HOW MUCH AMBIGUITY IS AMBIGUOUS?: AN ANALYSIS OF *CARGILL V. GARLAND* AND THE ROAD TO A RESURGENCE OF THE RULE OF LENITY

Alexander Storzillo[*]

ABSTRACT

The rule of lenity states that if a criminal law is ambiguous, a court must construe it narrowly in a way most favorable to the defendant. The rule serves two critical functions. First, by limiting a court's ability to interpret ambiguity within a penal law, Congress's power to define crime and punishment is preserved, thus upholding the separation of powers. Second, by construing ambiguity in favor of a defendant and ensuring that one does not have to guess whether their conduct is proscribed, the right to fair notice is guarded and due process vindicated. Contemporarily, when the rule has been used, the separation of powers function has been elevated at the expense of due process protection. Courts have been unable or unwilling to balance the two primary functions of lenity, leading the rule to be rarely invoked and typically found in dissenting opinions.

In 2018, in response to the Route 91 Harvest Music Festival shooting, The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) changed its longtime stance on the legality of bump stock attachments to semi-automatic rifles. The ATF's Final Rule proposed to "clarify" the arguably ambiguous text of the Firearms Owner's Protection Act and the National Firearms Act, prohibiting the sale or possession of machine guns and any parts that can convert a weapon into a machine gun. Michael Cargill, a bump stock owner, challenged the ATF's new interpretation and Final Rule. Although the Supreme Court handed down its decision in Garland v. Cargill *in June 2024,*

[*] Graduate of Rutgers Law School, January 2025. I would like to express my sincere thanks to my faculty advisor, Professor Megan Admire, for her invaluable guidance during the writing process and for the foundational skills she imparted in my first-year legal writing course.

this Note will argue that the Court missed a pivotal opportunity to finally articulate the level of ambiguity needed within a statute to trigger the rule of lenity, and in turn, pave the way for the rule's resurgence in the modern era.

TABLE OF CONTENTS

I. INTRODUCTION

At 10:05 P.M. on October 1, 2017, Stephan Paddock fired the first shots, culminating in "the worst mass shooting" in American history.[1] Seconds later, flashes could be seen emanating from the thirty-second floor of the Las Vegas Mandalay Bay Hotel as bullets rained down upon the Route 91 Harvest Music Festival.[2] Within eleven minutes, fifty-eight concertgoers were dead, and another 869 were wounded.[3] As videos of the tragedy circulated, experienced recreational shooters recognized the characteristic rhythm and sound that could only be produced by a bump stock device.[4] This was confirmed after an investigation of Stephan Paddock's hotel room recovered twelve semi-automatic rifles modified with bump stocks.[5]

A. ATF Issues the Final Rule

In the wake of the Route 91 Harvest Music Festival massacre, President Donald Trump issued a memo directing the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to "dedicate all available resources" to propose a rule banning "all devices that turn legal weapons into machineguns."[6] The following month, ATF proposed that it would "clarify" that non-mechanical bump stocks are machine guns as defined by the National Firearms Act and the Gun Control Act.[7] ATF supported its reasoning by noting that such devices enable a shooter to "initiate a

1. Eileen Holliday, *Backstage Chaos, Fears Still Fresh From 2017 Las Vegas Music Fest Massacre*, N.Y. POST, https://nypost.com/2022/10/01/fears-still-fresh-from-2017-las-vegas-festival-shooting-massacre/ (Oct. 1, 2022, 4:06 PM).

2. *Id*.

3. *Id*. Shooter Stephan Paddock, sixty-four, who took his own life, is not included in the death toll. *Id.* No known motive has been discovered. *Id.* The FBI has speculated that Paddock was angry over how the casinos treated him. *See* Rio Yamat & Ken Ritter, *FBI Documents Give New View into Las Vegas Shooter's Mindset*, ASSOCIATED PRESS (Mar. 30, 2023, 10:01 PM), https://apnews.com/article/las-vegas-shooter-9bbd180cf3aa6d3ea1a37bbfb7144ae1.

4. Martin Kaste, *The Politics of Bump Stocks, 1 Year After Las Vegas Shooting*, NPR (Sept. 26, 2018, 5:14 AM), https://www.npr.org/2018/09/26/650454299/the-politics-of-bump-stocks-one-year-after-las-vegas-shooting ("I knew for a fact it was a bump stock as soon as I heard the video . . . .").

5. *ATF: Las Vegas Shooter Had 12 Guns Modified to Mimic Automatics - Live Updates*, CBS NEWS, https://www.cbsnews.com/news/victims-of-las-vegas-shooting-list-names-latest-update/ (Oct. 6, 2017, 8:55 AM).

6. Application of the Definition of Machinegun to "Bump Fire" Stocks and Other Similar Devices, 83 Fed. Reg. 7949 (Feb. 20, 2018) (uncodified Presidential memorandum).

7. Bump-Stock-Type Devices, 83 Fed. Reg. 13442 (Mar. 29, 2018) (overruled by Garland v. Cargill, 602 U.S. 406 (2024)).

continuous firing cycle with a single pull of the trigger."[8] These changes were set in motion despite two failed bills proposed by Congress directed at the issue of bump stocks.[9] On December 26, 2018, ATF issued its Final Rule, which ordered citizens possessing bump stocks (mechanical and non-mechanical) to destroy or abandon them at an ATF office by March 26, 2019.[10] Senator Diane Feinstein, who proposed one of the bills that would have banned bump stocks, recognized the "about face" by the ATF and predicted the forthcoming litigation that would result.[11]

B. The Cargill Dispute

Firearms instructor and former U.S. Army veteran Michael Cargill[12] lawfully obtained two Slide Fire non-mechanical bump stocks in April 2018.[13] On March 25, 2019, Cargill surrendered both bump stocks to the ATF in compliance with the Final Rule.[14] That same day, Cargill filed suit in the Western District of Texas to enjoin Attorney General William Barr and acting ATF Director Regina Lombardo from enforcing the Final Rule.[15]

Through an analysis of Michael Cargill's challenge to ATF's Final Rule, alongside the historical context, goals, and pitfalls of the rule of lenity, this Note hopes to demonstrate the problems associated with administrative agencies interpreting criminal statutes and the need for a uniform standard with regard to the rule of lenity. This Note will also argue that the Supreme Court missed a pivotal opportunity in *Garland v. Cargill* by only addressing whether a non-mechanical bump stock is a machine gun and not clarifying the level of ambiguity needed within a statute to trigger the rule of lenity, setting a uniform standard for a resurgence of the rule.

8. *Id.*

9. *See* H.R. 3947 115th Cong. (2017); H.R. 3999 115th Cong. (2017).

10. Bump-Stock-Type Devices, 83 Fed. Reg. 66514, 66514–16 (Dec. 26, 2018).

11. *See* Press Release, Diane Feinstein, Senator, Feinstein Statement on Regulation to Ban Bump Stocks (Mar. 23, 2018) ("Unbelievably, the regulation hinges on a dubious analysis claiming that bumping the trigger is not the same as pulling it. The gun lobby and manufacturers will have a field day with this reasoning.").

12. *About Michael*, MICHAEL CARGILL, https://www.michaelcargill.com (last visited Apr. 17, 2025).

13. Cargill v. Barr, 502 F. Supp. 3d. 1163, 1182 (W.D. Tex. 2020), *aff'd*, 20 F.4th 1004 (5th Cir. 2021), *rev'd en banc*, 57 F.4th 447 (5th Cir. 2023).

14. *Id.*

15. Petition for Writ of Certiorari at 9, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976).

II. BUMP STOCKS EXPLAINED

A bump stock is an accessory that replaces the existing stock[16] on a semi-automatic rifle, freeing the rifle to slide back and forth rapidly, harnessing the recoil energy when the weapon is fired.[17] This enables the shooter to "bump fire," a technique where the recoil energy allows the shooter to quickly reengage the trigger, increasing the weapon's rate of fire.[18] An experienced shooter can accomplish bump firing without modifying the rifle, though it is much more challenging.[19] The necessary components of a non-mechanical bump stock[20] consist of a sliding shoulder stock, a trigger ledge, and a rectangular receiver module to guide the recoil energy of the weapon when fired.[21] To initiate the sequence, the shooter must provide and maintain forward pressure on the forebody of the rifle; the weapon slides back and forth with each shot while the recoil energy forces the gun backward, re-engaging the trigger against the shooter's stationary finger that is rested on the trigger ledge.[22] This process facilitates the repeated functioning of the trigger, enabling a shooter with a semi-automatic rifle to fire much more rapidly than could be accomplished with the factory stock and components of the rifle.[23]

16. Dave Campbell, *Back to Basics: Rifle Stock Components & Designs*, NRA AM. RIFLEMAN (Feb. 15, 2017), https://www.americanrifleman.org/content/back-to-basics-rifle-stock-components-designs/ ("A rifle stock is a device that provides an interface between the shooter and the rifle. Its foremost purpose is to allow the shooter a repeatable point of contact in relation to the rifle's aiming device.").

17. Larry Buchanan, *What is a Bump Stock and How Does It Work?*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html (June 14, 2024).

18. Cargill v. Garland, 57 F.4th 447, 453–54 (5th Cir. 2023) (describing a bump stock's function with diagrams).

19. *Barr*, 502 F. Supp. at 1176 (summarizing expert testimony). Jerry Miculek, a seasoned professional shooter, can fire an entire thirty round magazine in under five seconds with just his trigger finger and a non-modified rifle. Max McGuire, *Lawmakers are Falling for the Bumpfire Trap*, WASH. EXAM'R (Oct. 7, 2017, 3:33 PM), https://www.washingtonexaminer.com/red-alert-politics/lawmakers-falling-bumpfire-trap.

20. Non-mechanical bump stocks lack springs or other internal mechanical devices that automatically assist the shooter to engage bump firing. *Garland*, 57 F.4th at 453–54 (describing their function with diagrams). Non-mechanical bump stocks are the focus of this discussion and are currently at issue.

21. *Id.* at 453.

22. *Id.* at 453–54.

23. *See id.*; *see also* Buchanan, *supra* note 17 (comparing the Route 91 Harvest Music Festival shooter's ability to fire approximately ninety shots in ten seconds utilizing a bump stock with the Orlando Pulse Nightclub shooter's ability to fire approximately twenty-four shots in nine seconds with a traditional, non-modified semi-automatic rifle).

III. ATF CLASSIFICATION PROCESS

Since the first bump stocks were invented in the early 2000s, ATF has distinguished mechanical from non-mechanical bump stocks when categorizing an accessory as a machine gun.[24] Manufacturers and owners can submit their devices to the ATF's Firearms Technology Branch[25] and receive the Bureau's current position on a particular device.[26] From 2006 until 2017, ATF issued "dozens" of classification letters categorizing non-mechanical bump stocks as a legal "firearm part" and, therefore, not regulated under the Gun Control Act or the National Firearms Act.[27] In the wake of the Route 91 Harvest Music Festival massacre, the ATF changed its longtime stance on non-mechanical bump stocks and classified them as machine guns, thus outlawing them and leading to the present controversy.[28]

IV. MACHINE GUNS VS. SEMI-AUTOMATICS

As explained by an en banc panel of the Fifth Circuit in its review of *Cargill*, "to understand what a machine gun is, it is helpful to understand what a machine gun is *not*."[29] Across both semi-automatic weapons and machine guns, the firing mechanism consists of four main parts: a trigger, sear, hammer, and disconnector.[30]

24. *Garland*, 57 F.4th at 455 ("When ATF first considered mechanical bump stocks in 2006, it categorized them as machineguns . . . ATF maintains that classification.").

25. The ATF Firearms Technology branch is a specialized division that provides expert technical support to the ATF, law enforcement agencies, the firearms industry, Congress, and the general public. *See Firearms and Ammunition Technology*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES, https://www.atf.gov/firearms/firearms-and-ammunition-technology (Oct. 5, 2020). The division makes technical determinations concerning all firearms approved for domestic importation. *See id*. The division is also charged with rendering opinions on the legality of newly designed firearms and accessories. *See id*.

26. *See* Cargill v. Barr, 502 F. Supp. 3d. 1163, 1177 (W.D. Tex. 2020), *aff'd*, 20 F.4th 1004 (5th Cir. 2021), *rev'd en banc*, 57 F.4th 447 (5th Cir. 2023).

27. *Garland*, 57 F.4th at 455.

28. *See id.*

29. *See id*. at 457.

30. *See id.* at 452.

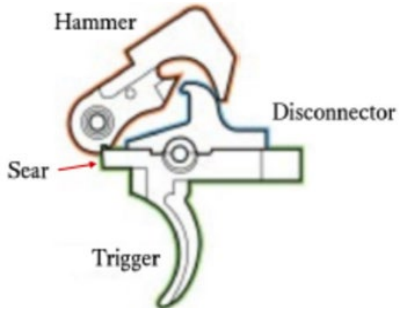

Diagram illustrating a semi-automatic firing mechanism[31]

"The trigger is the interface between the gun's internal mechanism and the human finger."[32] When this curved lever is pulled, it initiates the firing mechanism, which will cause the gun to fire a cartridge.[33] The sear holds the hammer back until the correct pressure is applied to the trigger.[34] The hammer, when released by the trigger and sear, "rotates forward and strikes the firing pin" that is then driven into the bullet cartridge, beginning the process that propels the cartridge out of the gun's barrel.[35] The disconnector disengages "the connection between the trigger and sear . . . each time a shot is fired."[36]

In a semi-automatic weapon, "the trigger must be released to reconnect the trigger . . . to fire the next shot."[37] A semi-automatic firearm may be rapidly fired with each trigger pull, but always "corresponds one-to-one with bullets fired."[38] The defining characteristics of a semi-automatic firearm are thus the need to reset the trigger after each shot and the ratio of trigger pulls to bullets fired.[39]

31. *Id.*
32. *Id.*
33. CONN. DEP'T OF ENERGY & ENV'T PROT., CONNECTICUT HUNTER SAFETY MANUAL 15 (2024).
34. *Sear*, U.S. CONCEALED CARRY, https://www.usconcealedcarry.com/resources/terminology/parts-of-firearms/sear/ (last visited Apr. 17, 2025).
35. Heidi Lyn Rao, *Understanding Hammer-Fired vs. Striker-Fired Pistols*, NRA WOMEN (Dec. 14, 2021), https://www.nrawomen.com/content/understanding-hammer-fired-vs-striker-fired-pistols/.
36. George Harris, *The Semi-Automatic Disconnector: How Does It Work?*, NRA SHOOTING ILLUSTRATED (July 9, 2018), https://www.shootingillustrated.com/content/the-semi-automatic-disconnector-how-does-it-work/.
37. *Id.*
38. Cargill v. Garland, 57 F.4th 447, 453 (5th Cir. 2023).
39. *See id.* at 452–53.

Though a semi-automatic and automatic share *most* of the same parts, an automatic firearm is equipped with an "auto sear."[40] This variation on a traditional sear allows the hammer to be released and re-cocked in a pendulum swing motion for as long as the trigger remains depressed.[41] This allows an automatic firearm to shoot continuously for as long as the user maintains pressure on the trigger or until ammunition is depleted.[42]

A. History of Machine Gun Legislation

1. The National Firearms Act of 1934

On a cold February morning in Chicago's North Side, seven men associated with the notorious gangster George "Bugs" Moran were lined up against a wall in a garage at 2122 North Clark Street and shot execution style.[43] What was subsequently dubbed the "St. Valentine's Day Massacre" paved the way for the first significant gun control legislation in United States history: The National Firearms Act of 1934 ("NFA").[44] The Act imposed criminal, regulatory, and tax requirements on weapons favored by gangsters, including machine guns,[45] shotguns, and rifles with barrel lengths less than eighteen inches, as well as firearm silencers and mufflers.[46] While the Act imposed a registration

40. *Id.* at 453.

41. *See id.*

42. *Id.*

43. *The St. Valentine's Day Massacre*, CHI. TRIB., https://www.chicagotribune.com/nation-world/chi-chicagodays-valentinesmassacre-story-story.html (May 23, 2019, 9:28 PM).

44. *See generally* National Firearms Act of 1934, Pub. L. No. 73–474, 48 Stat. 1236. *See also* Edward McClelland, *When a Mass Shooting Begat Gun Control*, CHI. MAG. (Aug. 9, 2019, 1:28 PM), https://www.chicagomag.com/news/august-2019/when-a-mass-shooting-begat-gun-control/. ("The fact that the victims had been murdered with Thompson submachine guns-so associated with local mobsters they were nicknamed the Chicago Typewriter-led to the passage of the National Firearm's Act of 1934.").

45. "The term 'machine gun' means any weapon which shoots, or is designed to shoot, automatically or semiautomatically, more than one shot, without manual reloading, by a single function of the trigger." § 2, 48 Stat. at 1237. At the time of passage, "single function of the trigger" and "single pull of the trigger" were used interchangeably by some. *See National Firearms Act: Hearings on H.R. 9066 Before the Comm. on Ways and Means*, 73rd Cong. 40 (1934) (statement of Karl. T. Frederick, President of the National Rifle Association of America).

46. *See National Firearms Act*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/rules-and-regulations/national-firearms-act (Mar 14, 2025).

tax of $200,[47] an amount likely easily paid by a notorious gangster, the real deterrence rested in requiring the registrant to be fingerprinted and photographed.[48] This registration requirement enabled law enforcement to attach charges to an otherwise difficult-to-pin-down criminal simply for possessing an unregistered firearm.[49] The Act was challenged as violative of the Second Amendment in 1939 and upheld by a unanimous decision by the United States Supreme Court.[50]

2. The Gun Control Act of 1968

In the thirty years since President Franklin Delano Roosevelt signed the National Firearms Act into law, no significant gun control legislation had been passed.[51] The assassination of President John F. Kennedy sparked a renewed interest in gun control that was perpetuated by the assassinations of Martin Luther King Jr. and Robert F. Kennedy in 1968.[52] In response, on October 22, 1968, President Lyndon B. Johnson signed the Gun Control Act of 1968 ("GCA") into law.[53] The most notable feature of the Act was its ban on interstate shipments of firearms and ammunition to private purchasers.[54] This was a direct response to Lee

47. Adjusted for inflation, this equates to approximately $4,700 in 2024. *Inflation Calculator*, FED. RSRV. BANK MINNEAPOLIS, https://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator (enter "200" into "$" box and select "1934" for the year) (last visited Apr. 17, 2025). This, however, made ownership to the average citizen almost impossible, as the average annual income was about $1,780. *See* Ronald G. Shafer, *They Were Killers With Powerful Guns. The President Went After Their Weapons*, WASH. POST (May 26, 2022, 10:48 AM), https://www.washingtonpost.com/history/2022/05/26/fdr-machine-gun-control-dillinger/.

48. Gabe Bullard, *That Time Mob Violence Inspired Gun Control in America*, NAT'L GEOGRAPHIC (June 14, 2016), https://www.nationalgeographic.com/science/article/united-states-machine-gun-ban.

49. *Id.* Attorney General Homer Cummings made this intent clear in his comments to the House Ways and Means Committee in 1934: "Therefore, when we capture one of those people, we have simply a plain question to propound to him-where is your license; where is your permit? If he cannot show it, we have got him and his weapons, and we do not have to go through an elaborate trial, with all kinds of complicated questions arising. That is the theory of the bill." *National Firearms Act: Hearings on H.R. 9066 Before the Comm. on Ways and Means*, 73rd Cong. 10 (1934) (statement of Att'y Gen. Homer Cummings).

50. *See generally* United States v. Miller, 307 U.S. 174 (1939).

51. *See* Olivia B. Waxman, *How the Gun Control Act of 1968 Changed America's Approach to Firearms—And What People Get Wrong About That History*, TIME, https://time.com/5429002/gun-control-act-history-1968/ (Oct. 30, 2018, 11:52 AM).

52. *See id.*

53. *See* Waxman, *supra* note 51; *see also* Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213.

54. Waxman, *supra* note 51; Lyndon B. Johnson, President, Remarks Upon Signing the Gun Control Act of 1968 (Oct. 22, 1968) ("Some of you may be interested in knowing really

Harvey Oswald obtaining the rifle he used to assassinate JFK through an advertisement in an NRA magazine.[55] Additionally, the Act banned sales of firearms to minors, felons, drug addicts, and "mental defective[s]."[56] Concerning machine guns, the GCA broadened the definition within the NFA to encompass components used for converting a firearm into a machine gun and components from which a machine gun can be constructed.[57] Though the Act further restricted the possession and sale of firearms, it has been critiqued as a compromise that did not go far enough.[58]

3. Firearms Owners' Protection Act of 1986

In 1986, Congress attempted to strike a balance between the protection of lawful gun owners and those who wished for further restrictions on the right.[59] On one hand, the Firearms Owners' Protection Act ("FOPA")[60] liberalized the interstate transport of firearms by establishing a "peaceable journey" provision allowing lawful gun owners of one state to transport the firearm through states in which they do not hold a valid permit.[61] As a counterbalance, the FOPA amended the GCA to include a prospective ban on the private possession and transfer of

what this bill does: It stops murder by mail order. It bars the interstate sale of all guns and the bullets that load them.").

55. *See* Waxman, *supra* note 51.

56. § 922, 82 Stat. at 1220.

57. *Id.* at 1231.

58. *See* Waxman, *supra* note 51 ("It was the first major gun control measure in the United States in 30 years, but its passage earned this dismissive take in the pages of TIME: 'better than nothing.'"); Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 U. CHI. J. LEGAL STUD. 133, 147 (1975) ("The Gun Control Act of 1968, like its 1938 ancestor, was thus something of a compromise candidate at the time of its passage—representing concession on the part of those opposed to any further federal controls and those who desired extensive further federal involvement.").

59. *See* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 585 (1986) (quoting 132 CONG. REC. H1665 (daily ed. Apr. 9, 1986) (statement of Rep. Tallon)) ("FOPA was predictably lauded as 'necessary to restore fundamental fairness and clarity to our Nation's firearms laws' . . . ."); *History of Federal Firearms Laws in the United States*, U.S. DEP'T OF JUST., https://www.justice.gov/archive/opd/AppendixC.htm (last visited Apr. 17, 2025); Cargill v. Barr, 502 F. Supp. 3d. 1163, 1177 (W.D. Tex. 2020), *aff'd*, 20 F.4th 1004 (5th Cir. 2021), *rev'd en banc*, 57 F.4th 447 (5th Cir. 2023) ("The legislative history of the FOPA further describes 'the need for more effective protection of law enforcement officers from the proliferation of machineguns.'") (quoting H.R. Rep. No. 99–495, at 4 (1986)).

60. 18 U.S.C. § 921 *et seq.*

61. *See Federal Firearms Transportation Laws*, U.S. CONCEALED CARRY ASSOC. https://www.usconcealedcarry.com/resources/federal-ccw-law/federal-firearms-transportation-laws/ (last visited Apr. 17, 2025).

machine guns.[62] Violation of this provision is a felony punishable by up to ten years imprisonment.[63] Currently, under both the GCA and the NFA, Congress has defined the term "machinegun" as:

> [A]ny weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.[64]

4. Delegation of Statutory Authority

Prior to 2002, the administration and enforcement of the NFA were shared between the Secretary of the Treasury and the ATF.[65] In January 2003, the ATF was transferred to the U.S. Department of Justice.[66] Similarly, the authority under the GCA once belonged to the Secretary of the Treasury and was subsequently transferred to the U.S. Attorney General.[67] These transfers left the U.S. Attorney General with the sole authority for administration and enforcement of the NFA and the GCA.[68] The Attorney General has since delegated his authority under the NFA and the GCA to the ATF.[69]

62. *See* 18 U.S.C. § 922.

63. 18 U.S.C. § 924(a)(2).

64. 26 U.S.C. § 5845(b).

65. *See* 26 U.S.C. § 7801(a)(2)(B). "[T]he Secretary of the Treasury was tasked with 'the administration and enforcement' of the statute, while ATF was tasked with issuing certain 'rulings and interpretations' related to the NFA's requirements." Cargill v. Barr, 502 F. Supp. 3d 1163, 1177 (W.D. Tex. 2020), *aff'd,* 20 F.4th 1004 (5th Cir. 2021), *rev'd en banc*, 57 F.4th 447 (5th Cir. 2023) (quoting 26 U.S.C. § 7801(a)(2)(B)).

66. *Transfer of ATF to U.S. Department of Justice*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES, https://www.atf.gov/our-history/timeline/transfer-atf-us-department-justice (Sept. 28, 2016) ("The Homeland Security Act split the missions and functions of ATF into two agencies: The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) transferred to the U.S. Department of Justice, and the Alcohol and Tobacco Tax and Trade Bureau (TTB) remained with the U.S. Department of the Treasury.").

67. *Barr*, 502 F. Supp. 3d at 1174–75.

68. *Id*.

69. *See* 28 C.F.R. § 0.130(a)(1)–(3) (2015).

V. THE RULE OF LENITY

A. English Roots

The origins of the rule of lenity can be traced back to fourteenth-century England, where the death penalty was imposed with little thought given to the defendant's crime or mitigating circumstances.[70] At the time, the only limit on the widespread use of the death penalty was the benefit of the clergy rule, which exempted members of the clergy from the reach of criminal laws and reassigned their cases to "more benign ecclesiastical courts."[71] As more capital felonies were created, this benefit was eventually extended to include all literate citizens.[72] Parliament, aware of the judiciary's philanthropy, enacted more capital offenses and increased the number of felonies that excluded any benefit of the clergy.[73] Left with little alternative, British courts began narrowly construing statutes that imposed the death penalty in favor of the defendant, thus creating what would eventually evolve into the modern rule of lenity.[74]

B. Lenity in the United States

1. The Early Stages of Lenity

Reflecting a broader influence of British legal traditions on the American legal system, the strict construction of criminal statutes was inherited from the English common law.[75] Though the concept was carried over, its purpose was transformed from protection against capital punishment[76] to a restraint on the judiciary and a mechanism to provide notice to a criminal defendant.[77] The first suggestion that ambiguity within a criminal statute should be strictly construed against the government was made in 1817, in *United States v. Sheldon*.[78] George Sheldon was indicted for transporting livestock from Vermont into

70. Sarah Newland, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 199 (1994).

71. David S. Romantz, *Reconstructing the Rule of Lenity*, 40 CARDOZO L. REV. 523, 526 (2018).

72. *Id.*

73. *Id.* at 526–27.

74. *Id.*

75. Newland, *supra* note 70, at 200–01.

76. *Id.* "Although capital punishment was infrequently used after 1800, American courts continued to use the rule of lenity to avoid applying overly harsh penalties." *Id.* at n.18.

77. *Id.* at 201.

78. *See generally* 15 U.S. 119 (1817).

Canada in violation of an 1812 statute that prohibited any "provision and munitions of war" from being transported into Canada from the United States.[79] The Court grappled with whether the transport of the livestock on foot fell within the scope of the statute that enumerated "waggon [sic], cart, sleigh, boat, or otherwise" as means of completing the transport.[80] The ambiguity within the law lay in Congress's inclusion of "or otherwise" as a means of completing the transport.[81] The Court, admitting that "the mischief is the same, whether the enemy be supplied with provisions in the one way or the other," still held that this conclusion "affords no good reason for construing a penal law by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law . . . ."[82] It has been suggested that though the *Sheldon* Court failed to explain why a criminal law should be narrowly construed, it nonetheless indicated the Court's sensitivity to "the danger of judicially-created statutory breadth."[83]

Carrying the principles first mentioned in *Sheldon,* Chief Justice John Marshall further summarized and articulated the judiciary's concerns with the ambiguity of penal laws in *United States v. Wiltberger*.[84] To determine whether it had jurisdiction over a manslaughter committed on a river in China, the Court considered the phrase "high seas" within the manslaughter statute.[85] In concluding that the river did not fall within the meaning of "high seas," Justice Marshall explained that

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle, that the power of punishment is vested in the legislature, not the judicial department.[86]

In making this statement, Chief Justice Marshall laid the foundation that the principles of lenity are to protect the individual's right to fair warning and the check on the judicial appropriation of Congress's

79. *Id.* at 119–20.
80. *Id.* at 120–21.
81. *Id.*
82. *Id.* at 121–22.
83. *See* Romantz, *supra* note 71, at 528.
84. *See* 18 U.S. 76 (1820).
85. *See id.* at 93–95.
86. *Id.* at 95.

lawmaking authority.[87] Though the "dual purpose" of lenity was articulated, the Court appeared "particularly wary" of the balance of power between the judiciary and the legislature.[88] It would take over a century for the Court to expand on and give weight to the fair warning aspect of lenity.

In considering the validity of Oklahoma's wage and hour law, the Court in *Connally v. General Constr. Co.* highlighted the importance of adequate notice to the public regarding penal laws and articulated the first standard for ambiguity within a statute that would trigger the rule of lenity.[89] Regarding the individual's right to fair warning and notice, the Court explained:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.[90]

Perhaps most notably, the *Connally* Court articulated the first standard for the degree of ambiguity within a penal law to trigger lenity's application. The Court stressed that criminal laws cannot contain provisions "so uncertain that they will reasonably admit of different constructions" and "must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue."[91] Though the issue in *Connally* concerned whether statutory vagueness constitutes a civil due process violation, its principles and standard were carried over into future criminal cases and used as a workable standard for triggering lenity.[92] Until the 1950s, the fair warning and separation of powers goals of lenity were "co-equal, important, and saturated in constitutional significance."[93] Beginning in 1952, the Supreme Court appeared to shift its focus from the fair warning

87. *See* Romantz, *supra* note 71, at 528. "[T]he Court announced a dual purpose of lenity that departed from its British roots but survives in form, if not in substance, to this day." *Id.*

88. *Id.* at 528–29. "[T]he power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95.

89. *See generally* Connally v. General Constr. Co., 269 U.S. 385 (1926).

90. *Id.* at 391.

91. *Id.* at 393.

92. *See* Romantz, *supra* note 71, at 531 (referencing McBoyle v. United States, 283 U.S. 25 (1931)).

93. Romantz, *supra* note 71, at 534.

aspect and severely diminished lenity's significance as a protection from ambiguous criminal laws.[94]

2. The Decline of Lenity and the Modern Approach

In *United States v. Universal C.I.T. Credit Corp.,*[95] the Supreme Court grappled with vague criminal provisions within the Fair Labor Standards Act ("FLSA").[96] The issue presented was whether Sections 15 and 16(a) of the FLSA could give rise to individual violations for each breach, resulting in the thirty-two offenses charged to the defendant, or in the alternative, whether each breach represents a "course of conduct" that constitutes a singular punishable offense.[97] Justice Felix Frankfurter, writing for the majority, noted that "the only issue before us—cannot be answered merely by a literal reading of the penalizing sections."[98] Though the Court applied lenity and chose the more favorable reading of the statute for the defendant, it also "opened a door" that would minimize lenity's significance and allow courts "to defeat the due process protections at the core of the rule."[99] By directing courts to "utilize, in construing a statute not unambiguous, all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress,"[100] and to "seize[] every thing from which aid can be derived[,]"[101] Justice Frankfurter "helped turn lenity into judicial sport" by creating a way for future courts to avoid the lenity issue altogether.[102] By directing courts to utilize every tool of statutory construction and resource, the court will almost always resolve the statutory ambiguity and thus never resort to the rule of lenity.[103] *Universal C.I.T.* signaled the beginning of the modern era of lenity and transformed the "once venerable doctrine" into a "tie-breaker at best; a throwaway doctrine at worst[,]" and perhaps most unfortunately, "relegated [lenity] to the purgatory of dissenting opinions."[104]

94. *See* Romantz, *supra* note 71 at 534–35.
95. *See generally* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952).
96. *See id.* at 221.
97. *Id.* at 218–21.
98. *Id.* at 221.
99. Romantz, *supra* note 71, at 535.
100. *Universal C.I.T.*, 344 U.S. at 221.
101. *Id.* (citing United States v. Fisher, 6 U.S. 358, 386 (1805)).
102. *See* Romantz, *supra* note 71, at 537.
103. *See id.*
104. *Id.* at 534, 538.

VI. CARGILL CHALLENGES THE FINAL RULE

A. Cargill v. Barr *(Western District of Texas)*

In challenging the Final Rule, Cargill's four arguments in support of his petition for injunctive relief were: (1) ATF lacked the authority to issue the Final Rule,[105] (2) Attorney General Barr and Director Lombardo violated the "principles of non-delegation and/or separation of powers,"[106] (3) The Final Rule's interpretation of machine gun conflicts with the NFA and the GCA,[107] and (4) Attorney General Barr and Director Lombardo "violated the Administrative Procedures Act in promulgating the Final Rule."[108]

A bench trial was conducted by Judge David Alan Ezra, who entered judgment in favor of the government.[109] The determination that ATF had the authority to issue the Final Rule[110] and that principles of non-delegation and separation of powers were not violated[111] would not become central conflicts in forthcoming appeals. Though Defendants did not invoke *Chevron* deference in support of their interpretation of 'machine gun' in the Final Rule, the Court addressed the issue because "Chevron is binding precedent that, when applicable, the Court is not permitted to ignore."[112] The court determined that *Chevron* deference

105. Cargill v. Barr, 502 F. Supp. 3d. 1163, 1171 (W.D. Tex. 2020), *aff'd*, 20 F.4th 1004 (5th Cir. 2021), *rev'd en banc*, 57 F.4th 447 (5th Cir. 2023).

106. *Id.*

107. *Id.* at 1190–91.

108. *Id.* at 1171.

109. *See id.* at 1171, 1198–99.

110. *See id.* at 1186–97.

111. *See id.* at 1187–88.

112. *Id*. at 1188. *Chevron* deference, a landmark doctrine in administrative law, "defined the parameters of judicial review of administrative agency action . . . ." Jonathan H. Adler, *The Chevron Doctrine*, CATO INST. (2023), https://www.cato.org/regulation/summer-2023/chevron-doctrine. The doctrine took its name from the 1984 Supreme Court case, in which the Court first articulated the standard. *See, e.g.*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron* deference consists of a two-step process courts must follow. *See* Jeff Turrentine, *The Supreme Court Ends Chevron Deference–What Now?,* NAT'L RES. DEF. COUNCIL (June 28, 2023), https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference. First, courts must use the regular rules of statutory construction to determine whether the statute's plain language answers the question. KATHARINE BRADY, IMMIGRANT LEGAL RES. CTR., WHO DECIDES? OVERVIEW OF CHEVRON, BRAND X AND MEAD PRINCIPLES 1 (2011), https://www.ilrc.org/sites/default/files/resources/overview_of_chevron_mead__brand_x.pdf. If the statute's plain language answers the question, the inquiry will end, and the agency's interpretation will not be deferred to. *Id*. If the statutory language is ambiguous, the court must proceed to step two, which has the court ask whether the administrative agency's interpretation of the statute is "reasonable enough to be permissible." *Id*. If this low standard of permissibility is met, the court must defer to the administrative agency's

was inapplicable in this case as the statute carries the possibility of criminal sanctions.[113] Judge Ezra's finding that the statutory term "single function of the trigger" encompasses "single pull of the trigger and analogous motions,"[114] would eventually lead to Cargill's appeal to the Fifth Circuit and become the central point of contention.

In concluding that "single function of the trigger" and "single pull of the trigger" are equivalent, Judge Ezra relied on the testimony of David A. Smith, a Firearms Enforcement Officer associated with the ATF's Firearms and Technology Division.[115] Smith testified that when a shooter maintains forward pressure on a bump stock-equipped rifle, it "is the equivalent of pulling the trigger on the [weapon] in full automatic."[116] In both scenarios, the weapon will continue to fire if the respective pressure is maintained or if the firearm malfunctions or runs out of ammunition.[117] Thus, the Court concluded that pulling the trigger on a rifle equipped with a bump stock and maintaining constant forward pressure on the rifle initiates the requisite "self-acting or self-regulating mechanism" needed to classify a weapon as a machine gun.[118] Because the Court found that "the traditional tools of statutory interpretation yield unambiguous meanings for these terms," the rule of lenity was not invoked or discussed further.[119]

The Court did not find persuasive Cargill's argument that because the trigger on a rifle equipped with a bump stock must still reengage before each shot is fired, this cannot mean that the weapon fires

interpretation "even if the court believes it is not the best possible one." *Id*. When *Chevron* deference is applied, the court "gives the agency's construction of the statute much broader deference than would be otherwise accorded." Mia Romano & Dru Stevenson, *Litigating the Bump-Stock Ban*, 70 U. KAN. L. REV. 243, 250 (2021). On June 28th, 2024, the Supreme Court struck down the *Chevron* Doctrine, thus ending the forty-year-old practice of deferring to an administrative agency's reasonable interpretation of ambiguous federal laws. *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) ("Chevron is overruled.").

113. *See Barr*, 502 F. Supp. at 1190 ("The Supreme Court has 'never held that the Government's reading of a criminal statute is entitled to any deference.'"). In a related bump stock case, in denying a writ of certiorari, Justice Neil Gorsuch wrote, "[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake." Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020). Due to this determination, and the Defendant's failure to invoke *Chevron*, this Note will not address any issues related to *Chevron* deference.

114. *Barr*, 502 F. Supp. at 1191.

115. *Id.; see also, e.g.,* Petition for Writ of Certiorari at 9–10, Cargill v. Garland, 602 U.S. 406 (No. 22-976).

116. *Barr*, 502 F. Supp. at 1175–76.

117. *See id.* at 1176.

118. *See id.* at 1192–94.

119. *Id*. at 1192.

automatically with just a single pull of the trigger.[120] In rejecting this argument, the Court adopted the "shooter-focused interpretation" of the statute rather than the mechanical focus offered by Cargill.[121] Dissatisfied with the court's interpretation, Cargill appealed the issue to the Fifth Circuit.[122]

B. Cargill v. Garland *(Fifth Circuit Court of Appeals)*

In the first of his appeals to the Fifth Circuit, Cargill argued that the district court's conclusion that bump stocks qualify as machine guns contradicts the unambiguous terms of the NFA.[123] Additionally, Cargill argued in the alternative that *if* the statute is ambiguous, the rule of lenity[124] requires that the ambiguity be resolved in his favor.[125] With regard to the proper interpretation of the statute, the Fifth Circuit was unpersuaded by Cargill's mechanical-focused interpretation.[126] The court noted that both the Supreme Court and the Fifth Circuit have traditionally used the terms "function" and "pull" interchangeably when addressing the NFA's definition of machine gun.[127] Thus, the Court concluded that the "caselaw and contemporary usage" lead only to one conclusion that "firearm triggers typically 'function' by means of a shooter's 'pull.'"[128] Because the Court concluded that the "traditional

120. *See id.* at 1193. ("Therefore, even though the shooter's finger disengages and re-engages with the trigger during the bump firing process, the sequence set in motion by the initial forward pressure causing the trigger pull continues.").

121. *See id.* at 1195. "Like other courts interpreting the Final Rule, the Court finds the 'shooter-focused interpretation' of the statute is the proper reading." *Id.* (quoting Aposhian v. Barr, 374 F. Supp. 3d 1145, 1151 (D. Utah 2019)); *see also* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 356 F. Supp. 3d 109, 130 (D.D.C. 2019).

122. *See* Cargill v. Garland, 20 F.4th 1004, 1006 (5th Cir. 2021), *rev'd en banc,* 57 F.4th 447 (2023).

123. *Id.* at 1009.

124. *See supra* Section V.

125. *Garland,* 20 F.4th at 1009.

126. *Id.*

127. *Id.* at 1009–10 (citing Staples v. United States, 511 U.S. 600 (1994)); United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989)). Additionally, the Court highlighted that both terms were used interchangeably at the time of the NFA's passage. *Id.* (citing H.R. Rep. No. 73-1780 (1934); *National Firearms Act: Hearings on H.R. 9066 Before the Comm. on Ways and Means*, 73rd Cong. 40 (1934)).

128. *Garland,* 20 F.4th at 1010. The Court highlighted that the mechanistic interpretation of the NFA had been addressed in a 2003 case heard before the circuit. United States v. Camp, 343 F.3d 743 (5th Cir. 2003). In *Camp*, the gun owner added a switch behind the existing trigger on the rifle, so when pulled, an electrical motor was activated, causing a fishing reel to rotate, allowing the rifle to fire in rapid succession. *Id.* at 745. The court rejected the plaintiff's mechanical-focused interpretation of the NFA reasoning that to hold otherwise "would allow transforming firearms into machine guns so long as the original trigger was not destroyed." *Id.*

tools of statutory interpretation" make clear that the ATF's Final Rule is the "best interpretation" of the NFA, no "grievous ambiguity" is present, and the rule of lenity cannot apply.[129] Though the three-judge panel of the Fifth Circuit did not analyze the rule of lenity issue, it would become a central point of contention and discussion among the judges of the en banc panel in Cargill's forthcoming appeal.

C. Fifth Circuit En Banc Rehearing

In June 2022, the Fifth Circuit granted Cargill's petition for a rehearing en banc.[130] By a 13-3 vote, the judgment of the Western District of Texas was reversed, and the case was remanded with instructions to enter judgment for Cargill.[131] In reaching this conclusion, the Court was split two ways. Eight of the sixteen judges found that the "plain reading" of the NFA "reveals that a bump stock is excluded from the technical definition of 'machinegun' set forth in the Gun Control Act and National Firearms Act."[132] An eleven-judge majority, "assuming arguendo" that the statute is ambiguous, held that the rule of lenity would apply, and the ambiguity must be construed in favor of Cargill.[133]

In addressing the plain reading of the statute, the plurality highlighted that the ATF has "routinely interpreted the ban on machineguns" as not applicable to non-mechanical bump stocks.[134] Only after the Route 91 Harvest Music Festival shooting did the ATF change its longstanding position.[135] Additionally, the plurality noted that though three other circuits have reviewed and denied preliminary injunction motions related to the enforcement of the Final Rule, each "agrees that the definition of machinegun within the National Firearms Act and Gun Control Act does not unambiguously mean what the Government says it means."[136] Addressing "by a single function of the trigger[,]" the plurality found that at the time of the NFA's passage, "'function' meant 'action.'"[137] The plurality concluded that though a mechanical bump stock increases

129. *Garland,* 20 F.4th at 1013–14.

130. Brief in Support of Certiorari at 13, Cargill v. Garland, 602 U.S. 406 (2024) (No. 22-976).

131. Cargill v. Garland, 57 F.4th 447, 473 (5th Cir. 2023) (en banc).

132. *Id.* at 451.

133. *See id.* at 469–70.

134. *Id.* at 451.

135. *See id.* at 455–56. This was done despite two bills introduced by Congress within ten days of the shooting, which would have directly addressed the issue. *Id.*

136. *Id.* at 457 (referencing Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 920 F.3d 1 (D.C. Cir. 2019); Aposhian v. Barr, 958 F.3d 969 (10th Cir. 2020); Gun Owners of Am., Inc. v. Garland, 992 F.3d. 446 (6th Cir. 2021)).

137. *Id.* at 459 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1019 (2d ed. 1934)).

the rate at which bullets are fired, it still does not fire more than one bullet "each time the trigger 'acts.'"[138] Despite the Government's contention that "single function of the trigger" means "single pull of the trigger," the plurality noted that this interpretation "is based on words that do not exist in the statute."[139] The statute does not mention the shooter's action, only the mechanical action of the trigger, thus lending itself to the mechanical-focused interpretation argued by Cargill.[140] The plurality took inspiration and guidance from The Navy-Marine Corps Court of Appeals, which was the first to adopt the mechanical-focused interpretation concerning non-mechanical bump stocks.[141]

Unlike the three-judge panel in Cargill's first appeal, the en banc panel addressed and analyzed the rule of lenity issue.[142] The majority recognized two standards that courts have considered "for whether a statute is sufficiently ambiguous to trigger the rule of lenity."[143] The first standard asks whether there is "reasonable doubt as to the statute's meaning."[144] The second, "more stringent" standard asks whether there is "grievous ambiguity in the statute."[145] Though the majority highlighted two different standards, it did not decide which standard applies because, in Cargill's case, "the rule of lenity applies even under the more stringent 'grievously ambiguous' condition."[146] The majority noted that after having "availed ourselves of all traditional tools of statutory construction," they could "only guess" the definitive meaning of "single function of the trigger."[147] The majority admittedly recognized that the "precise meaning of 'grievously ambiguous' is not entirely clear[,]" but "for purposes of this case, only this statute–is grievously ambiguous."[148] By not specifying a standard for the rule of lenity to apply

138. *Id.*
139. *Id.* at 459–60.
140. *See id.* "Congress did not use words describing the shooter's perspective of the weapon's rate of fire . . . Congress defined the term 'machinegun' by reference to the trigger's mechanics. We are bound to apply that definition as written." *Id.* at 461.
141. *Id.* at 458. *See also* United States v. Alkazahg, 81 M.J. 764 (N-M Ct. Crim. App. 2021). "The statute does not say. . . nor does it say 'by a single pull of the trigger in addition to external pressure from the shooter's non-firing hand' . . . Had Congress wanted to use the phrase 'by a single pull of the trigger' for *machine guns*, it could have. But it did not." *Id.* at 780–81.
142. *See id.* at 469–71.
143. *Id.* at 469. Though the majority only recognized two standards, many more have been advanced over the years and will be discussed later in this Note. *See infra* note 161.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 470.

or attempting to define what "grievously ambiguous" means, the majority missed a crucial opportunity to settle the issue.

D. Garland v. Cargill *(United States Supreme Court)*

On June 15, 2024, in a 6-3 decision, the United States Supreme Court affirmed the holding of the en banc panel of the Fifth Circuit and declared that a semi-automatic rifle equipped with a bump stock is not a machine gun under the NFA.[149] The majority, relying on the statutory text and traditional canons of interpretation, made no mention of ambiguity or the rule of lenity.[150] First, the majority noted that "[a] semiautomatic rifle equipped with a bump stock does not fire more than one shot 'by a single function of the trigger'" because "[w]ith or without a bump stock, a shooter must release and reset the trigger between every shot."[151] Furthermore, even if a rifle could fire more than one shot by a single function of the trigger, the majority highlighted that it still would not do so automatically, thus removing it from the ambit of §5845(b).[152]

Although the majority did not find the statute ambiguous, other courts have either determined it to be ambiguous or, like the Fifth Circuit, assumed for the sake of argument that it is and proceeded with a lenity analysis.[153] By not doing so, the Supreme Court missed an opportunity in *Cargill* to address the rule of lenity, including the differing levels of ambiguity articulated over the years, and set a uniform standard for the degree of ambiguity needed within a statute to trigger the rule.

VII. THE ROAD TO A RESURGENCE OF THE RULE OF LENITY

A. The Problem with Lenity

To revive the rule of lenity, the fundamental issues with its invocation and practice must be identified. At its core, it appears that the two main goals of lenity are in direct conflict.[154] This conflict, to some,

149. Garland v. Cargill, 602 U.S. 406, 410 (2024).
150. *See id.* at 415–16.
151. *Id.* at 415.
152. *Id.* at 424. The majority explained that in addition to pressing the trigger, "[a] shooter must also actively maintain just the right amount of forward pressure on the rifle's front grip with his nontrigger hand." *Id.* This constant manual maintenance and balance of forward pressure is an additional step independent of the trigger pull and thus does not allow for the firing of multiple shots solely with a single function of the trigger, as stated in § 5845(b). *Id.*
153. *See supra* Section VI.C.
154. *See* Romantz, *supra* note 71, at 569 ("[I]f a court favors the separation of powers function of the rule of lenity, then it diminishes the due process function, and vice versa.").

indicates that "[l]enity was doomed from the start."[155] Since the 1950s, courts have favored lenity's separation of powers goal at the expense of its vital due process function.[156] When a court utilizes all of the tools of statutory interpretation at its disposal, a solution to the ambiguity within a statute will inevitably be found.[157] Once the ambiguity is resolved, lenity does not need to be invoked.[158] The due process function of lenity suffers by resolving the ambiguity in this way. The average citizen does not have access to the resources or knowledge that judges do when resolving these ambiguities. As seen in *Cargill*, multiple judges from the Western District of Texas to the Fifth Circuit came to different conclusions regarding the interpretation of the NFA.[159] How can the average citizen decide whether their conduct is proscribed by law if judges, utilizing years of legal education, experience, and all tools of statutory interpretation, cannot come to a consensus? For this reason, the due process protections envisioned by the rule of lenity must be elevated. Any path to reviving lenity must keep both functions equal for the solution to be and remain effective.

The most significant barrier to the invocation of lenity has been the need for direction regarding the degree of ambiguity within a statute for the rule to apply. Though the Fifth Circuit identified two standards in *Cargill*,[160] the Supreme Court has identified nine tests over the years for when statutory ambiguity is severe enough to trigger the rule.[161] With no one test embraced or endorsed by the Supreme Court, this leads to the question, "how much ambiguousness constitutes an ambiguity"?[162]

155. *Id.* at 576.

156. *See supra* Section V.B.

157. *See id.*; *see also* Romantz, *supra* note 71, at 537.

158. *See* Romantz, *supra* note 71, at 537.

159. *See supra* Section VI.

160. *Garland,* 57 F.4th at 469. The Court identified "'reasonable doubt' as to the statute's meaning" and "grievous ambiguity" as the two standards for ambiguity to trigger the rule. *Id.*

161. Romantz, *supra* note 71, at 566–67; Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (sufficiently explicit); United States v. Rodriquez, 543 U.S. 377, 401–04 (2008) (Souter, J., dissenting) (two plausible interpretations); Scheidler v. Nat'l Org. for Women Inc., 537 U.S. 393, 409 (2003) (two rational readings); Muscarello v. United States, 524 U.S. 125, 148 (1998) (Ginsburg, J., dissenting) (subject to some doubt); United States v. Lanier, 520 U.S. 259, 267 (1997) (whether the statute standing alone or as construed is reasonably clear); Moskal v. United States, 498 U.S. 103, 108–09 (1990) (reasonable doubt standard); Dowling v. United States, 473 U.S. 207, 228–29 (1985) (statute must be plain and unmistakable); Maracich v. Spears, 570 U.S. 48, 76 (2013) ("[G]rievous ambiguity or uncertainty in the statute . . . ."); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16 (2011) (sufficiently ambiguous statute warrants application of the rule of lenity).

162. United States v. Hansen, 772 F.2d 940, 948 (D.C. Cir. 1985).

Without standardization, the doctrine will continue to be applied "haphazardly" and utilized "as a canon of last resort."[163]

Finally, it must be resolved where lenity fits within the existing statutory interpretation framework.[164] There have been three approaches to this issue: lenity first, lenity last, and lenity second.[165] The lenity first approach directs courts to adopt the "narrowest plausible interpretation" of the statute without regard to the canons of statutory interpretation.[166] When applying lenity in this way, courts risk usurping Congress's authority to make law by not even attempting to "glean the intent of Congress . . . ."[167] This approach, which directly favors the due process function of lenity, saw its use in the early days of the doctrine but has since fallen out of favor.[168] Lenity first is "likely inoperable" due to its elevation of the due process function at the expense of separation of powers.[169]

On the other end of the spectrum, and the method most favored by courts today, is lenity last.[170] Lenity last directs courts to apply the rule of lenity "*only* if there was an interpretive 'tie' after all other interpretive methods failed."[171] The lenity last approach likely leads to a "superfluous" rule of lenity because when a court can avail itself of all tools of statutory interpretation, the ambiguity will either be resolved, or the court will identify "some meaning in a statute beyond a 'guess' as to Congress's intent."[172] Additionally, though not intended, lenity last may run afoul of the separation of powers. By utilizing all available tools of statutory interpretation, there will inevitably be some "exercise of

163. *See* Maisie A. Wilson, *The Law of Lenity: Enacting a Codified Federal Rule of Lenity*, 70 DUKE L.J. 1663, 1676–78 (2021).

164. *See id.* at 1677. "Part of lenity's controversy stems from its haphazard application and fluctuating relationship to other canons." *Id.*

165. *Id.* at 1677–81.

166. *See* Wilson, *supra* note 163, at 1679.

167. *See* Romantz, *supra* note 71, at 569.

168. *See* Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. 179, 188 (2018) ("A close examination of past judicial practice reveals early and deliberate emphasis on lenity first, which is now experiencing a late-onset displacement that is decidedly at odds with the full range of lenity's constitutional underpinnings.").

169. *See* Wilson, *supra* note 163, at 1680. ("If lenity could be applied *before* even a textual analysis of a statute, the courts could *usurp* the legislature's power to make the laws.") (second emphasis added).

170. Wilson, *supra* note 163, at 1677. "In recent history the Court has held most often, with important exceptions, that lenity is a canon of last resort." *Id.* at 1677–78.

171. *Id.* at 1678. "[M]ethods which would include exhausting textual canons, other substantive canons, legislative history, and purposive arguments." *Id.*

172. *Id.* at 1678–79; *see also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 386 (1994) ("Ranking lenity 'last' among interpretive conventions all but guarantees its irrelevance.").

normative discretion."[173] Because many criminal statutes are "incompletely specified," extraneous conventions such as policy concerns will bleed into the interpretation, thus allowing courts "common-lawmaking discretion" and diminishing "legislative supremacy" to define the crime and punishment.[174] Furthermore, though delving into Congressional intent and history may not always "require significant normative judgments,"[175] it does run the risk of extending statutory language and coverage beyond what was foreseen or intended by Congress.[176]

In the middle lies lenity second. This method directs courts to identify the plain meaning of the statute's text and resolve "as much ambiguity as possible" with textual canons only.[177] If "reasonable doubt" as to the statute's meaning persists after applying these textual canons, the rule of lenity would be applied *without* resorting to other means of interpretation such as "substantive canons, purpose, or legislative history."[178] Not surprisingly, Justice Antonin Scalia favored this application of lenity and applied it throughout his tenure on the Supreme Court.[179] Lenity second comes the closest to striking a balance between the separation of powers goal and the due process protection intended by the rule of lenity.[180]

B. Proposed Lenity Framework

Any solution to revitalizing the rule of lenity must strike a balance between the due process and separation of powers goals that are essential

173. *See* Kahan, *supra* note 172, at 386.

174. *See id.* at 386, 386 n.207 ("[G]iven the incompletely specified nature of many criminal statutes, and the policy-laden nature of the conventions that courts use to make sense of them, the suggestion that statutory construction minus lenity equals 'ordinary interpretation' does not hold true in fact.").

175. An example of this would be when courts simply consult legislative history "to confirm that a particular statutory application was expressly contemplated (even if not expressly enumerated) by Congress." *Id.* at 387.

176. *See id.*; *see also* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("To delve into the structure, purpose, and legislative history of the original statute is to engage in a sort of creation.").

177. Wilson, *supra* note 163, at 1680–81. For a list of textual canons, see generally Bryan Garner & Antonin Scalia, *A Dozen Canons of Statutory and Constitutional Text Construction*, 99 JUDICATURE 2 (2015), https://judicature.duke.edu/articles/a-dozen-canons-of-statutory-and-constitutional-text-construction/.

178. Wilson, *supra* note 163, at 1680–81.

179. Zachary Price, *The Court after Scalia: The Rule of Lenity*, SCOTUSBLOG (Sept. 2, 2016, 2:16 P.M.), https://www.scotusblog.com/2016/09/the-court-after-scalia-scalia-and-the-rule-of-lenity/; *see also* Smith v. United States, 508 U.S. 223, 242–43 (1993) (Scalia, J., dissenting).

180. *See* Wilson, *supra* note 163, at 1682.

to the proper functioning of the rule. With this objective in mind, the correct path forward is a lenity second approach coupled with a trigger for ambiguity revolving around more than one reasonable interpretation of the statute.[181] Lenity second allows courts to interpret the statute using textual canons only.[182] If the ambiguity is resolved, the inquiry ends, thus upholding the separation of powers function of lenity. If there remains more than one reasonable interpretation of the statute after utilizing the canons of statutory interpretation, lenity will be applied, and the penal statute will be construed in favor of the defendant, upholding the due process protections envisioned by the rule.

1. Lenity Second

Out of the three choices for where lenity fits within the statutory interpretation framework, only lenity second provides the separation of powers and due process protections that will balance the rule.[183] The power to define a crime and its punishment is within the legislature's purview, not the judiciary.[184] If lenity is seen as an afterthought, as it contemporarily has been, it allows judges to "intentionally or inadvertently" take advantage of ambiguity within a statute to substitute their own sensibilities and interpretations.[185] Currently, judges are able to utilize all available tools of statutory construction, and if those fail to clear up the ambiguity, they may then avail themselves to other non-textual considerations such as "'legislative history and motivating policies' of the statute."[186] By limiting statutory interpretation to textual canons only, a degree of Congressional deference is upheld while maintaining consistency and fair notice to defendants by not delving deeper into hidden Congressional intent within legislative history or other policy considerations.[187]

181. Some courts have phrased this ambiguity trigger as "plausibility" rather than reasonability, though the meaning and application are essentially the same. *See* United States v. Alkazahg, 81 M.J. 764, 779 (N-M Ct. Crim. App. 2021). This Note advocates for either phrasing.

182. *See supra* Section VII.A.

183. See Wilson, *supra* note 163, at 1682.

184. THE FEDERALIST NO. 78 (Alexander Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, . . . may be said to have neither force nor will, but merely judgment . . . ."); *see also* United States v. Wiltberger, 18 U.S. 76, 95–96 (1820).

185. *See* United States v. Wooden, 595 U.S. 360, 391 (2022) (Gorsuch, J., concurring).

186. Kahan, *supra* note 172, at 386 ("The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overring consideration of being lenient to wrongdoers.").

187. *See* Wilson, *supra* note 163, at 1682.

Lenity's second application is illustrated in Justice Scalia's dissent in *Smith v. United States.*[188] The question presented to the Court was "whether the exchange of a gun for narcotics constitutes [the] 'use' of a firearm" in furtherance of a drug trafficking crime.[189] The majority, delving into Congress's intent to guard against the "dangerous combination" of guns and drugs, read the statute broadly to encompass the transaction, despite the defendant not using the gun in the common meaning of the term.[190] In dissent, Justice Scalia limited his reading of the statute to textual canons only, and found the meaning of the word "use" "eminently debatable" which was "enough, under the rule of lenity" to construe the statute narrowly in favor of the defendant.[191] By limiting his analysis to the text only, Justice Scalia still deferred to Congress but stopped short of divining hidden intent within the statute and applied lenity, ensuring the defendant's due process protections.

2. Ambiguity Trigger

Despite the Supreme Court's repeated assertion that "the touchstone of the rule of lenity is statutory ambiguity,"[192] a definitive standard for how much ambiguity is required within a statute to trigger the rule has never been articulated.[193] It has been suggested that the various attempts to test for ambiguity may signal the Court's reluctance to embrace the rule of lenity in the modern era.[194] This reluctance is further exemplified in The Supreme Court's decision not to address the rule of lenity in *Garland v. Cargill.*[195] After an analysis of the nine ambiguity standards the Court has offered over the years,[196] the best way forward for lenity's consistent application and balancing of its dual purpose is an ambiguity standard of more than one reasonable interpretation after an application of the lenity second statutory analysis.

In a related bump stock case, the Sixth Circuit applied a more than one reasonable interpretation lenity trigger in *Hardin v. BATFE.*[197]

188. *See* Smith v. United States, 508 U.S. 223, 241–46 (1993) (Scalia, J., dissenting).
189. *Id.* at 225.
190. *Id.* at 240; *see* Wilson, *supra* note 163, at 1681.
191. *See* 508 U.S. at 242–46.
192. Burgess v. United States, 553 U.S. 124, 135 (2008); Bifulco v. United States, 447 U.S. 381, 387 (1980); *see also* Lewis v. United States, 445 U.S. 55, 65 (1980).
193. *See supra* Section VII.A.
194. *See* Romantz, *supra* note 71, at 567.
195. *See generally* Garland v. Cargill, 602 U.S. 406 (2024).
196. *See* sources cited *supra* note 161.
197. Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 65 F.4th 895, 898 (6th Cir. 2023). Similar to Michael Cargill, plaintiff Scott Hardin, who owned several bump

Despite both sides arguing that the language of the NFA was "plain and unambiguous," the Sixth Circuit stated that "a significant number of reasonable jurists have reached diametrically opposed conclusions" and "because the statute is subject to 'more than one reasonable interpretation,' it is ambiguous."[198] The court determined that because the NFA does not "clearly and unambiguously prohibit bump stocks," the rule of lenity must be applied and the statute construed in favor of Hardin.[199]

Following the same reasoning as *Hardin* yet utilizing "plausibility" language instead of "reasonable," the Navy-Marine Corps Court of Appeals applied the rule of lenity in favor of a criminal defendant prosecuted for possessing bump stocks after the ATF's Final Rule went into effect.[200] After an analysis of the shooter-focused and mechanical-focused readings of the NFA, the court determined that the "plausibility" of either reading leads to the conclusion that the statute is ambiguous and the rule of lenity must apply.[201]

C. Proposed Lenity Framework Applied to Cargill v. Garland

Having established a lenity structure with clear instructions on where it is placed within the statutory interpretation framework and a definitive ambiguity standard, it can be applied to *Cargill v. Garland* to illustrate how it would have impacted the Fifth Circuit's decision and others moving forward. In *Cargill*, both sides argued that the text of the NFA was unambiguous; however, no one interpretation garnered the support of a majority at any stage of the litigation.[202] This is highly suggestive of at least some degree of ambiguity within the statute.

In analyzing whether "single function of the trigger" means "a single pull of the trigger," the en banc panel of the Fifth Circuit properly limited its statutory interpretation to the traditional canons.[203] Though the majority did consult an analogous statute written at the time of the NFA for "context,"[204] no legislative history was consulted, and no discussion of

stocks, challenged the ATF's Final Rule in the Western District of Kentucky as exceeding the ATF's statutory authority. *Id.* at 897–98.

198. *Id.* at 898 (citing Donovan v. FirstCredit, Inc., 983 F.3d 246, 256 (6th Cir. 2020)).

199. *Id.* at 902.

200. *See generally* United States v. Alkazahg, 81 M.J. 764 (N-M Ct. Crim. App. 2021).

201. *Id.* at 779.

202. *See generally* Brief for the Respondent, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976).

203. *See* Cargill v. Garland, 57 F.4th 447, 459–61 (5th Cir. 2023).

204. *Id.* at 461 (consulting 26 U.S.C. § 5845(c) defining a rifle as a weapon designed "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*.") (emphasis added). In making this comparison,

hidden Congressional intent was discerned, keeping the analysis within the constraints of the proposed lenity second framework.[205] The court applied a similar approach to the term "automatically" within the NFA.[206] After utilizing the traditional tools of statutory interpretation and determining that the language of the NFA was "unambiguous" and bump stocks were not machine guns within the definition of the statute,[207] if lenity second was properly applied, the discussion would have ended and no inquiry into the degree of ambiguity would have been necessary. "[A]ssuming arguendo" that the statute was ambiguous, the court carried on to a discussion of the level of ambiguity within a statute to trigger the rule, and in doing so created further confusion within the lenity jurisprudence.[208]

Despite the assertion that the language of the NFA was unambiguous, the majority still claimed that *if* the statute were ambiguous, the rule of lenity would apply.[209] Identifying only two standards: "reasonable doubt" and "grievous ambiguity," the majority did not endorse either one, but noted that "lenity applies even under the more stringent 'grievously ambiguous' condition."[210] This assertion is faulty because the majority did not explain how the traditional tools of statutory interpretation just used prior, which led to the conclusion that the statute was unambiguous, were now so ineffective that the statute would satisfy a "grievous ambiguity" standard to trigger the application of the rule of lenity.[211] Furthermore, despite relying on the "grievous ambiguity" condition, the majority failed to define what it precisely means.[212]

This reliance on grievous ambiguity is problematic for two reasons. First, the grievous ambiguity standard has only been suggested in opinions, but never actually applied, let alone defined.[213] Originating in

the majority highlighted that "Congress knew how to write a definition that explicitly turns on the action of a shooter rather than the action of a trigger, but chose not to do so here." *Id.*

205. *See id.* at 461 (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 167 (2012) for the proposition that "[c]ontext is a primary determinant of meaning.").

206. *See id.* at 462–64.

207. *See id.* at 464.

208. *Id.* at 469.

209. *Id.*

210. *Id.*

211. *See id.* at 480–81 (Higginson, J., dissenting) ("[T]he majority does not explain how the tools upon which it relied to interpret the statute–dictionaries, grammar, and corpus linguistics–would be useless to resolve an interpretive debate if the statute were ambiguous.").

212. *Id.* at 480.

213. *See* Brief of Families Against Mandatory Minimums (FAMM) as Amicus Curiae in Support of Neither Party at 10, Cargill v. Garland, 602 U.S. 406 (2024) (No. 22-976)

dicta, the grievous ambiguity standard did not find any mainstream use or significant endorsement.[214] Second, and perhaps most important, such a high bar for ambiguity cuts directly against the due process protections necessary for a balanced rule of lenity. If lenity were to only be applied after grievous ambiguity is identified, this would allow for statutes that raise reasonable doubt or as suggested here, more than one reasonable interpretation to be imposed on criminal defendants, sacrificing the right to fair notice.[215] Because no definition for grievous ambiguity has been offered, judges would be given wide latitude and potentially avoid ambiguity altogether by never finding that the text of the statute reached such a high bar of "grievousness."[216]

Had the Fifth Circuit applied a more than one reasonable interpretation standard to trigger the rule of lenity, a much clearer articulation of the rule would have resulted. The fact that each side argues that their interpretation of the NFA leads to an unambiguous result strongly indicates that more than one reasonable interpretation of the statute is present. At the heart of the bump stock issue is whether the NFA was written with a focus solely on the mechanics of the trigger or the process in which the shooter pulls the trigger.[217] With a total of twenty-two opinions written on this issue since ATF promulgated the Final Rule, each interpretation has received the endorsement of multiple judges and courts of appeals.[218] With each court providing a reasoned analysis based on textual canons and, at times, legislative history and intent, yet still coming to diametrically opposed conclusions, it is evident that more than one reasonable interpretation of § 5845(b) of the NFA is

[hereinafter FAMM Brief]. FAMM notes that the origin of the grievously ambiguous standard can be traced back to a "passing reference" in Huddleston v. United States, 415 U.S. 814, 831 (1974). *Id.*

214. *See* United States v. Wooden, 595 U.S. 360, 392 (2022) (Gorsuch, J., concurring) ("This 'grievous' business does not derive from any well considered theory about lenity or the mainstream of this Court's opinions.").

215. *See* FAMM Brief, *supra* note 213, at 11–12; *see also Wooden*, 595 U.S. at 392 ("[L]enity has sought to ensure that the government may not inflict punishments on individuals without fair notice . . . . A rule that allowed judges to send people to prison based on intuitions about 'merely' ambiguous laws would hardly serve those ends.").

216. *See* FAMM Brief, *supra* note 213, at 12 ("No one has defined what makes an ambiguity 'grievous' so this amorphous standard fails to constrain judges, instead allowing them to reach a favored result by attaching or not attaching, the term 'grievous' to ambiguous statutes.").

217. *See* Brief for the National Rifle Association of America, Inc. (NRA) as Amicus Curiae in Support of Respondent at 4–5, Cargill v. Garland, 602 U.S. 406 (2024) (No. 22-976).

218. Hardin v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 65 F.4th 895, 898 (6th Cir. 2023) ("[A] significant number of reasonable jurists have reached diametrically opposed conclusions as to whether the definition of machinegun includes bump stocks.").

present.[219] Furthermore, ATF's own actions bespeak ambiguity.[220] Since the creation of the first bump stocks, the ATF issued dozens of classifications, exempting them from the coverage of §5845(b).[221] Only after a mass shooting and presidential directive did the ATF "clarify" its longstanding position.[222] Rather than further complicate the rule of lenity with an undefined and unworkable grievous ambiguity standard, the Fifth Circuit could have simply acknowledged that more than one reasonable interpretation of §5845(b) exists and adopted a clear standard for invoking the rule of lenity in the future.

VIII. CONCLUSION

The rule of lenity provides an essential check on the powers of the government toward the individual. The once widely used doctrine has fallen out of favor, cast aside to dissenting opinions and lacking the separation of powers and due process protections envisioned by the rule. Through a lenity second framework of statutory interpretation coupled with a more than one reasonable interpretation ambiguity standard, the delicate balance between the two goals of lenity can be achieved and the essential protections of the individual from government and judicial overreach can be attained once again. *Garland v. Cargill* provided the Supreme Court with the perfect opportunity to revive the rule and once and for all articulate a framework and clear ambiguity standard to trigger the rule, an opportunity not seized by the Court.

219. *See id.*

220. *See generally* Brief of National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent, Cargill v. Garland, 602 U.S. 406 (2024) (No. 22-976).

221. *See supra* Section III; *see also* Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring) ("The [ATF] used to tell everyone that bump stocks don't qualify as 'machineguns' . . . . The law hasn't changed, only the agency's interpretation of it.").

222. *See supra* Section I.A.