AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Judicial Review

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

*Daniel Guedes objected to a decision by the Bureau of Tobacco, Firearms and Explosives to classify bump stock devices as machine guns in the wake of a mass shooting in Las Vegas in one a shooter armed with a bump-stock enhanced semi-automatic weapon murdered 58 people. Guedas may many objections to that rule, including the claim that the Bureau was not authorized to reclassify bump stock devices as machine guns under the National Firearms Act and the Gun Control Act. The local federal district court applied what is called* Chevron *deference. This doctrine, which dates from* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. (1984) *requires federal courts to defer to an agency’s reasonable interpretation of the federal law, even if in the absence of that interpretation, the federal court might reach a different interpretive conclusion. That decision was affirmed by the Court of Appeals for the District of Columbia. Guedas appealed to the Supreme Court.*

*The Supreme Court denied certiorari. Justice Neil Gorsuch, however, issued a statement called on the justices to rethink* Chevron *deference in the circumstances of this case and more broadly. What are Justice Gorsuch’s arguments against* Chevron *deference? How much of* Chevron *deference to they cover? Are they sound?* Chevron *at one point was considered a conservative doctrine. Why are contemporary conservatives questioning that doctrine at this time in American history? What is the proper liberal position on* Chevron *deference?*

The petition for a writ of certiorari is denied.

Statement of Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If4aeafc13c5f11eaadfea82903531a62).

Does owning a bump stock expose a citizen to a decade in federal prison? For years, the government didn't think so. But recently the Bureau of Alcohol, Tobacco, Firearms and Explosives changed its mind. Now, according to a new interpretive rule from the agency, owning a bump stock is forbidden by a longstanding federal statute that outlaws the “possession [of] a machinegun.” . . . Contrary to the court of appeals's decision in this case, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984), has nothing to say about the proper interpretation of the law before us.

In the first place, the government expressly waived reliance on [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). . . . That was mistaken. This Court has often declined to apply [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference when the government fails to invoke it. Even when [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) deference is sought, this Court has found it inappropriate where “the Executive seems of two minds” about the result it prefers.  Nor is it a surprise that the government can lose the benefit of [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) in situations like these and ours. If the justification for [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is that “ ‘policy choices’ should be left to executive branch officials ‘directly accountable to the people,’ ” then courts must equally respect the Executive's decision *not* to make policy choices in the interpretation of Congress's handiwork.

To make matters worse, the law before us carries the possibility of criminal sanctions. And, as the government itself may have recognized in offering its disclaimer, whatever else one thinks about [*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&pubNum=0000780&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), it has no role to play when liberty is at stake. Under our Constitution, “[o]nly the people's elected representatives in the legislature are authorized to ‘make an act a crime.’ ”  Before courts may send people to prison, we owe them an independent determination that the law actually forbids their conduct. A “reasonable” prosecutor's say-so is cold comfort in comparison. That's why this Court has “never held that the Government's reading of a criminal statute is entitled to any deference.”  Instead, we have emphasized, courts bear an “obligation” to determine independently what the law allows and forbids. . . .

[*Chevron*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984130736&originatingDoc=If4aeafc13c5f11eaadfea82903531a62&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))'s application in this case may be doubtful for other reasons too. The agency used to tell everyone that bump stocks don't qualify as “machineguns.” Now it says the opposite. The law hasn't changed, only an agency's interpretation of it. And these days it sometimes seems agencies change their statutory interpretations almost as often as elections change administrations. How, in all this, can ordinary citizens be expected to keep up—required not only to conform their conduct to the fairest reading of the law they might expect from a neutral judge, but forced to guess whether the statute will be declared ambiguous; to guess again whether the agency's initial interpretation of the law will be declared “reasonable”; and to guess *again* whether a later and opposing agency interpretation will *also* be held “reasonable”? And why should courts, charged with the independent and neutral interpretation of the laws Congress has enacted, defer to such bureaucratic pirouetting?

. . . .