as a reason to tax firearms is not a legitimate interest, unless the government "seeks to safeguard the community by disarming the poor."¹³¹ Even if the tax portion of the NFA increases revenue, despite no record of such a purpose being advanced in the legislative history, it lacks "the necessary tailoring to survive taxing a constitutionally protected item."¹³² The *Murphy* Court suggested that the government has many alternative means of raising revenue without burdening the Second Amendment, such as taxing income.¹³³ Even the *Miller* Court did not suggest that an outright ban on short-barrel firearms was constitutional,¹³⁴ and as discussed earlier, that Court should have held that such firearms were protected. What the government "cannot do by ban or regulation, it cannot do by taxation."¹³⁵ Admittedly, however, a five dollar tax on "any other weapons" does seem de minimis when considered in isolation.

More fundamentally, however, the power to exert a tax, no matter how inconsequential it may seem, is the power to exert a deadly force on a fundamental right.¹³⁶ This is not a new concept. Fundamental rights must be available for the enjoyment of the citizenry free from governmental intrusion. In *Grosjean v. American Press Co.*,¹³⁷ the Court struck down a tax that was levied on

128. *Id.* at *2.

129. *Id.* at *80.

130. *Id.* at *83 (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 327 (1819)).

131. *Id.* at *82.

132. *Id.* (citing *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 n.7 (1983)).

133. *See id.*

134. *United States v. Miller*, 307 U.S. 174, 180 (1939).

135. *Id.* at *83 (citing *Minneapolis Star & Tribune*, 460 U.S. at 585).

136. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 313, 327 (1819)).

137. 297 U.S. 233 (1936).

“any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week . . . of two per cent.”¹³⁸ Instead of upholding the tax, the Court held that “[t]he word ‘liberty’ contained in the Fourteenth Amendment embraces not only the right of a person to be free from physical restraint, but the right to be free in the enjoyment of all his faculties as well.”¹³⁹ The Court, in likening the tax of publications to the Stamp Act, noted that the “aim of the [American Revolution] was not to relieve taxpayers from a burden, but to establish and preserve the right.”¹⁴⁰ As the First Amendment is a fundamental right subject to the protections of the Fourteenth Amendment, so too, is the Second Amendment.¹⁴¹

Similarly, in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹⁴² the Supreme Court struck down a “use tax” imposed on “the cost of paper and ink products consumed in the production of a publication” in excess of \$100,000.¹⁴³ As with the Court’s analysis in *Heller* of the Second Amendment, the *Minneapolis Star & Tribune Co.* Court recognized that the First Amendment does not exempt the press from all government regulation.¹⁴⁴ Still, the Court held that “[a] tax that burdens the rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest.”¹⁴⁵ However, the tax at issue in *Minneapolis Star & Tribune Co.* was not a general sales tax, but one that “singled out the press.”¹⁴⁶ Such “[a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected.”¹⁴⁷

Grosjean and *Minneapolis Star & Tribune Co.* are not concerned with the actual burden of the tax imposed, but with the force

138. *Id.* at 240.

139. *Id.* at 244 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)).

140. *Id.* at 247.

141. See *McDonald v. City of Chi.*, 561 U.S. 742, 858 (2010).

142. 460 U.S. 575 (1983).

143. *Id.* at 577.

144. Cf. *Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol*, 700 F.3d 185, 200 (5th Cir. 2012) (“As the Supreme Court recognized in *Heller*, the right to keep and bear arms has never been unlimited.” (citations omitted)).

145. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582 (citing *United States v. Lee*, 455 U.S. 252 (1982)).

146. *Id.* at 583.

147. *Id.* at 585.

such a tax exerts on a fundamental right. Although the reasons for protecting the press differ markedly from the reasons for protecting firearm ownership, the Second Amendment is nonetheless a fundamental right.¹⁴⁸ It does not matter whether the tax is five dollars or two million dollars, a tax on a fundamental right is a burden that must satisfy “achieve an overriding governmental interest.”¹⁴⁹ Courts “as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation” and “the possibility of error inherent . . . cannot be tolerate[d].”¹⁵⁰ Simply put, courts cannot be expected to arbitrarily draw a line of permissible tax between the five dollar amount for “any other weapons” and the two hundred dollar tax for other NFA-regulated firearms. The tax, in and of itself, is a burden on the fundamental right of the Second Amendment to self-defense which should not stand.¹⁵¹

Another reason that the NFA’s restrictions on short-barrel firearms would fail the narrow tailoring requirement of strict scrutiny is because there is no functional or tactical advantage to short barrel lengths that would lend itself to increased use by criminals. The NFA is an expansive law that encompasses a range of firearms including automatic firearms, firearm accessories, and explosives.¹⁵² Some of these items, such as grenades and light machine guns, were likely the types of weapons that Congress was worried about when drafting the NFA.¹⁵³ The function and effectiveness of these items was so alien to the general public that they were only used by criminals and could be regulated more strictly.¹⁵⁴ The idea of regulating firearms based on their length is arguably nonsensical on its face since the difference between a short-barrel rifle and a non-restricted rifle is, in many cases, only 1.5 inches. Barrel length, after all, only matters until the barrel reaches

148. See *McDonald v. City of Chi.*, 561 U.S. 742, 799–800. (2010).

149. *Minneapolis Star & Tribune Co.*, 460 U.S. at 582 (citing *Lee*, 455 U.S. 252 (1982)).

150. *Id.* at 589–90.

151. Sales tax and other general tax schemes that apply to products other than firearms (but include firearms in their scheme) are of course permissible. See *id.* at 581–82; *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240 (1936). What tax schemes cannot do is target firearms solely for punitive treatment.

152. 26 U.S.C. § 5845 (2012).

153. See *NFA Hearing*, *supra* note 15, at 4, 6 (statement of Homer S. Cummings, Att’y Gen. of the United States).

154. See *id.* at 6.

its optimal chamber pressure and the gas from the propelled bullet reaches its peak expansion point.¹⁵⁵

One negative effect of a shortened barrel is the loss of accuracy at long distances.¹⁵⁶ After the peak expansion point of a bullet is reached, the barrel becomes less important, despite public perception.¹⁵⁷ In fact, a barrel that is too long may become a hazard if the bullet succumbs to friction and slows in the barrel.¹⁵⁸ While a shorter barrel may lead to a drop in muzzle velocity in rifles such as the AR-15, “the drop in velocity and accuracy [may be] small enough to be of little concern . . . at normal range.”¹⁵⁹ Even if one supposes that short-barrel firearms are regulated precisely because they remain accurate while being more concealable than other semi-automatic firearms, that justification still fails to account for the fact that around 300 people are killed with *all* rifles—both short- and long-barrel—annually,¹⁶⁰ and that non-restricted pistols are far more commonly used in firearm-related crime.¹⁶¹

III. INFIRMITIES IN THE NFA REGULATORY REGIME

Not only is the NFA itself constitutionally infirm, but the regulations promulgated pursuant to the NFA are defective under basic administrative law principles. Section 12 of the NFA originally granted “[t]he Commissioner [of the Internal Revenue Service], with the approval of the Secretary [of the Treasury], [the authority to] prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect.”¹⁶² In 2002, Congress transferred this authority to the Director of the ATF in coordination with the Attorney

155. See ROBERT A. RINKER, UNDERSTANDING FIREARM BALLISTICS 117 (2010).

156. *Id.* See generally Brandon Louis Clark, Effect of Barrel Length on the Muzzle Velocity and Report from a Mosin-Nagant 7.62x54R Rifle (May 2011) (unpublished Honors College Thesis, University of South Florida), <http://honors.usf.edu/documents/thesis/u82488180.pdf> [<https://perma.cc/JRQ6-SMFW>].

157. Cf. RINKER, *supra* note 155, at 117.

158. Cf. *id.* at 118.

159. *Id.* at 120 (discussing in the hunting context).

160. See Expanded Homicide Data Table 8, *supra* note 108.

161. See *id.*

162. National Firearms Act of 1934, § 12, Pub. L. No. 73-474, 48 Stat. 1236, 1240.

General of the United States.¹⁶³ The ATF has since adopted a variety of interpretations that are arbitrary and irrational given the functionality of firearms regulated by the Act.

Take, for example, regulations related to unrestricted pistol variants of commonly available “assault weapons.”¹⁶⁴ These pistols, which are not themselves regulated by the NFA, can easily fall within the purview of the NFA as either short-barrel rifles or “any other weapons” if certain attachments are added. First, the ATF has determined that a “pistol” with a *vertical* fore-grip attached is an “any other weapon” regulated under the NFA yet does not affirmatively place a pistol with an *angled* fore-grip in that category—potentially exempting the latter from NFA regulation.¹⁶⁵ Second, the ATF has taken inconsistent positions in ruling letters. It now holds that a person who “misuses” a firearm attachment may be prosecuted for making an unregistered short-barrel firearm in violation of the NFA, in contradiction to its previous position.¹⁶⁶ Applying the appropriate standard of deference to the ATF, these interpretations are “plainly erroneous or inconsistent” with the language of the regulations promulgated pursuant to the NFA, and should not be granted deference.¹⁶⁷

163. See Homeland Security Act of 2002, § 1111(c)(1), Pub. L. No. 107-296, 116 Stat. 2135, 2275 (codified at 28 U.S.C. §§ 599A(c)(1) (2012)).

164. It is important to note that pistol versions of “assault weapons,” which have walked the tight rope between remaining a non-regulated “pistol” and falling under NFA regulations as an “any other weapon” or short-barrel rifle, were rare when the NFA was enacted. See generally WAR DEP’T, TECHNICAL MANUAL IN ORDINANCE MAINTENANCE: THOMPSON SUBMACHINE GUN, CAL. .45, M1928A1, at 8 (1942).

165. See U.S. Dep’t of Justice, *Adding a Vertical Fore Grip to A Handgun*, (May 4, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fpls-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [<https://perma.cc/GCW5-N6PP>].

166. Compare Acting Chief Max M. Kingery, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Open Letter on the Redesign of “Stabilizing Braces”* (Jan. 2015) [hereinafter Current Letter], <https://www.atf.gov/file/11816/download> [<https://perma.cc/FJ35-BMD5>], with Letter from John R. Spencer, Chief, Firearms Technology Branch, Bureau of Alcohol, Tobacco, Firearms, and Explosives 3 (Aug. 30, 2010) [hereinafter Spencer Letter], <https://www.guntrustlawyer.com/files/2015/02/ATF-Response-AFG-on-AR-Pistol.pdf> [<https://perma.cc/U6CE-BUZZ>].

167. Separate from the *Auer* argument forwarded here are arguments that the ATF’s interpretation is contrary to the NFA and that the interpretation is arbitrary and capricious. In that case a court may set aside the regulation. See 5 U.S.C. § 706(2)(A) (2012); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency decision is arbitrary and capricious

A. *Auer Deference and the ATF's Regulation of Vertical Fore-Grips*

The ATF's interpretation of the regulatory definition of "pistol," with regards to vertical and angled fore-grips is "plainly erroneous and inconsistent" with the meaning of the regulation and therefore does not deserve judicial deference under *Auer v. Robbins*. The Court in *Auer* ruled that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation'" at issue.¹⁶⁸ The ATF has determined that the Gun Control Act's definitions of firearms exempted from regulation by the NFA (such as pistols) left too much space for individuals to circumvent the statute, so it promulgated its own, more restrictive definition of "pistol."¹⁶⁹ The new definition was then interpreted to prohibit the attachment of vertical foregrips to pistols. This interpretation is "plainly erroneous and inconsistent" with the ATF's promulgated definition of "pistol."

The Gun Control Act of 1968 defines terms not regulated by the NFA, including the definition of a "handgun" as "a firearm which has a short stock and is designed to be held and fired by the use of a single hand."¹⁷⁰ The key part of this definition is the term "designed," which means to "develop according to a plan" or "the arrangement of parts, details, form, color, etc. so as to produce an artistic unit."¹⁷¹ Under such a definition, an AR-15 pistol could have a vertical or angled fore-grip attached to it by the user, but it would still be considered a "pistol" because that was how the firearm was originally designed.

Despite this clear definition, the ATF determined that it needed fine-tuning, and promulgated a new definition through notice-and-comment rulemaking procedures. The ATF's definition of a pistol is:

if the agency has relied on factors which Congress did not intend for it to consider, if it has entirely failed to consider an important aspect of the problem, has offered an explanation contrary to the evidence, or the decision is too implausible). The ATF offered a mere four sentences of explanation in the Final Rule establishing the current regulatory definition of "pistol." See ATF Final Rule: Commerce in Firearms and Ammunition, 53 Fed. Reg. 10,480, 10,482 (Mar. 31, 1988).

168. 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)).

169. See ATF Final Rule: Commerce in Firearms and Ammunition, 53 Fed. Reg. at 10,491 (codified at 27 C.F.R. § 479.11 (2016)).

170. 18 U.S.C. § 921(a)(29) (2012).

171. *Design*, WEBSTER'S NEW COLLEGE DICTIONARY 391 (2005).

[A] weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock designed to be gripped by one hand and at an angle to and extending below the line of the bore(s).¹⁷²

The phrase “designed, made and intended,” adds a degree of ambiguity to the now convoluted and hard-to-follow definition. This definition allows the ATF to classify firearms that would otherwise be considered pistols as “any other weapon” because of a temporarily attached vertical fore-grip, and purports to receive nearly absolute deference under *Auer*.

The ATF’s reasoning, which may be inferred from its promulgated definition, is one of textual contortion and manipulation. To classify a firearm as an “any other weapon,” the ATF must first determine that the arm does not fit the categories of the NFA or Gun Control Act. Following this mission, the ATF argues that the addition of a vertical fore-grip renders the firearm “no longer designed to be held and fired by the use of a single hand.”¹⁷³ The ATF then reasons that an AR-15 pistol with a vertical fore-grip is not a pistol at all.¹⁷⁴ Furthermore, an AR-15 pistol with a vertical fore-grip cannot be a “rifle” because it lacks a buttstock.¹⁷⁵ If the firearm qualified as a “rifle,” the owner would be allowed to attach a fore-grip to the gun without fear of violating the NFA. However, if the firearm cannot be a pistol or a rifle, the ATF can then argue that the gun falls under the Act.

172. 27 C.F.R. § 479.11.

173. U.S. Dep’t of Justice, *Adding a Vertical Fore Grip to A Handgun* (May 4, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fifs-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [<https://perma.cc/GCW5-N6PP>].

174. *See id.* The inconsistency arises with the angled fore-grip, the attachment of which does not transform the pistol into an “any other weapon” under current ATF regulations. *See id.*

175. *See* 26 U.S.C. § 5845(c) (2012); *see also* 27 C.F.R. § 479.11; ATF Rul. 2011-4 (July 25, 2011), <https://www.atf.gov/firearms/docs/ruling/2011-4-pistols-configured-rifles-rifles-configured-pistols/download> [<https://perma.cc/J2GD-VNDV>] (A rifle is “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.”). Necessary for a rifle to be classified as such, therefore, is the presence of an attached buttstock.

Next, the Bureau points to the NFA's definition of "any other weapon." It claims that because the firearm does not meet the criteria of the definitions of a "rifle" or the ATF's definition of "pistol," it may be classified as an NFA-regulated "any other weapon."¹⁷⁶ "Any other weapon" includes "any weapon . . . capable of being concealed on the person from which a shot can be discharged."¹⁷⁷ If the AR-15 pistol were still legally classified as a "pistol," it could not be classified as an "any other weapon" because that category expressly excludes such firearms.¹⁷⁸ But the ATF seemingly maintains that the vertical fore-grip transforms the "pistol" into something else, despite its rifled bore.¹⁷⁹ Because the firearm does not qualify as a "rifle" or a "pistol" under the NFA or ATF regulations, it is classified as an "any other weapon."¹⁸⁰

Courts have already rejected the ATF's attempts to reclassify nonregulated pistols as regulated "any other weapons" due to the attachment of vertical fore-grips. The first case involving the attachment of a vertical fore-grip was *United States v. Davis*.¹⁸¹ The defendants were charged with violating several provisions of the NFA, including manufacturing suppressors without a tax stamp, attempting to sell suppressors without a license, and possessing unregistered pistols with attached vertical fore-grips.¹⁸² The Magistrate Judge dismissed the charges, holding that "[e]ven after being modified with grips, the pistols are still 'pistols' . . . and not 'any other weapon' as defined by 26 U.S.C. section 5845(e)."¹⁸³

176. See *supra* note 23–25 and accompanying text.

177. 26 U.S.C. § 5845(e) (emphasis added).

178. *Id.* ("Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition."). A "rifled bore" is the inner part of the barrel which has "rifling." "Rifling" is a series of lands and grooves inside the barrel which "create[s] the spin to the projectile that is needed for gyroscopic stability and accuracy" (similarly to a properly thrown football). RINKER, *supra* note 155, at 412.

179. See U.S. Dep't of Justice, *Adding a Vertical Fore Grip to A Handgun* (May 4, 2006), <https://www.atf.gov/firearms/docs/open-letter/all-fpls-may2006-open-letter-adding-vertical-fore-grip-handgun/download> [<https://perma.cc/GCW5-N6PP>].

180. See *id.*

181. Report of Magistrate and Order of Dismissal, *U.S. v. Davis*, Cr. No. 8:93-cr-00106-GRA (D.S.C. June 21, 1993).

182. *Id.* at ¶¶ 1, 4, 5.

183. *Id.* at ¶ 27.

The Ninth Circuit reached the same conclusion in *United States v. Fix*.¹⁸⁴ The court addressed a defendant appealing his conviction for violating the NFA by keeping an unregistered pistol with a vertical fore-grip.¹⁸⁵ The court held that the “weapon does not fit the definition required” of the section defining “any other weapon.”¹⁸⁶ A “pistol,” as defined by the ATF, requires only that the firearm be “a weapon *originally* designed, made, and intended to fire a projectile.”¹⁸⁷ Thus, the court determined that the “definition does not consider modifications of the weapon by the owner.”¹⁸⁸ Additionally, the Court held that even if the firearm was no longer a pistol, it would still not qualify as an “any other weapon” because “§§ 5845(a) and (e) expressly exclude[] weapons with a rifled bore.”¹⁸⁹

The Sixth Circuit reached the opposite conclusion in *United States v. Black*,¹⁹⁰ holding that a vertical fore-grip, when attached to a pistol, creates an “any other weapon” under the NFA.¹⁹¹ The case concerned a convicted felon who was arrested for driving without a license.¹⁹² In his car, police found a variety of firearms including a pistol with a vertical fore-grip.¹⁹³ The Court held that the ATF had ample authority to define a “pistol,” and that the “ATF’s [subsequent] interpretation of [its definition] is controlling unless ‘plainly erroneous or inconsistent with the regulation.’”¹⁹⁴ Even so, the Court called the interpretation a “close call.”¹⁹⁵

184. 4 F. App’x 324, 326 (9th Cir. 2001).

185. *See id.* at 326 (Weapon “was originally designed and made to be fired with one hand, and still could be, despite the addition of a foregrip.”).

186. *Id.*

187. 27 C.F.R. § 479.11 (2016) (emphasis added).

188. *Fix*, 4 F. App’x at 326.

189. *Id.*

190. 739 F.3d 931 (9th Cir. 2014).

191. *See id.* at 935.

192. *See id.* at 932.

193. *Id.* at 934.

194. *Id.* at 935 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

195. *Id.* (“While this may be a close call, we defer to the ATF’s interpretation of its own regulation if only because it is plainly consistent with the language of 26 U.S.C. § 5845(e).”). This Note disagrees with the court’s assertion that the ATF’s interpretation is plainly consistent because the Gun Control Act’s definition of “handgun” overrides the ATF’s authority to create its own, more restrictive definition of “pistol.”

Despite the holding of *Black*, the ATF's interpretation is not entitled to *Auer* deference. As held in *Fix*, the term "originally" in the ATF's definition of "pistol" modifies the words that follow it: "designed, made, and intended."¹⁹⁶ Additionally, the ATF's definition requires that pistols have "a short stock designed to be gripped with one hand."¹⁹⁷ The addition of a vertical foregrip does not conflict with this definition because a AR-15 pistol still has the necessary "pistol grip" and was *originally* designed and intended to be fired with one hand. As such, the ATF's regulation that prohibits vertical fore-grips on pistols should not receive *Auer* deference.

B. *Chevron Deference and the ATF's Regulation of Vertical Fore-Grips*

Perhaps more interestingly, the decision in *Black* did not address the argument that the ATF lacked the authority to promulgate a new definition that contradicts the Gun Control Act and therefore contravenes the will of Congress. Separate from *Auer* deference, the Court should have addressed whether the ATF was entitled to *Chevron* deference in promulgating a definition for "pistol" in light of the Gun Control Act's definition of "handgun." The Court instead focused only on the ATF's promulgated definition, ignoring Congress's definition of "handgun" in the Gun Control Act.

The ATF interpretation of the NFA in creating its definition of "pistol" is evaluated under *Chevron*. *Chevron* deference provides wide discretion to agencies by courts. First, the evaluating court asks "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."¹⁹⁸ However, even where Congress's intent is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."¹⁹⁹ Because the ATF undoubtedly has authority from Congress to

196. *United States v. Fix*, 4 F. App'x 324, 326 (9th Cir. 2001).

197. 27 C.F.R. § 479.11 (2016).

198. *Chevron, U.S.A., Inc., v. Nat. Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

199. *Id.*

make rules carrying the force of law and the ATF exercised that authority in promulgating its definition, *Chevron* is triggered.²⁰⁰

Even though *Chevron* grants great deference to the ATF, the Bureau's interpretation of the NFA, which purports to override the Gun Control Act's definition of "handgun" is a clear contravention of statutory language. The Gun Control Act's definition of "handgun" focuses entirely on the design of the firearm in question.²⁰¹ While the ATF creates a two-prong test for "pistols" that focuses on the physical characteristics of the firearm, it goes further to include within the NFA's regulatory reach all firearms "intended to fire a projectile (bullet) from one or more barrels when held in one hand."²⁰² This expanded definition allows the ATF to regulate firearms based on the use of the arm, which varies from person to person, rather than the immutable characteristics that the NFA and Gun Control Act seek to regulate. Such a focus on intent grants the Bureau carte blanche to pursue the individual misuse of firearms based on a vague and arguably subjective standard. This is a vast delegation of power that, at the very least, should not be inferred from a mere definitional provision.

If a court were to nevertheless find that the plain "handgun" language to be ambiguous, the ATF should still be denied *Chevron* deference because the Bureau's interpretation is not "a permissible construction of the statute."²⁰³ To determine what constitutes "a permissible construction," the legislative history of the category of "any other weapons" in the NFA is instructive. While not dispositive, the limited record regarding the NFA's "any other weapon" category shows two things: (1) pistols and rifles are excluded, and (2) the focus of the category is concealable weapons.²⁰⁴ The category of "any other weapon" was analyzed in a discussion between Congressmen Vinson and Treadway during a hearing of the House Committee on Ways and Means. Representative Vinson wanted to ensure that pistols or revolvers would not be included within the defini-

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

201. See 18 U.S.C. § 921(a)(29) (2012) (A handgun is "a firearm which has a short stock and is designed to be held and fired by the use of a single hand.").

202. 27 C.F.R. § 479.11 (emphasis added).

203. *Chevron*, 467 U.S. at 842–43.

204. *NFA Hearing*, *supra* note 15, at 88 (statements of Mr. Woodruff and Mr. Keenan); *id.* at 116 (statements of Mr. Vinson, Mr. Treadway, and Gen. Reckord).

tion, even though they can be concealed.²⁰⁵ The only other time the phrase of “any other firearm” or “any other weapon” arose during in the hearings was in passing, as part of the phrase “any other firearm capable of being concealed on the person.”²⁰⁶ Based on the legislative history, Congress only contemplated including those firearms that were not originally made as pistols which could actually be concealed.²⁰⁷

Even if we concede that an AR-15 pistol with a vertical fore-grip is no longer a pistol,²⁰⁸ these firearms are by no means concealable “on the person.” Although the barrel of an AR-15 pistol can range from 14 inches to 7.5 inches, the firearm is bulky and wider than concealable pistols. The AR-15 pistol, like other firearms with both pistol and rifle variants, was never designed to be concealed on the body. The Glock 26, on the other hand, is a common firearm selected by those who wish to conceal carry.²⁰⁹ By comparison, it has an overall length of 6.49 inches and a width of only 1.18 inches.²¹⁰ Additionally, an AR-15 must accommodate an external magazine, optics, and the added vertical fore-grip. The firearm simply is not capable of being “concealed on the person” unless the person goes to extraordinary lengths to do so.

C. *Further Complications from the ATF’s Fore-Grip Regulation Regime*

Unfortunately, the confusion regarding fore-grips does not end with vertical grips. The ATF has decided that although vertical fore-grips create an “any other weapon” as defined by the NFA, an angled fore-grip, such as that designed by Magpul Industries, does not. Magpul filed a patent on November 6,

205. *Id.*

206. *Id.* at 6 (statement of Homer S. Cummings, Att’y Gen. of the United States).

207. See H.R. REP. NO. 73-1780, at 2 (1934) (“The term ‘firearm’ is defined to mean a shotgun or rifle having a barrel of less than 18 inches in length, any other gun (except a pistol or revolver) if the gun may be concealed on the person.”).

208. Even without a forward grip, “assault weapon” pistols essentially require the shooter to place one hand in front of the magazine well, near or on the front handguard, to stabilize the pistol’s weight and manage recoil.

209. See Brandon Curtis, *The 10 Best Concealed Carry Guns*, CONCEALED NATION (July 12, 2014), <http://concealednation.org/2014/07/the-10-best-concealed-carry-guns/> [<https://perma.cc/6BJ4-RM6M>].

210. See *Glock 26*, GLOCK, INC., (last visited Mar. 22, 2017), <https://us.glock.com/products/model/g26> [<https://perma.cc/8RNA-XNFX>].

2009 for a forward grip that was angled, forming a triangle with the base of the triangle then attached to the bottom rail of a rifle's handguard.²¹¹ Unlike other vertical fore-grips, the angled fore-grip "position[s] the shooter's hand high on the centerline of the bore," which "helps [the shooter] mitigate recoil and control the weapon to facilitate faster, more accurate follow-up shots."²¹² It would make more sense to regulate the angled fore-grip than the vertical fore-grip because the angled grip is both more concealable and more effective than traditional vertical fore-grips.

On August 30, 2010, the ATF answered a series of questions in a letter regarding non-restricted AR-15 pistols. Without any further elaboration, the Chief of the Firearms Technology Branch, John R. Spencer, answered "yes" to the question: "Can I lawfully install a Magpul [Angled Fore-Grip] on the bottom accessory rail of the subject AR-15 type pistol?"²¹³ Although this grip still requires the shooter wishing to benefit from the angled fore-grip to use both hands when shooting (as would be required of a vertical fore-grip), only the vertical fore-grip can change a "pistol" into an "any other weapon." This interpretation has persisted for the seven years since the letter's release.

Angled fore-grips make a firearm *more* concealable than a vertical fore-grip does (although the firearm is still not reasonably concealable) simply due to the fact that the angled grip does not protrude from the firearm as much as the vertical one. If the legislative intent of Congress was to include AR-15 pistols with attached vertical fore-grips, it must certainly have also intended to include those with angled fore-grips. Regardless of the concealability argument, however, a fore-grip (vertical or angled) does not change the mechanical function of the firearm. To draw a distinction between the two fore-grips that prohibits using the less effective and concealable attachment defies logic entirely. The erroneous and inconsistent ATF interpretation of the NFA must be rejected as an impermissible construction of the NFA and the Gun Control Act's definition of "handgun."

211. See U.S. Patent No. 643497 (filed Nov. 6, 2009).

212. *AFG-Angled Fore Grip*, MAGPUL INDUS., INC. (last visited Mar. 22, 2017), <https://www.magpul.com/products/afg?productVariantID=VO346> [<https://perma.cc/LU59-AYGK>].

213. Spencer Letter, *supra* note 166, at 3.

When Congress failed to define “handgun” or “pistol” in the original provisions of the NFA, it may have determined that such definitions were unnecessary. It did not intend to delegate any authority on the matter to the ATF, as Congress subsequently defined “handgun” in the Gun Control Act.²¹⁴ Although the NFA did contain a catchall provision labeled “any other weapon,” Congress surely did not intend for the ATF to be permitted to hold that non-NFA-regulated rifles and pistols can easily be transformed into NFA-restricted arms by simply adding an attachment that does not alter the mechanical function of the gun. To hold otherwise would encourage administrative agencies to abuse the authority Congress has granted to them.

D. *The Sig Sauer Brace Controversy*

Although the ATF has been reluctant to pursue charges regarding vertical fore-grips, it has continued to criminalize other pistol attachments. Specifically, over just the last few years, the ATF set its sights on the “Sig Sauer” stabilizing arm brace. The brace was designed by Alex Bosco and quietly launched in 2013 by a company called SB-Tactical through the popular firearm website, Midway USA.²¹⁵ The brace’s purpose was noble: to aid wounded veterans in firing the AR-15 pistol. The “shooter would insert his or her forearm into the device while gripping the pistol’s handgrip, then tighten the Velcro straps for additional support and retention.”²¹⁶ As a result, a veteran who had lost one of his hands could still use his disabled arm to stabilize his AR-15 pistol during use.

The design was submitted to the ATF with the stated intent of “facilitat[ing] one handed firing of the AR-15 pistol for those with limited strength or mobility due to handicap.”²¹⁷ By installing this device as one would a buttstock, “it [becomes] no longer necessary to dangerously ‘muscle’ this large pistol during the one handed aiming process, and recoil is dispersed significantly, resulting in more accurate shooting without compromis-

214. 18 U.S.C. § 921(a)(29) (2012).

215. See Christian Lowe, *The Rise and Fall of the SB-15 ‘Sig-Brace’*, GRAND VIEW OUTDOORS (Mar. 24, 2015), <http://www.grandviewoutdoors.com/grand-view-outdoors/the-rise-and-fall-of-the-sb-15-sig-brace/> [https://perma.cc/7VAN-AQDX].

216. Current Letter, *supra* note 166, at 1.

217. *Id.*

ing safety or comfort.”²¹⁸ However, because the stabilizing brace is attached in the same manner as a traditional buttstock, shooters found that the brace, if placed against the shoulder, could be effectively used as a buttstock. Sergeant Joe Bradley of the Greenwood, Colorado Police Department submitted a letter to the ATF inquiring as to the legality of this practice. On March 5, 2014, the ATF responded in an individual letter (the “Revoked Letter”) that was later uploaded to the Internet. The Revoked Letter stated that “certain firearm accessories such as the Sig Stability Brace have not been classified . . . as shoulder stocks and, therefore, using the brace improperly does not constitute a design change” that would be necessary to “change the classification of the weapon per [f]ederal law.”²¹⁹

The Revoked Letter caused great excitement in the firearm community, causing a surge in the purchase and use of stabilizing braces. The Revoked Letter “determined that firing a pistol from the shoulder would *not* cause the pistol to be reclassified as [a short-barrel rifle].”²²⁰ Furthermore, the ATF insisted that “[g]enerally speaking, we *do not* classify weapons based on how an individual uses a weapon.”²²¹

Just months later, however, the ATF reversed course.²²² In a new letter (the “Current Letter”), the Acting Chief of the Firearms Technology Criminal Branch of the ATF disavowed the Revoked Letter as “contrary to the plain language of the NFA” and a misapplication of federal law.²²³ When used properly, according to the Current Letter, the Sig Brace “is not considered a shoulder stock.”²²⁴ However, when the same firearm is placed against the shoulder, the pistol is transformed into a NFA-restricted rifle and the shooter may be fined \$10,000 and imprisoned for ten years.²²⁵

218. *Id.*

219. Letter from Earl Griffith, Chief, Firearms Technology Branch, ATF, to Sgt. Joe Bradley, Greenwood, Colorado, Police Dep’t 1 (Mar. 5, 2014) [hereinafter Revoked Letter], https://www.scribd.com/fullscreen/216207869?access_key=key-%2026ke01u6fwjyzpgmfm06&allow_share=true&escape=false&view_mode=scroll [https://perma.cc/Z5CH-WRME].

220. *Id.*

221. *Id.*

222. See Current Letter, *supra* note 166.

223. *Id.* at 2. For the purposes of this note, it will be assumed that an open letter such as the Current Letter is applicable to every citizen and corporation.

224. *Id.*

225. See 26 U.S.C. §§ 5871, 5872(a) (2012).

The ATF's Current Letter portrays a troubling trend. A pistol cannot be transformed into a rifle merely because of where it is placed on the body. Furthermore, simply because something is designed for one purpose, does not make all other uses illegitimate.²²⁶ Firearms are machines that function in the same manner despite the positioning of the shooter. The size, firing mechanism, safety buttons or levers, and sights remain the same whether a pistol is placed against the shoulder or held in one hand. Put simply, nothing changes. Reasoning otherwise is contrary to the purpose and text of the NFA.

Agencies are generally granted deference when promulgating regulations due to their superior knowledge of the subject matter.²²⁷ However, to avoid abuse and to calm accountability concerns, the amount of deference an agency receives when it interprets a statute differs according to the facts.²²⁸ In this context, there are two types of deference: *Chevron* deference and *Skidmore* deference. *Chevron* deference requires the reviewing court to not disturb an agency's interpretation if it was issued pursuant to an agency's delegated authority and the regulation represents a "permissible construction of the statute."²²⁹ If Congress did not intend for the agency to issue binding interpretations of the statutory provision at issue, the agency action may nonetheless be afforded *Skidmore* deference.²³⁰ This second level of deference is a function of how well-reasoned an agency action is. Accordingly, *Skidmore* deference is based on four factors: "the thoroughness [of the agency's] consideration, the validity of its reasoning, the regulation's consistency with earlier and later pronouncements, and all those factors which give the regulation power to persuade, if lacking power to control."²³¹

The ATF's determination that a pistol with a stabilizing brace can be classified as a short-barrel firearm if shouldered should be evaluated under the *Skidmore* test. When choosing between *Chevron* and *Skidmore*, courts use a standard announced in *Unit-*

226. One such instance is the use of Listerine, which was originally in 1860 invented as a surgical antiseptic. See *From Surgery Antiseptic to Modern Mouthwash*, LISTERINE, <https://www.listerine.com/about> [<https://perma.cc/5ZCX-323J>].

227. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984).

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

229. *Chevron*, 467 U.S. at 842–43.

230. *Mead Corp.*, 533 U.S. at 227.

231. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

*ed States v. Mead Corp.*²³² Similar to the letters distributed by the ATF,²³³ the Court in *Mead* was tasked with determining whether a “classification ruling by the United States Customs Service deserves judicial deference.”²³⁴ The Court held that an agency receives *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority.”²³⁵ Delegation can be proven “by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.”²³⁶ If no such delegation occurred, the promulgated interpretation is evaluated under *Skidmore*.²³⁷

Although the NFA does grant the Director of the ATF and the Attorney General of the United States authority to “prescribe such rules and regulations as may be necessary for carrying the provisions of this Act into effect,”²³⁸ the finding that the use of a stabilizing brace turns a pistol into an unregistered short-barrel rifle was not promulgated under such authority. For that reason alone, *Chevron* deference should not apply. Additionally, and more fundamentally, Congress’s definitions of various types of firearms in the NFA and the Gun Control Act of 1968 show that it did not delegate to the ATF any authority to reclassify firearms due to how they are used on the shooter’s person. The text of the NFA is clear in that it seeks to regulate firearms based on physical characteristics, such as a shotgun “having a barrel or barrels of less than 18 inches” or “a rifle having a barrel or barrels of less than 16 inches.”²³⁹ Sections 5845 (a)–(f), the NFA’s definition provisions, do not contemplate individual use, but rather lay out measurements and other mechanical and aesthetic characteristics of the arms it seeks to regulate.²⁴⁰ Both the NFA and the Gun Control Act regulate firearms based solely on their functionality and ap-

232. 533 U.S. 218 (2001).

233. See Revoked Letter, *supra* note 219; Current Letter, *supra* note 166.

234. *Mead Corp.*, 533 U.S. at 221.

235. *Id.* at 218.

236. *Id.*

237. See *id.* at 226–27.

238. National Firearms Act of 1934, § 12, Pub. L. No. 73-474, 48 Stat. 1236, 1240; 26 U.S.C. § 599A (2012) (vesting this authority in the Attorney General).

239. 26 U.S.C. § 5845(a) (2012).

240. See *id.* § 5845(a)–(f).

pearance, and thus the ATF has no basis under either Act to regulate individual behavior. Congress's clear preemption of the ATF's ability to alter NFA definitions, coupled with the limited nature of its ruling letters, preclude the ATF's determination regarding the stabilizing brace from receiving *Chevron* deference.²⁴¹

Without *Chevron* deference, the ATF's criminalization of shouldering a stabilizing brace is evaluated under *Skidmore*. Under that standard, the ATF's ruling receives no deference and is plainly unlawful. Courts evaluate the *Skidmore* factors in varying ways, but appellate courts most commonly utilize the factors as a sliding scale test.²⁴² Still, the ATF determination on stabilizing braces fails the weight of the factors. The first factor, evaluating the "thoroughness evident in [the ATF's] consideration," weighs at least moderately against deference. Between its two ruling letters, the ATF completely reversed its reasoning over a matter of months. The Revoked Letter cited a determination made by the Firearms Technology Branch of the ATF not released to the public. This determination supposedly concluded "that the firing of a weapon from a particular position, such as placing the receiver extension of an AR-15 type pistol on the user's shoulder, does not change the [firearm's] classification."²⁴³ The ATF's Current Letter cites NFA definitions and other situations in which a particular use of a firearm or other device would change the classification of the item,²⁴⁴ but it never explains why the reasoning from its Revoked Letter was so perfunctorily set aside. The Current Letter's at-best cursory treatment of the contrary position raised in its own Revoked Letter reasonably suggests that the ATF did not thoroughly consider its final determination.

241. Indeed, irrespective of how the issue of *Chevron* deference is resolved, a reviewing court should be obligated to interpret any statutory ambiguities in favor of the gun owner. See HALBROOK, *supra* note 25, § 6.2 ("[T]he rule of lenity applies to all NFA definitions should any ambiguity arise."); see also *United States v. Thompson Center Arms Co.*, 504 U.S. 505, 517–18 (1992) (holding that the rule of lenity applies to the NFA).

242. See Kristin E. Hickman and Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1271 (2007) ("In 79 of 106, or 74%, of *Skidmore* applications, the reviewing court assessed at least one *Skidmore* factor in evaluating the administrative interpretation. By contrast, only 20 of 106, or 18.9%, of *Skidmore* applications reflected independent judgment.").

243. Revoked Letter, *supra* note 219, at 1.

244. See Current Letter, *supra* note 166, at 1; see also 26 U.S.C. § 5845 (2012).

Nevertheless, even if the ATF's Current Letter were to be facially convincing, it still must fail the *Skidmore* standard. The second *Skidmore* factor, analyzing the "validity of [the ATF's] reasoning,"²⁴⁵ likely provides the decisive blow to the ATF stabilizing brace determination. The Bureau's reasoning depends on the definitions set forth by the NFA. First, the ATF points to the definition of "firearm" as being a shotgun with a barrel of less than eighteen inches or a rifle with a barrel less than sixteen inches.²⁴⁶ Furthermore, both "rifle" and "shotgun" are defined as "a weapon designed or *redesigned*, made or remade, and intended to be fired from the shoulder."²⁴⁷ Finally, *Webster's II New College Dictionary*, which the ATF itself cited, defines "re-design" as "alter[ing] the appearance or function of" an item.²⁴⁸ So, taking all this together, the ATF concluded that using the stabilizing brace as a buttstock constitutes the "redesign" of a pistol into a NFA-regulated rifle. The addition of a stabilizing brace supposedly alters a firearm's appearance, and the misuse of that brace presumably alters a firearm's function.²⁴⁹

Beyond the literal reading of the NFA's text, the ATF provides two examples in its Current Letter to show that its interpretation is not novel. First, the ATF has regulated behavior before by determining that a person who "misuses" an unregulated flare launcher as a grenade launcher has "made" an NFA weapon.²⁵⁰ Far from the single-shot flare guns commonly found on ships, many flare launchers today resemble grenade launchers commonly used by armed forces around the world.²⁵¹ When used to launch flares, these items are not regulated by the NFA.²⁵² However, if one loads anti-personnel ammunition, an

245. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

246. See Current Letter, *supra* note 166, at 1; see also 26 U.S.C. § 5845.

247. 26 U.S.C. § 5845

248. *Redesign*, WEBSTER'S II NEW COLLEGE DICTIONARY (3rd ed. 2005).

249. Current Letter, *supra* note 166, at 2.

250. *Id.*

251. See, e.g., *Spikes Tactical 37mm Flare Launcher*, BROWNELLS (last visited Feb. 4, 2017), <http://www.brownells.com/shooting-accessories/flashlights-accessories/accessory-mounts/37mm-flare-launchers-kaos-stock-systems-12-havoc-launcher-sku100-007-034-43848-91011.aspx> [<https://perma.cc/67YV-JHFX>].

252. See 26 U.S.C. §5845(f)(3) ("The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device.").

NFA-regulated destructive device has been created.²⁵³ Second, the ATF cites a previous Bureau determination, Revenue Ruling 61-45, that designates Luger and Mauser pistols with buttstocks as short-barrel rifles.²⁵⁴

Ultimately, the ATF's conclusions here must fail. Accepting the definition of "redesign" forwarded by the ATF, the "misuse" of the stabilizing brace, to which the ATF originally objected, *still* does not meet the definition's requirements. First, the appearance of a pistol with an attached stabilizing brace is objectively the same whether fired from the shoulder or the arm. Nothing is added or taken away from the pistol when pressed to the shoulder. When placed on the ground after being fired from either the shoulder or the arm, what remains is *still* a pistol with a stabilizing brace, nothing more.

Second, the function of the firearm has also not changed. When, as the ATF argues, a flare gun is "misused" as a grenade launcher, the flare gun's very function changes. Rather than firing flares, it is now firing grenades. This is true whether or not a particular flare guns can seamlessly load and fire flares, anti-personnel rounds, or 37mm or 40mm grenades. Moreover, the shooter must aim and take precautions with a grenade launcher differently than he would a flare, and the specialized 37mm grenade itself is an addition to the flare gun. Conversely, in the context of the stabilizing brace, the AR-15 pistol fires the same ammunition it always did, without any change in form or function. The stabilizing brace is not manipulated, the fire rate of the firearm remains the same, the gas port is untouched, the trigger bears the same weight, and the shells feed and eject in the same manner as when the brace is "properly" utilized. There is, admittedly, an increase in accuracy and recoil management when using the brace as a buttstock, but these factors have nothing to do with the firearm's position. They instead relate to the shooter's position on the firearm. Therefore, alt-

253. See ATF Rul. 95-3 (1995), <https://www.atf.gov/firearms/docs/ruling/1995-3-3738mm-gasflare-guns-anti-personnel-ammunition-are-defined-nfa-weapons/download> [<https://perma.cc/NZB9-VMZC>].

254. Current Letter, *supra* note 166, at 1. The Luger "Long 08" or more commonly, the "Artillery Model" pistol was adopted by the German Army on August 22, 1908, though stock attachments appeared in later years. The C96 Mauser pistol saw use in both World Wars and a variety of colonial insurrections. See JOHN WALTER, *THE LUGER BOOK* 32 (1986); see also IAN V. HOGG, *MILITARY PISTOLS & REVOLVERS* 91 (1987); GEORGE MARKHAM, *GUNS OF THE REICH* 58 (1989).

though the definition of “redesign” requires the alteration of “appearance or function,” the “misuse” of the stabilizing brace, without more, cannot meet this definition.

The next of the *Skidmore* factors, “consistency with earlier and later pronouncements,”²⁵⁵ also strikes against the ATF. As mentioned, both letters were released within a matter of months, completely conflicting with each other. The ATF’s citation to earlier precedent, its determination that P.08 Luger and C96 Mauser pistols with a buttstock were short-barrel rifles,²⁵⁶ cannot dent the legal effect of this inconsistency. The analogy is disingenuous, at best. These firearms, commonly used during the First and Second World Wars, *were* “redesigned” or “remade” as prohibited by the NFA.²⁵⁷ These pistols were designed to be “pistols,” but they were turned into rifles through the addition of a buttstock.²⁵⁸ Here, the stabilizing brace was neither designed nor approved as a buttstock. When attached to a “pistol,” the ATF concedes that the firearm’s classification does not change because the stabilizing brace is not itself a buttstock.²⁵⁹ As such, there can be no “redesign” of the firearm. Nothing is added or taken away from the pistol, whether placed on the ground, fired attached to the forearm, or fired from the shoulder. Finally, even if this argument is not convincing, the ATF has since removed Mauser and Luger pistols with attached buttstocks from the purview of the NFA as collector’s items.²⁶⁰

255. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

256. See Current Letter, *supra* note 166, at 1.

257. The Luger “Long 08” or more commonly, the “Artillery Model” pistol was adopted by the German Army in 1908, though stock attachments appeared in later years. See WALTER, *supra* note 254, at 32.

258. Some variants of the C96 included a buttstock that doubled as a holster. This is of no consequence here as stock is not attached to the pistol and the pistol cannot be used when it is in the holster. Meanwhile nothing needs to be adjusted or altered to shoulder a stabilizing brace. See *C96 Mauser Features*, FIREARMS GUIDE (last visited Feb. 4, 2017), http://www.firearmsguide.com/index.php?option=com_firearms&view=firearms&Itemid=106 [https://perma.cc/L5TF-YZCT].

259. See Current Letter, *supra* note 166, at 1.

260. See BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, CURIOS AND RELICS LIST § III, <https://www.atf.gov/firearms/docs/curios-or-relics-list-update-january-2008-through-june-2014pdf/download> [https://perma.cc/3M3R-GENY].

The reasoning of the ATF in its usage-based determination of stabilizing braces leaves much to be desired. As demonstrated above, the Bureau's thoroughness is demonstrably lacking, its reasoning has many fatal flaws, and its determination is not consistent with previous interpretations of the NFA. Had the Agency done an honest evaluation of the Act and its own determinations, it would have determined that a pistol with a brace is still just a "pistol." For a court to allow such inconsistency would create a type of Schrödinger's firearm problem. In such a regime, a firearm would both violate and not violate the NFA at any given time. Such inconsistency and invalid reasoning should not be tolerated by courts, negating any persuasive effect the Bureau's decision could have had.

IV. CONCLUSION

There are more people filing applications for NFA firearm transfers now than at any time since the Act's enactment in 1934.²⁶¹ Although the NFA has been presumed constitutional for nearly eighty-two years, Congress surely did not intend for various pieces of plastic, which do not alter the mechanical function of a firearm, to land a person in prison for ten years with a \$10,000 fine. Similarly, there is no indication that Congress considered the intent of a person using a firearm in applying these penalties. As such, the ATF regulations determining that a pistol with a vertical fore-grip is an "any other weapon," and that a pistol with a stabilizing brace is a short-barrel rifle when shouldered, should not receive deference under *Chevron* or *Skidmore*. The regulations are poorly reasoned and exceed the plain language of the NFA.

Unfortunately, these ATF regulations are simply emblematic of a larger issue. It is not simply the ATF, but rather the National Firearms Act itself, that has enabled these short-barrel firearm regulations to come to life. Despite the Court's holding in *United States v. Miller*, subjecting these firearms to the NFA's regulatory apparatus is unconstitutional. The simple truth is that short-barrel firearms are no different than non-restricted firearms. The continued restriction of short-barrel firearms serves no purpose except to arbitrarily condemn citizens to

261. See *supra* note 84–85 and accompanying text.

grave penalties for what usually amounts to an honest mistake. Although the debate regarding firearm rights will continue to rage indefinitely, courts have a duty to “protect constitutional rights from extinction by means both direct and indirect.”²⁶² This duty also must also apply to encroachments of the NFA, rendering some of its provisions unconstitutional.

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262. *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, at *78–79 (D.N. Mar. I. Sept. 28, 2016); *see also Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1156–63 (9th Cir. 2014) (discussing the history of judicial review of state legislation restricting or banning the carry of arms during the Antebellum Period).

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