Gun Control Act of 1968 — *Statutory Interpretation* — *Context* —
Bondi v. VanDerStok

At the same time that *Loper Bright Enterprises v. Raimondo*[1] overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*'s[2] regime of deference to agency interpretations of law, it reaffirmed *Skidmore v. Swift & Co.*'s[3] instruction that courts may "respect" (but not defer to) certain agency interpretations, particularly if they have remained consistent over time.[4] Last Term, in *Bondi v. VanDerStok*,[5] the Supreme Court deployed *Skidmore* for the first time since deciding *Loper Bright*. While Justice Gorsuch, writing for the majority, construed the challenged regulation as consistent with the agency's prior practice and thus applied *Skidmore* respect, Justice Thomas's dissent insisted that the regulation broke from agency practice. Justice Gorsuch tied his explanation for why the agency's practice was consistent to his argument about the scope of facial review. But *VanDerStok* also provides a useful case study of how the original context of a statute, an increasingly favored textualist tool, can help determine whether agency practice is consistent. The so-called "mischief rule," a cousin of the text-in-context argument with deep historical roots, modestly expands or contracts the literal reach of statutory text shorn of context in light of the "mischief" the statute was adopted to address. Through the lens of a statute's mischief, courts may conclude that when an agency routinely targets similar problems, even if it uses distinct means, that targeting constitutes consistent practice meriting *Skidmore* respect.

On November 22, 1963, Lee Harvey Oswald shot President John F. Kennedy with a rifle he bought through the mail, using an alias, from an ad he saw in a gun magazine.[6] That killing, along with the 1968 assassinations of Dr. Martin Luther King Jr. and Senator Robert Kennedy, spurred Congress[7] to adopt the Gun Control Act of 1968[8] (GCA). The law regulated interstate sales of firearms to limit their "easy availability" and the circumvention of existing state and federal tracing and licensing rules.[9] Under the GCA, gun dealers must, inter alia, maintain

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[1] 144 S. Ct. 2244 (2024).

[2] 467 U.S. 837 (1984), *overruled by, Loper Bright*, 144 S. Ct. at 2273.

[3] 323 U.S. 134 (1944).

[4] *Id.* at 140; *see also Loper Bright*, 144 S. Ct. at 2259, 2262, 2265, 2267 (reaffirming *Skidmore*).

[5] 145 S. Ct. 857 (2025).

[6] EARL WARREN ET AL., REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 118–21 (1964).

[7] *See* William J. Vizzard, *The Gun Control Act of 1968*, 18 ST. LOUIS U. PUB. L. REV. 79, 80, 83 (1999).

[8] Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 and 26 U.S.C. §§ 5801–5872).

[9] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 901, 82 Stat. 197, 225 (congressional findings and declaration).

sales records for, engrave serial numbers on, and conduct background checks before selling "firearms,"[10] defined as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device.[11]

Per a contemporaneous encyclopedia, a frame is a gun's "basic structure and principal component,"[12] and a receiver is the "part of a gun that houses the breech action and firing mechanism."[13]

In recent years, technological advances have enabled gunmakers to sell weapon parts kits and unfinished frames and receivers that individuals can easily assemble at home.[14] Some of these manufacturers did not adhere to the GCA, including by not serializing the kits, because they did not consider their products firearms.[15] That lack of serial numbers made it hard for law enforcement to trace these "ghost guns" back to their owners after they were used in crimes.[16] In response, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which is authorized to prescribe regulations to implement the GCA,[17] finalized a ghost guns regulation in 2022.[18] The regulation interpreted subsection (A) to "include a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive."[19] And it interpreted subsection (B) to "include a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver."[20]

Before the regulation went into effect, a group of plaintiffs — including individuals, a weapon parts kit manufacturer, and a nonprofit organization — sued ATF and other federal actors to enjoin enforcement of the new rule.[21] The district court granted the plaintiffs' motion for summary judgment and vacated the entire rule, holding that it conflicted with the statute's plain language and thus exceeded ATF's

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10 18 U.S.C. §§ 923(g)(1)(A), 923(i), 922(t)(1).

11 *Id.* § 921(a)(3).

12 CHESTER MUELLER & JOHN OLSON, SMALL ARMS LEXICON AND CONCISE ENCYCLOPEDIA 87 (1968) (defining "frame").

13 *Id.* at 168 (defining "receiver").

14 *VanDerStok*, 145 S. Ct. at 863.

15 *Id.*

16 Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652, 24652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478–479).

17 *See* 18 U.S.C. § 926(a) ("The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter."); 28 C.F.R. § 0.130(a) (2024) (delegating this authority to the ATF Director).

18 Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. at 24652.

19 27 C.F.R. § 478.11 (2022).

20 *Id.* § 478.12(c).

21 *See* VanDerStok v. Garland, 680 F. Supp. 3d 741, 752–53 (N.D. Tex. 2023).

statutory authority — on the logic that an incomplete version of a final object (like a "firearm" or a "frame or receiver") is not itself that final object.[22] The district court rejected ATF's appeal to its prior practice regulating incomplete firearms, asserting that evidence of the agency's prior "*ultra vires* [action] d[id] not convince the Court it should be permitted to continue the practice."[23] The federal defendants appealed.[24]

The Fifth Circuit largely affirmed.[25] Relying on similar reasoning to the district court's, the Fifth Circuit held that ATF's regulation conflicted with the statutory text.[26] The Fifth Circuit also argued that the new rule "arbitrarily reversed course" because it effectuated a "sharp change in" position "over a few short years,"[27] invoking the language of the Administrative Procedure Act's[28] (APA) bar on "arbitrary" or "capricious" action.[29] As evidence of that "sharp change," the Fifth Circuit cited to a brief ATF submitted to a district court in 2021 stating that unfinished frames or receivers were not firearms simply because they could be readily converted into ones.[30] However, the Fifth Circuit vacated the district court's remedy, setting aside as unlawful only the two definitions plaintiffs challenged (of "firearm" and "frame or receiver"), and remanded for further consideration.[31]

Judge Oldham concurred to emphasize in part the contrast between the challenged rule and ATF's old rule.[32] ATF's original definition of "frame or receiver" provided what Judge Oldham considered a "clear, bright-line rule" — the type of "longstanding regulatory certainty" that "[m]illions of law-abiding Americans [who] work on gun frames and receivers" could "rely on."[33] The new regulation, however, provided that "the [ATF] Director may consider any associated templates, jigs, molds, equipment, tools, instructions," and the like when determining whether a partial "frame or receiver" may be "converted to function as a frame or receiver,"[34] and offered several "factors relevant in" determining whether an object could be "[r]eadily" converted into a firearm.[35] These changes, Judge Oldham argued, turned the rule into "a vague,

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[22] *See id.* at 764–72.

[23] *Id.* at 767.

[24] VanDerStok v. Garland, 86 F.4th 179, 186 (5th Cir. 2023).

[25] *Id.* at 197.

[26] *See id.* at 189–95.

[27] *Id.* at 190.

[28] 5 U.S.C. §§ 551–559, 701–706.

[29] *Id.* § 706(2)(A).

[30] *VanDerStok*, 86 F.4th at 190 (citing Memorandum of Law in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment at 4, City of Syracuse v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, No. 20-cv-06885 (S.D.N.Y. Jan. 29, 2021), Dkt. No. 98).

[31] *See id.* at 195–97.

[32] *See id.* at 197 (Oldham, J., concurring).

[33] *Id.*

[34] 27 C.F.R. § 478.12(c) (2022).

[35] *Id.* § 478.11.

indeterminate, multi-factor balancing test" whose "uncertainty" would "hang[] over the heads of American gun owners" "like a Sword of Damocles."[36]

The Supreme Court reversed.[37] Writing for the Court,[38] Justice Gorsuch first "t[ook] it as given"[39] that plaintiffs presented "a 'facial' pre-enforcement challenge," rather than a challenge to the regulation as "applied to particular weapon parts kits or unfinished" components.[40] Justice Gorsuch noted that the plaintiffs' complaints described their challenge as "facial,"[41] and that the plaintiffs did not dispute the government's assertion that facial invalidity requires more than "the possibility that [ATF's regulation] may be invalid as applied[] in some cases."[42] A facial challenge, the Court concluded, required the defendants to prove only that "at least some" weapon parts kits or unfinished frames or receivers regulated by the rule also satisfied the statute's requirements, not that *all* of the regulation's applications fit within the statute.[43]

The Court then asked whether some weapon parts kits fulfilled subsection (A)'s requirements that the regulated item be (1) a "weapon," and (2) "able to expel a projectile by the action of an explosive, designed to do so, or susceptible of ready conversion to operate that way."[44] On the first requirement, Justice Gorsuch reasoned that "'weapon' is an artifact noun — a word for a thing created by humans."[45] Because "[a]rtifact nouns are typically 'characterized by an intended function,' rather than by 'some ineffable "natural essence"' . . . everyday speakers sometimes use [them] to refer to unfinished objects."[46] Some kits' "intended function[s] as instrument[s] of combat [are] obvious," and so despite not yet literally being a "weapon," an "ordinary speaker" might refer to it as a weapon (just like an ordinary speaker might say that they just bought a table from IKEA, even before assembling it).[47] Justice Gorsuch found further evidence for his reading in subsection (A)'s parenthetical noting that a "weapon" "includ[es] a starter gun" — a starter gun fires blanks,

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[36] *VanDerStok*, 86 F.4th at 197 (Oldham, J., concurring).

[37] *VanDerStok*, 145 S. Ct. at 876.

[38] Justice Gorsuch was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Kavanaugh, Barrett, and Jackson.

[39] *VanDerStok*, 145 S. Ct. at 866.

[40] *Id.* at 865.

[41] *Id.* (quoting BlackHawk Manufacturing Group Inc.'s Complaint for Declaratory & Injunctive Relief ¶ 108, VanDerStok v. Garland, 680 F. Supp. 3d 741 (N.D. Tex. 2023) (No. 22-cv-00691), Dkt. No. 99).

[42] *Id.* (quoting Brief for Petitioner at 17–18, *VanDerStok*, 145 S. Ct. at 857 (No. 23-852) (first alteration in original)).

[43] *Id.* at 869.

[44] *Id.* at 866 (quoting 18 U.S.C. § 921(a)(3)(A)).

[45] *Id.* at 868.

[46] *Id.* (quoting Scott Grimm & Beth Levin, *Artifact Nouns: Reference and Countability*, 47 NE. LINGUISTIC SOC'Y, no. 3, 2017, at 55, 55).

[47] *Id.*

so it is not a "weapon" until someone converts it to fire bullets (which requires under an hour of work with commonly available tools and knowledge).[48] Congress recognized that a not-yet-weapon like a starter gun can be a weapon, implicitly embracing the "artifact noun" logic.[49]

Next, the Court concluded that at least some weapon parts kits met the second requirement, as they could "readily be converted" to shoot a projectile.[50] Justice Gorsuch noted that because a starter gun must be able to fulfill that ready-conversion requirement, so too a weapon kit that "requires no more time, effort, expertise, or specialized tools to complete" must be readily convertible.[51] The Court observed that Polymer80's "Buy Build Shoot" kit was just such a kit, and thus held that the regulation on weapon parts kits was not facially invalid.[52]

The Court likewise held that ATF's regulation on unfinished frames or receivers was not facially invalid.[53] Justice Gorsuch argued that the terms "frame" and "receiver" are, like the word "weapon," artifact nouns and thus can include incomplete objects.[54] The Court concluded that a novice using everyday tools could turn some unfinished frames or receivers into a functional firearm in short order.[55] And since other sections of the GCA treat unfinished frames and receivers as "frame[s]" or "receiver[s]," it would be inconsistent to apply "a more restrictive meaning" to subsection (B).[56]

Justice Gorsuch then reasoned that "[t]he novelty of the plaintiffs' complete-items-only reading of subsection (B) supplie[d] another strike against it."[57] Though the new rule "regulate[d] a greater variety of unfinished frames and receivers than the agency ha[d] in the past"[58] and "look[ed] at different evidence in"[59] determining the frame or receiver's level of completion, ATF "for decades" had "consistently interpreted subsection (B) to reach some unfinished frames and receivers, including ones no more finished than Polymer80's."[60] Justice Gorsuch cited a page on ATF's website from 2020, an ATF technical bulletin from 2013, and four classification letters from 1990 to 2004 that ATF sent to individuals

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[48] *Id.* (quoting § 921(a)(3)(A) (alteration in original)).
[49] *Id.* at 868–69.
[50] *Id.* at 869 (quoting § 921(a)(3)(A)).
[51] *Id.* (citing Appendix to the Petition for a Writ of Certiorari at 220a, *VanDerStok*, 145 S. Ct. 857 (No. 23-852)).
[52] *Id.*
[53] *Id.* at 872.
[54] *Id.* at 873 (quoting § 921(a)(3)(B)).
[55] *Id.* at 872–73.
[56] *Id.* at 873 (citing § 923(i)).
[57] *Id.*
[58] *Id.*
[59] *Id.* at 874 n.5.
[60] *Id.* at 873–74.

who had inquired whether their unfinished receivers were firearms.[61] Drawing from *Loper Bright*'s discussion of *Skidmore* (though not citing *Skidmore* itself), Justice Gorsuch reasoned that "the contemporary and consistent views of a coordinate branch of government can provide evidence of [a] law's meaning."[62]

Justice Sotomayor concurred.[63] She argued that ATF's new rule was sufficiently clear to regulated entities, observing that the firearms industry has complied with the GCA "[f]or more than half a century," so its "requirements are not new."[64] "What is new," she argued, was not ATF's rule, but rather "some manufacturers[']" attempts "to circumvent" the GCA "by selling easy-to-assemble firearm kits and frames."[65]

Justice Kavanaugh's concurrence highlighted that although ATF's rule provided only vague guidance regarding the line beyond which an item is a firearm, the rule's breadth would be mitigated by the GCA's mens rea requirements for proving a violation.[66]

Justice Jackson also concurred.[67] Responding to the dissents, she argued that the case was governed by the APA's standard for delegated agency action — whether the agency exceeded its statutory authority — not "whether the agency's discretionary choices overlap precisely with what we, as unelected judges, would have done."[68]

Justice Thomas dissented.[69] Starting with the regulatory scheme's history, he asserted that ATF's 1968 definition of "frame or receiver,"[70] which Justice Thomas argued aligned with the "generally understood" contemporaneous meaning, had "governed for over 50 years" before "ATF recently changed course."[71] Justice Thomas observed that the new rule expanded the regulatory definition and changed how ATF "determine[s] whether an object is" a firearm via the rule's new provision permitting consideration of associated instructions and tools.[72] On the merits, Justice Thomas argued that ATF's rule exceeded the statute because "frame[s] or receiver[s]" cannot "include objects that are *not* frames or receivers" — citing in part to ATF's 2021 district court brief.[73] The rule was also invalid for permitting "ATF to classify objects . . .

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[61] *See id.* (citing *Are "80%" or "Unfinished" Receivers Illegal?*, ATF (Apr. 6, 2020), https://www.atf.gov/firearms/qa/are-"80"-or-"unfinished"-receivers-illegal [https://perma.cc/QX2X-8UHQ]; Joint Appendix at 5, 8, 10, 22, 117–18, *VanDerStok*, 145 S. Ct. 857 (No. 23-852)).

[62] *Id.* at 874 (citing Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024)).

[63] *Id.* at 876 (Sotomayor, J., concurring).

[64] *Id.*

[65] *Id.*

[66] *Id.* at 877 (Kavanaugh, J., concurring).

[67] *Id.* (Jackson, J., concurring).

[68] *Id.* at 878.

[69] *Id.* (Thomas, J., dissenting).

[70] *See supra* notes 12–13 and accompanying text.

[71] *VanDerStok*, 145 S. Ct. at 879 (Thomas, J., dissenting).

[72] *Id.* at 880 (quoting 27 C.F.R. § 478.12(c) (2022)).

[73] *Id.* at 883–84 (citing Memorandum of Law, *supra* note 30, at 14).

based on criteria other than [their] physical characteristics" (through the provision related to associated instructions).[74] He also argued that even if the statute was ambiguous, the rule of lenity should apply and resolve in favor of regulated entities that could face criminal penalties.[75]

Justice Alito also dissented to dispute that the majority's just-one-item standard should govern facial regulatory definition challenges.[76]

Justices Gorsuch and Thomas's disagreement over the consistency of ATF's interpretation provides a useful case study for what makes an agency interpretation consistent. Textualists have increasingly used statutory context, a reframed version of the old "mischief rule," to determine a given statute's scope. Through that lens, an agency has been persuasively consistent in its implementation of a statute where it has targeted the same *problem* that the enacting Congress targeted, even if using different *means* in light of changing circumstances. Applied here: ATF's consistent practice targeting untraceable guns, the same problem Congress targeted in enacting the GCA, is evidence that ATF's modern interpretation targeting the same problem is valid — despite employing different means to do so. But where an agency perverts a statute to target distinguishable ends, even if the agency action otherwise looks consistent, courts should deem that novel use inconsistent with prior practice.

Extratextual "context" is an accepted tool of modern textualism.[77] Consider *Bond v. United States*,[78] where Chief Justice Roberts concluded that a statute governing "chemical weapon[s]" did not clearly apply to "an amateur attempt by a jilted wife to injure her husband's lover" in part because "the context from which the statute arose [preventing chemical warfare] demonstrates a much more limited prohibition was intended."[79] Justice Scalia, in contrast, objected that the "[u]navoidable [m]eaning" of the statutory term "chemical weapon" did cover this nonpeaceful use of toxic chemicals.[80] More recently, Chief Justice Roberts deployed similar mischief-type analysis in *Fischer v. United States*.[81] The Court determined that the Sarbanes-Oxley Act should be read "in light of [its] history," a document shredding scandal involving Enron.[82] It held that the Act's bar on "obstruct[ing] . . . official proceeding[s]"[83] reached only "document shredding and similar scenarios that prompted the legislation in the first place," but not "all forms

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[74] *Id.* at 885.
[75] *Id.* at 891.
[76] *Id.* at 892–94 (Alito, J., dissenting).
[77] *See* Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275, 1282–83 (2020).
[78] 572 U.S. 844 (2014).
[79] *Id.* at 848, 866.
[80] *Id.* at 867–68 (Scalia, J., concurring in the judgment).
[81] 144 S. Ct. 2176 (2024); *see The Supreme Court, 2023 Term — Leading Case:* Fischer v. United States, 138 HARV. L. REV. 436, 436 (2024).
[82] *Fischer*, 144 S. Ct. at 2186.
[83] *Id.* at 2187 (quoting 18 U.S.C. § 1512(c)(2)).

of obstructive conduct" — potentially meaning the statute did not apply to the *Fischer* defendants' January 6, 2021, attempt to obstruct the presidential election certification.[84] Again, a more hardline textualist dissent argued that even though "statutes often go further than the problem that inspired them," courts should still "stick to the text."[85]

That "context" rule revives the "mischief rule."[86] As Professor Samuel Bray explains, the mischief rule, which dates back to pre-Founding English statutory interpretation, provides that interpreters should read statutes in light of the "mischief" they were adopted to address, often some public event or problem preceding enactment.[87] That original mischief can provide courts with a stopping point — declining to apply the statute to problems too dissimilar to those targeted by the enactors — or a tool to frustrate clever evasions — modestly extending the statute to bar similar mischiefs that may technically evade its acontextual plain language.[88]

While *Bond* and *Fischer* are examples of mischief as a limiting rule, *VanDerStok* is an example of mischief as an extending rule to target evasions.[89] Justice Gorsuch's introduction to his opinion embraced mischief-type language. After describing the high-profile assassinations that precipitated the GCA, he recognized the general mischief Congress sought to address in the GCA — that "criminals [could] acquire largely untraceable guns too easily," including "through the mail"[90] — and highlighted that the GCA's serialization requirement "serve[d]" the "end[]" of allowing law enforcement to trace firearms used in crimes.[91] Justice Gorsuch observed that new advanced materials technologies and 3D printing have enabled home firearm assembly — something not feasible "[w]hen Congress adopted the GCA in 1968."[92] "The upshot" was that police efforts to trace ghost guns "ha[d] proven 'almost entirely futile'" under ATF's prior regulations,[93] and thus ATF's new rule aimed "to combat the proliferation of ghost guns."[94] Justice Sotomayor's concurrence sounded even more clearly in the language of mischief, arguing

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[84] *Id.* at 2186–87, 2190.

[85] *Id.* at 2195 (Barrett, J., dissenting).

[86] *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 84 (2006).

[87] *See* Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 977, 992 (2021).

[88] *See id.* at 970–71.

[89] *See* Samuel Bray, *Ghost Guns and the Mischief Rule*, REASON: VOLOKH CONSPIRACY (Oct. 9, 2024, at 12:32 ET), https://reason.com/volokh/2024/10/09/ghost-guns-and-the-mischief-rule [https://perma.cc/NA6P-BVNJ].

[90] *VanDerStok*, 145 S. Ct. at 862 (citing Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. IV, § 901, 82 Stat. 197, 225 (1968)).

[91] *Id.* at 863.

[92] *Id.*

[93] *Id.* at 863–64 (citing Brief for the Petitioners at 8, *VanDerStok*, 145 S. Ct. 857 (No. 23-852)).

[94] *Id.* at 864.

that manufacturers have attempted "to circumvent" the GCA, a type of "evasion" that the GCA would "not tolerate."[95]

Justice Gorsuch did not expressly connect his narrative framing to his *Skidmore* analysis, instead holding that the prior interpretation was consistent with the present one because both would have deemed the Polymer80 product a "firearm," which was the only question he needed to answer on facial review.[96] But if he had made the connection, Justice Gorsuch may have reasoned that the mischief rule can help distinguish consistent from inconsistent agency interpretations. *Loper Bright* held that judges interpreting statutes must "effectuate the will of Congress."[97] *Skidmore*, as incorporated into *Loper Bright*, provides that courts trying to "determin[e] the meaning of statutory provisions" may "seek aid from" interpretations that "have remained consistent over time."[98] While *Loper Bright* did not say what kind of consistency matters, it did say that interpretations by agencies "responsible for implementing particular statutes . . . 'constitute a body of experience and informed judgment'" that may be persuasive.[99] The easiest case for consistency would be where the agency asked a legal question in the past and answered it the same way in the present. But a *VanDerStok*-type situation, where a court must infer some generalizable interpretive answer from a history of agency practice (like ATF's one-by-one classification letters) presents a harder case.[100] The mischief rule can help courts resolve this consistency conundrum: Where Congress adopted a statute with a particular problem in mind and hoped to regulate similar but as-yet-unknown problems, courts could consider agency interpretations of the statute consistent (and thus deserving respect) where the agency was consistent in targeting related problems — even if the agency's "experience and informed judgment" demanded different means in response to changing circumstances.[101]

VanDerStok illustrates how that approach could operate. Justice Thomas framed ATF's rule as inconsistent, asserting that "[o]ne of the [challenged] Rule's critical innovations" was its associated instructions provision.[102] Justice Gorsuch, meanwhile, argued that "even if the new rule looked at different evidence in making that same determination, it reflected the agency's consistent understanding that subsection (B)

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95 *Id.* at 876 (Sotomayor, J., concurring).

96 *See id.* at 873–74 (majority opinion).

97 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).

98 *Id.* at 2262.

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

100 *See* Note, *Judicial Review of Agency Change*, 127 HARV. L. REV. 2070, 2075 (2014) (describing a "highly fact dependent" and "murkier set of cases" lying "[b]eneath the clear categories" of agency change, including "cases in which the agency has applied a broad precedent or policy in a way that is inconsistent with past applications").

101 *Loper Bright*, 144 S. Ct. at 2262 (quoting *Skidmore*, 323 U.S. at 140).

102 *VanDerStok*, 145 S. Ct. at 880 (Thomas, J., dissenting).

reaches some incomplete 'frames or receivers.'"[103] Yet Justice Gorsuch's opinion provided no guidance for determining which elements of an interpretation are relevant or irrelevant when reviewing a regulation's consistency with historical practice.

Now apply the mischief rule: As Justice Thomas acknowledged, while incomplete firearms have "been regulated for half a century," they weren't "regulated in this way for half a century."[104] But ATF recognized that a new way was necessary to continue addressing the same problem in the face of clever evasions: "[C]hanging circumstances — *i.e.*, more advanced and accessible technology, the subsequent proliferation of '80% receivers,' and the resulting threat to public safety from unserialized firearms — necessitate[d] this change [to consider associated instructions]."[105] Packaging instructions with an incomplete frame or receiver "can serve the same purpose as" another manufacturer tactic that ATF *has* long-regulated: pre-sale dimpling to indicate where the purchaser should drill a hole to convert the product into a functional firearm.[106] A bright-line rule instead of the multifactor consideration of associated instructions and the like would have allowed creative evaders to simply determine where the line is and place themselves outside of it. That outcome "would unreasonably thwart Congress's evident purpose in the GCA," namely "ensur[ing] that weapons [are] distributed through regular channels and in a traceable manner," in order to stop "sales to undesirable customers and [enable] the detection of the origin of particular firearms."[107] Thus, although the types of objects ATF considered firearms and "the manner in which" ATF made those determinations changed over time, those changes — from guns-through-the-mail, to dimpling, to ghost guns — were all aimed at the same problem of untraceable guns.

The Ninth Circuit adopted a similar approach to consistency in the post–*Loper Bright* case *Lopez v. Garland*.[108] The court considered whether the Bureau of Immigration Appeals' (BIA) interpretation of a statute permitting the removal of noncitizens "convicted of two or more crimes involving moral turpitude"[109] deserved *Skidmore* respect.[110] The BIA had previously considered theft offenses to be crimes involving moral turpitude only where they included "intent to deprive

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[103] *Id.* at 874 n.5 (majority opinion) (citation omitted).

[104] Transcript of Oral Argument at 6, *VanDerStok*, 145 S. Ct. 857 (No. 23-852), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/23-852_ca7d.pdf [https://perma.cc/B32X-4YZV].

[105] Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24652, 24689 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447, 478–79).

[106] *Id.* at 24668.

[107] *Id.* at 24686 & n.108 (quoting New York v. Burger, 482 U.S. 691, 713 (1987) (second alteration in original)).

[108] 116 F.4th 1032 (9th Cir. 2024).

[109] 8 U.S.C. § 1227(a)(2)(A)(ii).

[110] *Lopez*, 116 F.4th at 1039–41.

permanently"[111] an owner of their property — reflecting a "purpose" of distinguishing "morally 'reprehensible conduct'" from non-reprehensible "temporary takings."[112] But after "[s]urveying contemporary state law in all fifty states" and the Model Penal Code, "the BIA concluded that criminal law had since evolved to 'recognize that many temporary takings are as culpable as permanent ones,'" and thus updated its interpretation to match.[113] The Ninth Circuit recognized that the new interpretation was "inconsistent with 'earlier . . . pronouncements,'" but nevertheless held that it was "consistent with the agency's longstanding distinction . . . between reprehensible and non-reprehensible criminal conduct"[114] and thus deserved *Skidmore* respect.[115] Here again, the agency consistently targeted the same problem, the one that the enacting Congress focused on (separating "crimes involving moral turpitude"[116] from those that do not) — even though the tool that the agency used to accomplish that goal changed along with changing moral understandings (switching away from a bright-line rule).

The utility of the mischief test may vary depending on the case. For instance, consistent aims with inconsistent means may represent inconsistency where the core interpretive issue or the statute itself focuses on means, rather than ends.[117] But *Skidmore* applies a "sliding scale" of respect,[118] considering several factors (including consistency) to determine what "weight" an executive interpretation deserves.[119] As a result, consistency is not an all-or-nothing determination, and mischief-like consistency need not make sense in all contexts. Perhaps the more consistent the problem targeted, or the more discretion in selecting means that the statute leaves to the agency, the more distinguishable the means may be without breaking continuity. But, regardless of how the test is applied in specific cases, *VanDerStok* provides a useful case study for how an agency may permissibly balance evolution with consistency.

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111 *Id.* at 1041.

112 *Id.* at 1039–40 (quoting Diaz-Lizarraga, 26 I. & N. Dec. 847, 849–51 (B.I.A. 2016)).

113 *Id.* at 1040 (quoting *Diaz-Lizarraga*, 26 I. & N. Dec. at 851).

114 *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (first alteration in original)).

115 *Id.* at 1041 (quoting Orellana v. Barr, 967 F.3d 927, 934 (9th Cir. 2020)). Although the court stated that it applied "*Skidmore* deference," quoting a pre–*Loper Bright* Ninth Circuit precedent, *id.* (quoting *Orellana*, 967 F.3d at 934), it had earlier demonstrated its understanding that *Skidmore* entailed only "'due respect,' but not binding deference to the agency's interpretation," *id.* at 1039 (quoting Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266–67 (2024)).

116 8 U.S.C. § 1227(a)(2)(A)(ii).

117 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2615 (2022) (taking issue with the agency's chosen means).

118 United States v. Mead Corp., 533 U.S. 218, 250 (2001) (Scalia, J., dissenting).

119 *Loper Bright*, 144 S. Ct. at 2284 (quoting *Skidmore*, 323 U.S. at 140).