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Kisor v. Wilkie as a Limit on Auer Deference in the Sentencing Context

Jarrett Faber

KISOR V. WILKIE AS A LIMIT ON *AUER* DEFERENCE IN THE SENTENCING CONTEXT

ABSTRACT

While there has been increased attention on the necessity of criminal justice reform in the United States, limited attention has been paid to the role that the United States Sentencing Commission has played in exacerbating the very problems that it was designed to address. Though the Sentencing Commission was initially envisioned as a body that would protect criminal defendants from sentencing disparities, it has morphed into a body that has limited effectiveness in reaching that goal due to its misuse of commentary as a tool to effect substantive change in sentencing policy to the detriment of criminal defendants. Commentary was initially designed as a flexible tool that the Sentencing Commission could use to interpret and explain the sentencing guidelines, but it has increasingly been used by the Commission to replace amendments to the guidelines themselves. This shift might seem insignificant on its face, but, in reality, it has subjected criminal defendants to years of additional imprisonment in the absence of the protections that Congress initially intended, because courts have been required to defer to this commentary in most cases by an administrative law doctrine known as Auer *deference.*

This Comment proposes that the Supreme Court's recent decision in Kisor v. Wilkie *to integrate the test for* Chevron *deference into the test for* Auer *deference presents an opportunity for courts to address this problem. This Comment then argues that courts should strictly apply the traditional tools of statutory construction and use the rule of lenity in determining whether (1) a sentencing guideline is genuinely ambiguous and (2) the Sentencing Commission's interpretation of that guideline in commentary is reasonable. Applying the test for* Auer *deference in this manner would drastically reduce the frequency with which commentary receives deference from the courts, something that would protect criminal defendants from changes in sentencing policy that are enacted in the absence of the protections provided for in the Sentencing Reform Act. Moreover, this change would encourage the Sentencing Commission to make substantive changes to sentencing policy by amending the sentencing guidelines themselves—not by amending the commentary—which would benefit criminal defendants and society more generally.*

INTRODUCTION

Like 97.4% of federal defendants convicted of felony or class A misdemeanor offenses,[1] Miguel Nieves-Borrero entered into a plea agreement with the federal government.[2] As part of the plea agreement, Mr. Nieves pleaded guilty to aiding and abetting a convicted felon in the possession of a firearm,[3] and the government agreed that the recommended punishment under the federal sentencing guidelines was ten to sixteen months of imprisonment.[4] Mr. Nieves and the government also "agree[d] to recommend a term of imprisonment at the lower end of the applicable [sentencing] guideline range."[5] Unfortunately for Mr. Nieves, the court was not bound to the sentence recommended in this plea agreement.[6] Instead, as part of the sentencing process, the court considered a presentence report—prepared by a probation officer—which recommended a sentence that drastically departed from the one that the government had agreed to recommend.[7]

The presentence report, unlike the plea agreement, accounted for Mr. Nieves's two prior convictions, which triggered a prior offense enhancement[8]

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[1] U.S. SENT'G COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 8, 56–58 tbl.11 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf.

[2] United States v. Nieves-Borrero, 856 F.3d 5, 6 (1st Cir. 2017).

[3] *Id.*; *see* U.S. SENT'G GUIDELINES MANUAL § 2K2.1 (U.S. SENT'G COMM'N 2018) [hereinafter 2018 GUIDELINES MANUAL]. Because Mr. Nieves's crime was a federal offense, the sentencing guidelines served as the starting point for his sentencing. 2018 GUIDELINES MANUAL, *supra*, at ch. 1, pt. A.2; United States v. Booker, 543 U.S. 220, 264 (2005) ("The district courts, while not bound to apply the Guidelines, must . . . take them into account when sentencing.").

[4] *Nieves-Borrero*, 856 F.3d at 6. The plea agreement did not consider Mr. Nieves's prior convictions nor stipulate a criminal history category for him, factors that affect the sentencing ranges that apply under the *Guidelines Manual*. *Id.*

[5] *Id.* (internal quotation marks omitted). The Federal Rules of Criminal Procedure allow for the government to recommend or request a specific sentence or sentencing range as part of a plea agreement, though it is not binding on the court. FED. R. CRIM. P. 11(c)(1); *see also* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 29 n.39 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf (describing the role that the *Guidelines Manual* plays in federal plea agreements).

[6] *See Nieves-Borrero*, 856 F.3d at 7. The court has the discretion "to accept or reject [a] plea agreement immediately or defer a decision." 2018 GUIDELINES MANUAL, *supra* note 3, § 6B1.1 cmt. In commentary, the Sentencing Commission "recommends that the court defer acceptance of [a] plea agreement until the court has reviewed the presentence report." *Id.*

[7] *Nieves-Borrero*, 856 F.3d at 7. Federal probation officers prepare presentence reports after conducting an interview with the defendant. U.S. SENT'G COMM'N, *supra* note 5, at 6. The presentence report contains information about the offense, the offender, the statutory range of punishment, and the relevant sentencing guidelines. *Id.*

[8] Under the *Guidelines Manual*, an offender's sentence may be enhanced if the offender has certain prior convictions. *See* OFFICE OF GEN. COUNS., U.S. SENT'G COMM'N, CRIMINAL HISTORY 10–18 (2018),

under the sentencing guidelines.[9] Because of these prior convictions, the presentence report calculated that the applicable sentencing guidelines range for Mr. Nieves was seventy to eighty-seven months of imprisonment,[10] which stood in stark contrast to the fifteen months of imprisonment that the government had ultimately recommended at Mr. Nieves's sentencing hearing.[11] Considering all the relevant sentencing factors, the court sentenced Mr. Nieves to seventy months of imprisonment.[12] While the sentence itself is jarring in light of the government's recommendation, the most alarming aspect is the role that administrative law played in depriving Mr. Nieves of his liberty at an extreme expense to his family[13] and the State.[14]

Through an administrative deference doctrine known as *Auer* deference,[15] the Supreme Court has counseled that deference to an administrative agency's interpretation of its own regulation is appropriate "unless [the interpretation] is plainly erroneous or inconsistent with the regulation."[16] And, the Supreme Court has sanctioned the use of *Auer* deference in the context of federal sentencing, so courts frequently have to defer to the Sentencing Commission's interpretations of the sentencing guidelines as they are presented in commentary.[17] The Supreme Court has consistently found that such deference is appropriate despite the troubling fact "that the Sentencing Commission wields the authority to dispense 'significant, legally binding prescriptions governing application of governmental power against private individuals—indeed, application of the

https://www.ussc.gov/sites/default/files/pdf/training/primers/2018_Primer_Criminal_History.pdf.

[9] *Nieves-Borrero*, 856 F.3d at 7. Mr. Nieves had prior convictions for fourth-degree aggravated battery and attempt to possess with intent to distribute controlled substances. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] At the time of his sentencing, Mr. Nieves had one child. Brief of Defendant-Appellant at 23, *Nieves-Borrero*, 856 F.3d 5 (No. 15-2154).

[14] In Fiscal Year 2018, it cost $37,449 per year ($102.60 per day) to house a federal inmate in a Bureau of Prisons facility. *See* Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891, 63,891–92 (Nov. 19, 2019).

[15] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997).

[16] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945); *see Auer*, 519 U.S. at 461.

[17] *See* Stinson v. United States, 508 U.S. 36, 38 (1993) ("We decide that commentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."). "Commentary" is text "that accompanies the guideline sections [and] may serve a number of purposes. First, it may interpret the guideline or explain how it is to be applied . . . . Second, the commentary may suggest circumstances which, in the view of the Commission, may warrant departure from the guidelines . . . . Finally, the commentary may provide background information, including factors considered in promulgating the guideline or reasons underlying promulgation of the guideline." 2018 GUIDELINES MANUAL, *supra* note 3, § 1B1.7.

ultimate governmental power, short of capital punishment.'"[18] While some judges have resisted the use of *Auer* deference in the sentencing context,[19] the Supreme Court has neglected to revisit the doctrine's application to commentary,[20] leaving criminal defendants like Mr. Nieves at the whim of the Sentencing Commission—an appointed body that does not reflect Congress's original intent.[21]

In Mr. Nieves's case, the failure of his plea agreement to consider his two prior convictions was erroneous, and the presentence report and court were correct to consider these convictions as part of the sentencing process.[22] However, the application of a prior offense enhancement for one of these convictions—attempt to possess with intent to distribute controlled substances—was extremely problematic and troublesome, as the enhancement was based solely on an interpretation of the underlying sentencing guideline that the Sentencing Commission had advanced through commentary.[23]

The sentencing guideline applicable to Mr. Nieves's underlying offense of aiding and abetting a convicted felon in the possession of a firearm provided for a variety of prior offense enhancements where "the defendant committed any part of the instant offense subsequent to sustaining one [or more] felony conviction[s] of either a crime of violence or a controlled substance offense."[24] Commentary to this guideline defined the term "controlled substance offense"

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[18] United States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2018) (quoting Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).

[19] *See, e.g.*, United States v. Havis (*Havis I*), 907 F.3d 439, 450 (Thapar, J., concurring) ("Were this a civil case, these problems with *Auer* deference would merit close attention. But as this is a criminal case, and applying *Auer* would extend Havis's time in prison, alarm bells should be going off."), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019).

[20] *See, e.g.*, Allen v. United States, 139 S. Ct. 1575 (2019) (denying a petition for writ of certiorari that asked the Supreme Court to revisit the application of *Auer* deference in the sentencing context).

[21] *Compare infra* note 54 (describing how the composition of the Sentencing Commission was originally envisioned), *with* Carrie Johnson, *Trump Pick for Sentencing Commission Has History of Racially Charged Remarks*, NPR (Mar. 2, 2018, 12:44 PM), https://www.npr.org/2018/03/02/590236153/trump-pick-for-sentencing-commission-has-history-of-racially-charged-remarks (criticizing a nominee to the Sentencing Commission for holding views on sentencing policy that are out of the mainstream), *and infra* note 314 (illustrating the modern composition of the Sentencing Commission).

[22] *See* United States v. Nieves-Borrero, 856 F.3d 5, 6–7 (1st Cir. 2017); 2018 GUIDELINES MANUAL, *supra* note 3, § 2K2.1(a)(4)(A).

[23] *Nieves-Borrero*, 856 F.3d at 9. Commentary is the text in the *Guidelines Manual* that is eligible for *Auer* deference. *See* Stinson v. United States, 508 U.S. 36, 38 (1993) ("[C]ommentary in the *Guidelines Manual* that interprets or explains a guideline is authoritative unless it violates the Constitution or federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline."); *see also* 2018 GUIDELINES MANUAL, *supra* note 3, § 1B1.7 (noting that commentary accompanies the guidelines sections to "interpret . . . or explain [how they] are to be applied").

[24] 2018 GUIDELINES MANUAL, *supra* note 3, § 2K2.1(a)(4)(A).

by referring to another guideline and the commentary that accompanied it.[25] Significantly, the referenced guideline unambiguously provided that "the term 'controlled substance offense' mean[t] an offense under federal or state law . . . that prohibit[ed] the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense."[26] Yet, the commentary purporting to interpret this guideline provided for a much broader definition of the term "controlled substance offense," which included "the offenses of aiding and abetting, conspiring, and *attempting* to commit such offenses."[27]

When the court enhanced Mr. Nieves's sentence, it specifically referenced this commentary in concluding that his conviction for attempt to possess with intent to distribute controlled substances was a "controlled substance offense."[28] The court paid no attention to the blatant ambiguity between the definition provided by the sentencing guideline and the greatly expanded definition provided by its commentary, even though the former did not include attempt offenses like the prior conviction at issue.[29] While this ambiguity might seem insignificant on its face, it resulted in Mr. Nieves being sentenced to an additional two years of imprisonment.[30] And, in the aggregate, criminal defendants are sentenced under this provision and other arbitrary provisions en

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[25] *Id.* § 2K2.1 cmt. n.1 ("'Controlled substance offense' has the meaning given that term in § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2.").

[26] *Id.* § 4B1.2(b).

[27] *Id.* § 4B1.2 cmt. n.1 (emphasis added).

[28] *Nieves-Borrero*, 856 F.3d at 9.

[29] *Id.* Other circuit courts have rejected deference to this commentary provision, resulting in an inter-circuit split. *Compare Nieves-Borrero*, 856 F.3d at 9 (citing the commentary provision approvingly), *with* United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018) (finding that the commentary provision impermissibly expanded on the definition provided by the sentencing guidelines).

[30] The presentence report found that the base offense level for Mr. Nieves's crime of aiding and abetting a convicted felon in the possession of a firearm was twenty-six, because (1) "the offense . . . involved a semiautomatic firearm that [was] capable of accepting a large capacity magazine" and (2) Mr. Nieves had "at least two felony convictions of either a crime of violence or a controlled substance offense." 2018 GUIDELINES MANUAL, *supra* note 3, § 2K2.1(a)(1); *see Nieves-Borrero*, 856 F.3d at 7. The report "also applied a two-level enhancement . . . because . . . [the] conviction was for conduct that involved five firearms, and applied a three-level reduction for acceptance of responsibility," resulting "in a total adjusted offense level of [twenty-five]." *Nieves-Borrero*, 856 F.3d at 7; *see* 2018 GUIDELINES MANUAL, *supra* note 3, §§ 2K2.1(b)(1), 3E1.1. Combined with Mr. Nieves's criminal history category, this produced a sentencing guidelines range of seventy to eighty-seven months' imprisonment. *Nieves-Borrero*, 856 F.3d at 7. If Mr. Nieves's conviction for attempt to possess with intent to distribute controlled substances did not qualify as a controlled substance offense and everything else remained the same, the sentencing guidelines range that would be produced is forty-six months to fifty-seven months' imprisonment. *See* 2018 GUIDELINES MANUAL, *supra* note 3, at ch. 5 pt. A. Thus, assuming that the judge would again sentence at the low end of the range, Mr. Nieves's sentence would have been two years shorter.

masse,[31] resulting in a system that drastically departs from the one that the Sentencing Reform Act intended to create.[32]

This Comment focuses on the problems that arise at the intersection of *Auer* deference and the sentencing guidelines and proposes a solution that (1) is appropriately protective of the rights of criminal defendants and (2) retains the necessary flexibility for the Sentencing Commission, allowing it to act through commentary when appropriate. To begin, Part I explores the background against which Congress enacted the Sentencing Reform Act of 1984 and the Act's delegation of rulemaking authority to the Sentencing Commission. Part II tracks the development of *Auer* deference from its origin in *Bowles v. Seminole Rock & Sand Co.* to its reformulation as a multi-step test in *Kisor v. Wilkie*. Part III then examines the intersection of the sentencing guidelines and *Auer* deference and details the problems that have arisen, which indicate a need to change the current sentencing regime. Finally, Part IV proposes that the multi-step test provided by the Supreme Court in *Kisor* can accommodate a new understanding of *Auer* deference that is appropriately protective of criminal defendants. As part of this multi-step test, courts should strictly apply their interpretive tools and use the rule of lenity to foreclose *Auer* deference to commentary when it is harmful to criminal defendants. Such an approach would ensure that the Sentencing Commission cannot act in a manner that is contrary to the interests of criminal defendants without amending the sentencing guidelines themselves, while still retaining a more limited role for commentary.

I. THE SENTENCING COMMISSION, THE *GUIDELINES MANUAL*, AND THE FEDERAL CRIMINAL JUSTICE SYSTEM

During Fiscal Year 2018, federal district courts "reported 69,425 felony and Class A misdemeanor cases to the [United States Sentencing] Commission," with "75.0 percent of all offenders receiv[ing] sentences" under the *Guidelines Manual*.[33] When criminal offenders appealed their sentences, 71.3% of their sentences were affirmed outright while only 10.8% of their sentences were

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[31] In 2019, 1,737 offenders (2.5% of all offenders sentenced) were found to be career offenders under the definitions set forth in this provision of the Sentencing Guidelines. U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 77 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf.

[32] *See infra* Part I.

[33] U.S. SENT'G COMM'N, *supra* note 1, at 8, 84 tbl.29. A sentence under the *Guidelines Manual* is one that is "within the applicable guidelines range, or . . . outside the applicable guidelines range [with] the court cit[ing] a departure reason from the *Guidelines Manual*." *Id.* at 8.

reversed,[34] reflecting the influential position that the Sentencing Commission and its *Guidelines Manual* occupy at the center of the federal criminal justice system.[35] This Part begins by examining the traditional discretion exercised by federal district court judges in sentencing and the movement toward uniformity in sentencing that arose from problems inherent in this pre-guidelines system. This Part then discusses the Sentencing Reform Act of 1984, which (1) established the Sentencing Commission and (2) delegated it the authority to promulgate federal sentencing policy. Finally, this Part explores how the Sentencing Commission and its *Guidelines Manual* operate today.

A. The Movement Toward Sentencing Reform

Before federal sentencing was done in accordance with the *Guidelines Manual*, sentencing disparities abounded in the federal criminal justice system, which led Congress, the United States Parole Commission, and federal judges to call for reform.[36] Historically, federal district court judges employed indiscriminate sentencing in criminal cases, in which criminal statutes provided "the penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long, whether he should be fined and how much, and whether some lesser restraint, such as probation, should be imposed instead of imprisonment or fine."[37] The discretion that federal district court judges enjoyed under indiscriminate sentencing was so broad that reviewing courts afforded almost "unconditional deference [to the sentencing judge] on appeal."[38] As a result, serious sentencing disparities were widespread[39] and arose from differences in

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[34] *Id.* at 180.

[35] *See* Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALBANY L. REV. 771, 771–73 (2013) (discussing the recent growth in the size of the federal prison system and the role that the Sentencing Commission and the *Guidelines Manual* has played in this growth).

[36] *See infra* notes 48–55. *See generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) (proposing a system of mandatory sentencing guidelines to limit sentencing disparities and arbitrariness in sentencing).

[37] Mistretta v. United States, 488 U.S. 361, 363 (1989).

[38] *Id.* at 364. Judge Frankel, a reform-minded district court judge in the Southern District of New York, remarked that "[t]he sentencing powers of the judges are . . . so far unconfined that . . . they are effectively subject to no law at all." FRANKEL, *supra* note 36, at 11.

[39] *Mistretta*, 486 U.S. at 365; *see* Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 HOFSTRA L. REV. 799, 800 (2018); Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1177–81 (2017).

the sentencing judge, the geographic location of the court,[40] and "demographic factors, particularly race and gender," among other things.[41]

Disparities in "federal sentencing at the 'front-end' of the process were exacerbated by the intervening actions of the Federal Bureau of Prisons and the Parole Commission at the 'back end' of the process."[42] The Bureau of Prisons governed good time allowances in prison, under which "federal prisoners were able to . . . significantly reduce the length of time [that they] served relative to the term of imprisonment imposed by federal district courts."[43] Independently from the good time allowances, "the Parole Commission reviewed prison sentences of federal offenders that exceeded one year and decided whether to exercise its discretion to release them from prison at some point before the expiration of the sentences imposed."[44] Because most prisoners became eligible for parole "after they had served one-third of the[ir] prison sentence,"[45] some sentencing judges imposed longer sentences on the assumption that parole would be granted and lessen the sentence, leading to sentencing disparities between judges.[46] As such, sentencing disparities at the trial level were inherent in the pre-guidelines system and exacerbated through the actions of the Bureau of Prisons and the Parole Commission.[47]

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[40] Newton & Sidhu, *supra* note 39, at 1177–81. A study of sentencing in the Second Circuit asked judges to sentence hypothetical criminal defendants based on uniform materials and revealed both intra-circuit and intra-district discrepancies in sentencing. ANTHONY PARTRIDGE & WILLIAM B. ELDRIDGE, FEDERAL JUDICIAL CENTER, THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 6–7, 26–31 (1974), https://www.fjc.gov/sites/default/files/2012/2dCrStdy.pdf. For example, the median punishment imposed in the first case of the study "was 10 years' imprisonment and a $50,000 fine, [with] sentence[es] rang[ing] from 3 years' imprisonment to 20 years' imprisonment and a $65,000 fine." *Id.* at 5. A later Department of Justice study involving 208 judges confirmed "the sentencing disparities identified in the Second Circuit Study." Newton & Sidhu, *supra* note 39, at 1179.

[41] Newton & Sidhu, *supra* note 39, at 1180 nn.83–84 (summarizing studies on race- and gender-based sentencing disparities prior to the promulgation of the *Guidelines Manual*). Sentencing disparities often compounded when demographic factors overlapped. *See, e.g.*, *Sentencing Guidelines: Hearings Before the Subcomm. on Crim. Just. of the Comm. on the Judiciary*, 100th Cong. 661, 663 (1987) (statement of Ilene H. Nagel, Comm'r, U.S. Sent'g Comm'n) ("[B]lack defendants convicted and sentenced for bank robbery in jurisdictions in the South are likely to actually serve approximately thirteen months longer than similarly situated bank robbers convicted and sentenced in other regions.").

[42] Newton & Sidhu, *supra* note 39, at 1170.

[43] *Id.* In some cases, good time allowances reduced a federal prisoner's sentence to half that imposed by the sentencing judge. *Id.* at 1170–71.

[44] *Id.* at 1171. Parole functioned "as an integral part of . . . the indeterminate sentencing system [and was] based on the theory that prison rehabilitated offenders, [which allowed] their reentry into the community well before the expiration" of the sentence imposed. *Id.* But rehabilitation as a theory for punishment has been frequently criticized. *See, e.g.*, FRANKEL, *supra* note 36, at 86–102; Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CINN. L. REV. 1, 29–40 (1972).

[45] Newton & Sidhu, *supra* note 39, at 1171.

[46] *See* Breyer, *supra* note 39, at 800.

[47] Newton & Sidhu, *supra* note 39, at 1169–75.

Recognizing the need for change, Congress, the Parole Commission, and members of the judiciary took actions to mitigate the problematic roles that they played in the sentencing regime. In 1958, Congress authorized the convening of sentencing institutes "for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in the courts of the United States,"[48] and, in 1973, the Parole Commission attempted to reduce arbitrary sentencing disparities by adopting "guidelines that established a 'customary range' of confinement."[49] Ultimately, however, neither the sentencing institutes[50] nor the parole guidelines had any significant impact because neither did anything to moderate the trial judge's discretion in sentencing so long as the sentence imposed was within the statutory range provided by Congress.[51]

More significant was a book written by Judge Marvin Frankel of the Southern District of New York, which called attention to sentencing disparities throughout the country[52] and "urged Congress to create a commission charged with the task of issuing a set of guidelines that would modestly limit the extraordinarily broad discretion of federal sentencing judges."[53] Judge Frankel proposed that Congress create a "commission [that] would be a permanent agency responsible for (1) the study of sentencing, corrections, and parole; (2) the formulation of laws and rules to which the studies pointed; and (3) *the actual enactment of rules*, subject to traditional checks by Congress and the courts."[54] While the impact of this book was not immediately felt, it was

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[48] Joint Resolution of Aug. 25, 1958, Pub. L. No. 85-752, 72 Stat. 845, § 1 (codified as amended at 28 U.S.C. § 334 (2012)); *see* Mistretta v. United States, 486 U.S. 361, 365 (1989); FRANKEL, *supra* note 36, at 61–68.

[49] *Mistretta*, 488 U.S. at 365 (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 391 (1980)). Congress explicitly endorsed the parole guidelines in 1976 by passing the Parole Commission and Reorganization Act. Pub. L. No. 94-233, 90 Stat. 219 (1976) (codified at 18 U.S.C. §§ 4201–4218, *repealed by* Joint Resolution of Oct. 12, 1984, Pub. L. 98-473, § 218(a)(5), 98 Stat. 1837, 2027).

[50] FRANKEL, *supra* note 36, at 63, 68; *see also* Mark Phillip Rabinowitz, *Criminal Sentencing: An Overview of Procedures and Alternatives*, 45 MISS. L.J. 782, 792 (1974) (noting that sentencing institutes "occur too infrequently, and have been said to be ineffective in changing philosophies of attending judges").

[51] *Mistretta*, 488 U.S. at 365–66; *see supra* notes 37–38 and accompanying text.

[52] *See generally* FRANKEL, *supra* note 36 (describing the sentencing disparities inherent in pre-*Guidelines Manual* system).

[53] Jon O. Newman, *The Federal Sentencing Guidelines: A Good Idea Badly Implemented*, 46 HOFSTRA L. REV. 805, 805 (2018); *see* Newton & Sidhu, *supra* note 39, at 1184.

[54] FRANKEL, *supra* note 36, at 119. As proposed, the Commission was to be composed of diverse groups of people, including "lawyers, judges, penologists and criminologists," as well as "sociologists, psychologists, business people, artists, and . . . former or present prison inmates." *Id.* at 120. Judge Frankel thought it was important to include prisoners on the Commission, given that (1) "prison riots and other events" were sweeping the nation at the time of his proposal, and (2) "[p]risoners [had] begun to appear in commissions of inquiry and similar bodies." *Id.*

ultimately significant, as it "led to the convening of a seminar at the Yale Law School . . . [which] prepared a draft bill that served as the model for what became the Sentencing Reform Act of 1984."[55]

B. The Sentencing Reform Act of 1984 and the Origin of the Sentencing Commission

Congress took a renewed interest in sentencing in the late 1970s and proposed—for the first time—a "comprehensive bill [that] included the establishment of a sentencing commission for the purpose of drafting sentencing guidelines."[56] While several pieces of sentencing reform legislation were introduced during this period, Congress did not ultimately attain the necessary bipartisan support for such legislation until the Sentencing Reform Act of 1984.[57]

The Sentencing Reform Act of 1984 drastically altered the existing system of indiscriminate sentencing in three ways. First, the Act "rejected imprisonment as a means of promoting [the] rehabilitation" of criminal offenders;[58] instead, sentencing was to promote retributive, deterrent, incapacitative, and educational goals.[59] Second, the Act abolished the Parole Commission and consolidated the power that "the sentencing judge and the Parole Commission [exercised in deciding] what punishment an offender should suffer" in a new body[60]—the United States Sentencing Commission.[61] Third, appellate review of sentencing

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[55] Newman, *supra* note 53, at 806; *see* PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 96–134 (1977) (publishing the draft bill); U.S. SENT'G COMM'N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 3–4 (1987), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Supplementary_Report_Initial_Sentencing_Guidelines.pdf (discussing the workshops that were convened and the draft bill that was produced).

[56] U.S. SENT'G COMM'N, *supra* note 55, at 4.

[57] Newton & Sidhu, *supra* note 39, at 1184; *see* U.S. SENT'G COMM'N, *supra* note 55, at 5–6.

[58] Mistretta v. United States, 488 U.S. 361, 367 (1989) (first citing 28 U.S.C. § 994(k); then citing 18 U.S.C. § 3553(a)(2)). There was growing skepticism toward rehabilitation as a goal of criminal punishment when the Sentencing Reform Act of 1984 was passed. *See* FRANKEL, *supra* note 36, at 86–102 (criticizing the role that rehabilitation as a theory of punishment played in promoting indeterminate sentencing); NORA V. DEMLEITNER, DOUGLAS A. BERMAN, MARC L. MILLER & RONALD F. WRIGHT, SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 131–33 (4th ed. 2018) (describing the "[r]ise and fall of the rehabilitative ideal"); Newton & Sidhu, *supra* note 39, at 1183 n.100 (summarizing social science research that concluded that rehabilitation through imprisonment did not work).

[59] § 3553(a)(2). Today, the *Guidelines Manual* identifies "rehabilitation" as a "basic purpose of punishment," along with "deterrence, incapacitation, [and] just punishment." 2018 GUIDELINES MANUAL, *supra* note 3, at ch. 1, pt. A, introductory cmt.

[60] *Mistretta*, 488 U.S. at 367. Indeterminate sentencing was dramatically reduced through the elimination of parole—now, prisoners could be released early only for good behavior. *Id.* (citing 18 U.S.C. § 3624(a)–(b)).

[61] As established, the Sentencing Commission was an independent commission housed in the judicial

was limited to cases in which (1) the sentence imposed by the federal district court judge was not within the range mandated by the sentencing guidelines, or (2) the sentencing guidelines were incorrectly applied.[62]

Congress delegated to the Sentencing Commission the ability to promulgate (1) "guidelines . . . for [the] use of a sentencing court in determining the sentence to be imposed in a criminal case"[63] and (2) "general policy statements regarding [the] application of the guidelines or any other aspect of sentencing or . . . implementation."[64] Congress also required the Sentencing Commission to establish categories of offenses[65] and defendants[66] that it could use to create sentencing ranges "for each category of offense involving each category of defendant."[67] Congress intended the end product of this process to be a matrix of sentencing ranges that federal district court judges would use when

branch. 28 U.S.C. § 991(a). The Commission was composed of "seven voting members and one nonvoting member," at least three of which had to be federal judges. *Id.* Other provisions of the Act specified appointment and removal provisions and imposed limitations on the Commission's political composition. *Id.* Notably, the composition of the original Sentencing Commission did not resemble the composition initially proposed by Judge Frankel, and resembles it even less so today. *Compare About the Commissioners*, U.S. SENT'G COMM'N, https://www.ussc.gov/commissioners (last visited Feb. 12, 2021) (describing the current composition of the Sentencing Commission), *with supra* note 54 (describing Judge Frankel's initial proposal for the composition of the Sentencing Commission).

[62] *Mistretta*, 488 U.S. at 368 (citing 18 U.S.C. § 3742(a)–(b)). A defendant was permitted to appeal their sentence if the sentence exceeded the range set by the guidelines, while the Government was permitted to appeal the sentence if it fell below the range set by the guidelines. § 3742 (a)–(b). Subsequent changes have been made to this standard due to constitutional challenges. *See infra* notes 78–79 and accompanying text.

[63] § 994(a)(1). Initially, the sentencing guidelines were binding in nature. *Mistretta*, 488 U.S. at 367 (citing §§ 991, 994, 995(a)(1)). Judges could depart from the guidelines only if there were mitigating or aggravating factors that were not adequately considered by the U.S. Sentencing Commission. *See* § 3553(b)(1). The Supreme Court, however, found that the binding nature of the sentencing guidelines was unconstitutional in *United States v. Booker*. *See infra* notes 76–80 (discussing the provisions of the Sentencing Reform Act that were modified following the decision in *Booker*).

[64] § 994(a)(2). While the "Sentencing Reform Act [did] not in express terms authorize the issuance of commentary, the Act does refer to it." Stinson v. United States, 508 U.S. 36, 41 (1993); *see also infra* Part III.A (discussing the function of commentary). Guidelines, commentary, and general policy statements are published as part of the *Guidelines Manual*. *See* 2018 GUIDELINES MANUAL, *supra* note 3, at ch.1, pt. A.

[65] Categorization of offenses had to take into account (1) the grade of the offense, (2) the circumstances mitigating or aggravating the seriousness of the offense, (3) the nature and degree of harm caused, (4) the community view of the offense's gravity, (5) the public's concern with the offense, (6) the deterrent effect of the sentence imposed, and (7) the current incidence of the offense in the community and nationally. § 994(c).

[66] Categorization of defendants had to take into account (1) age, (2) education, (3) vocational skills, (4) mental and emotional conditions as they mitigate defendant's culpability, (5) physical condition (drug dependency), (6) previous employment record, (7) family ties and responsibilities, (8) community ties, (9) the defendant's role in the offense, (10) criminal history, and (11) the degree of dependence upon criminal activity for livelihood. § 994(d). However, a defendant's "education, vocational skills, employment record, family ties and responsibilities, and community ties" were generally inappropriate to consider. § 994(e).

[67] § 994(b)(1).

determining criminal sentences.[68] The ranges themselves were constrained by the Act to those limits already provided by the underlying criminal statutes,[69] with "[t]he maximum of the range [ordinarily] . . . not [to] exceed the minimum of that range by more than the greater of 25% or six months."[70]

While the Sentencing Reform Act was passed in 1984, the Sentencing Commission did not promulgate the first *Guidelines Manual* until November 1987.[71] Almost immediately afterward, litigation testing both the Sentencing Commission and its *Guidelines Manual* began.[72]

C. Constitutional Challenges to the Sentencing Commission and the Guidelines Manual

The constitutionality of the Sentencing Commission was challenged almost immediately after the initial *Guidelines Manual* was promulgated in 1987, though the Commission largely survived constitutional scrutiny.[73] In *Mistretta v. United States*, a criminal defendant argued that a sentence promulgated under the guidelines was unconstitutional on the grounds that (1) "the Sentencing Commission was constituted in violation of the established doctrine of separation of powers," and (2) "Congress delegated excessive authority to the Commission to structure the [g]uidelines."[74] Nonetheless, the Supreme Court ultimately rejected both arguments and found that the Sentencing Commission was constitutional in its entirety.[75]

Other constitutional challenges have been raised to individual sentencing guidelines. However, the Sentencing Reform Act and the Sentencing

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[68] *See* Newton & Sidhu, *supra* note 39, at 1308. The matrices that the Sentencing Commission promulgated stand in marked contrast to the simplicity of the grid adopted by the Federal Parole Guidelines. *Id.*; *see* 2018 GUIDELINES MANUAL, *supra* note 3, at ch. 5, pt. A.

[69] Mistretta v. United States, 488 U.S. 351, 368 (1989) (citation omitted).

[70] § 994(b)(2). The sentencing guidelines were not designed to be static, so Congress affirmatively tasked the Sentencing Commission with periodically "review[ing] and revis[ing] . . . the guidelines [that it] promulgated." § 994(o). In the same vein, Congress affirmatively required the Commission to submit to "Congress at least annually an analysis of the operation of the guidelines," *Mistretta*, 488 U.S. at 369 (citing § 994(w)), as well as any proposed "amendments to [the] guidelines and modifications to previously submitted amendments that ha[d] not taken effect." § 994(p). As a congressional check, proposed amendments and modifications had to be submitted with explanation to Congress at least 180 days before the effective date of the changes, during which time Congress could take action if warranted. *Id.*

[71] *See generally* Newton & Sidhu, *supra* note 39, at 1183–1221 (describing the Sentencing Commission's earliest days and the three-year process of promulgating the initial *Guidelines Manual*).

[72] *Mistretta*, 488 U.S. at 370.

[73] *See id.*

[74] *Id.*

[75] *Id.* at 412.

Commission itself have largely survived constitutional scrutiny with one major exception, namely that the provisions of the Act which made the sentencing guidelines mandatory have been found unconstitutional.[76] In *United States v. Booker*, the Supreme Court found that the mandatory provisions of the Sentencing Reform Act were unconstitutional because they violated the guarantees of the Sixth Amendment.[77] The Court, however, determined that those provisions that "ma[de] the [g]uidelines mandatory . . . [could] be severed and excised,"[78] and concluded that the guidelines could operate as "effectively advisory" in their absence.[79] Thus, today, sentencing courts are required "to consider [the] [g]uidelines ranges," but are permitted "to tailor the sentence in light of other statutory concerns."[80]

Subsequent Supreme Court decisions have interpreted the sentencing guidelines in this new capacity.[81] Nonetheless, what remains significant is that (1) the sentencing guidelines are advisory in nature,[82] and (2) sentences that are imposed within the recommended sentencing guidelines range enjoy a presumption of reasonableness on appeal.[83]

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[76] United States v. Booker, 543 U.S. 220, 226–27 (2005).

[77] *Id.* at 232.

[78] *Id.* at 245. The provisions that the Supreme Court excised are 18 U.S.C. § 3553(b)(1) ("[T]he court shall impose a sentence of that kind, and within the range . . . .") and § 3742(e) ("[T]he court of appeals shall review de novo the district court's application of the guidelines to the facts.").

[79] *Booker*, 543 U.S. at 245. A data project conducted by the Sentencing Commission post-*Booker* demonstrates the continued importance of the sentencing guidelines, even though they are no longer mandatory. U.S. SENTENCING COMMISSION, SPECIAL POST-*BOOKER* CODING PROJECT (2005), http://www.nhp.uscourts.gov/sites/default/files/pdf/booker.pdf. In the period immediately after the decision in *Booker*, 61.9% of federal sentences imposed fell within the sentencing range recommended by the *Guidelines Manual*, as compared to 64.5%, 64.0%, 65.0%, and 69.4% in in the years preceding the decision (2000–2003, respectively). *Id.* at 7–12. Similarly, in 2018, "75.0 percent of all offenders received sentences under the *Guidelines Manual*, in that the sentence was within the applicable guidelines range, or was outside the applicable guidelines range and the court cited a departure reason from the *Guidelines Manual*." U.S. SENT'G COMM'N, *supra* note 1, at 8.

[80] *Booker*, 543 U.S. at 245–46; *see also Havis I*, 907 F.3d 439, 444 (6th Cir. 2018) ("Though advisory, the Guidelines and their commentary remain the 'lodestone' of federal sentencing."), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019).

[81] For a discussion of Supreme Court cases interpreting the new advisory nature of the sentencing guidelines, see Jeff Papa & Chris Kashman, *An Introduction to the Federal Sentencing Guidelines*, 51 IND. L. REV. 357, 365–66 (2018); Cappellino & Meringolo, *supra* note 35, at 780–83.

[82] *Booker*, 543 U.S. at 226–27.

[83] Rita v. United States, 551 U.S. 338, 347 (2007) ("[A] court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines.").

II. DEFERENCE TO AN AGENCY'S INTERPRETATION OF ITS OWN REGULATIONS

As highlighted by *Mistretta*,[84] the congressional delegation of rulemaking authority to agencies is commonplace, and such delegations are almost always upheld as constitutional by the Supreme Court.[85] Importantly, these delegations of rulemaking authority are accompanied by the presumption that federal agencies are to be "the primary interpreters of ambiguous federal statutes" that they have been charged by Congress to administer.[86] Moreover, empirical data reflects this presumption, as courts defer to an agency's interpretation of a statute that it administers or a regulation that it has promulgated in the vast majority of the cases in which a deference doctrine is invoked.[87] This Part begins by introducing *Chevron* deference and *Auer* deference, two of the most important administrative deference doctrines. This Part then examines *Bowles v. Seminole Rock & Sand Co.* and *Auer v. Robbins*, which establish that courts should defer to an agency's interpretation of its own regulations unless the interpretation is plainly erroneous or inconsistent with the regulation (an administrative deference doctrine now known as *Auer* deference).[88] This Part concludes by discussing criticisms of *Auer* deference and examining the Supreme Court's recent decision in *Kisor v. Wilkie*, which upheld *Auer* deference but set forth a new test for its application.[89]

A. An Introduction to Administrative Deference Doctrines

While congressional delegations of rulemaking authority to agencies are commonplace,[90] they do not put agency action beyond judicial review; instead,

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[84] Mistretta v. United States, 488 U.S. 361 (1989).

[85] *See generally* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017) (contrasting the insignificance of the nondelegation doctrine at the federal level with the vibrancy of the nondelegation doctrine at the state level); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379 (2017) (arguing that courts have never used the nondelegation doctrine to substantively limit the delegation of legislative power).

[86] Christopher J. Walker, *Do Judicial Deference Doctrines Actually Matter?*, LAW & LIBERTY (Aug. 25, 2016), https://www.lawliberty.org/2016/08/25/do-judicial-deference-doctrines-actually-matter/. This presumption is reflected by the Administrative Procedure Act's judicial review provisions. *Compare* 5 U.S.C. § 706 (setting forth the standards of review that courts use in evaluating agency action), *with* Walker, *supra* (highlighting legislation that would alter § 706 and require courts to "decide *de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies").

[87] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1099 (2008).

[88] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

[89] Kisor v. Wilkie, 139 S. Ct. 2400, 2414–18 (2019).

[90] *See supra* note 85 and accompanying text.

the Administrative Procedure Act (APA) governs the exercise of rulemaking authority by agencies and provides for judicial review of agency action.[91] As part of this judicial review, courts determine the "meaning or applicability of the terms of an agency action," allowing courts to determine whether they should "hold unlawful and set aside agency action, findings, and conclusions."[92] While this language "could be read to 'mean that all statutory ambiguities are to be resolved judicially' . . . [,] [a]dministrative law nonetheless recognizes that agencies should often enjoy special sway over [the determination of] legal meaning" in light of the agency's expertise and the congressional delegation of rulemaking authority.[93]

As a result, the Supreme Court has recognized several deference doctrines that require courts to defer to an "agency's construction of [a] statute (or regulation) that it administers," including *Chevron* deference and *Auer* deference.[94] *Chevron* deference applies when courts are determining whether an agency's interpretation of a statute that it administers should receive deference.[95] In making this determination, the court employs a two-step analysis.[96] In *Chevron* Step One, the court considers "whether Congress has directly spoken to the precise question at issue" using the "traditional tools of statutory construction."[97] Then, in *Chevron* Step Two, if the court determines that Congress has not "directly spoken to the precise question at issue," the court looks to "whether the agency's [interpretation] is based on a permissible construction of the statute."[98] The agency's interpretation will receive "controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute."[99]

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[91] 5 U.S.C. § 706.

[92] *Id.*

[93] 4 CHARLES H. KOCH, JR. & RICHARD MURPHY., ADMINISTRATIVE LAW AND PRACTICE § 11.31 (3d ed. 2019) (quoting United States v. Mead Corp., 533 U.S. 218, 241 n.2 (2001) (Scalia, J., dissenting)).

[94] *Id. See generally* Eskridge & Baer, *supra* note 87, at 1097–1136 (2008) (summarizing deference doctrines that the Supreme Court has applied over time).

[95] Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842 (1984).

[96] *Id.* at 842–43.

[97] *Id.* at 842–43, 843 n.9. While courts and scholars disagree on what the "traditional tools of statutory construction are," courts have, at various times, considered statutory text and structure, legislative history, statutory purpose, and constitutionally inspired norms. *See* Abbe R. Gluck, *What 30 Years of* Chevron *Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607, 618–19 (2014) (noting the murkiness inherent in the phrase "traditional tools of statutory construction"); Frederick Liu, Chevron *as a Doctrine of Hard Cases*, 66 ADMIN L. REV. 285, 289, 308–10 (2014) (identifying tools that courts have used as "traditional tools of statutory construction").

[98] *Chevron*, 467 U.S at 843.

[99] *Id.* at 844.

Auer deference, on the other hand, applies when courts are determining whether an agency's interpretation of its own regulations should receive deference.[100] Under *Auer* deference, courts treat an agency's interpretation of its own regulations as "controlling unless [the interpretation is] 'plainly erroneous or inconsistent with the regulation.'"[101] Significantly, the Supreme Court has recognized that commentary contained in the *Guidelines Manual* is analogous to an agency's interpretation of its own regulations and may receive *Auer* deference.[102] Thus, an understanding of the doctrine's origin, rationale, and development is essential to understanding how the doctrine intersects with the *Guidelines Manual* today—creating problems for criminal defendants.

B. Seminole Rock—*The Origin of Deference to an Agency's Interpretation of Its Own Regulations*

With little explanation, the Supreme Court announced for the first time in *Bowles v. Seminole Rock & Sand Co.* that courts "must necessarily look to the administrative construction of [a] regulation if the meaning of the words used [in it] is in doubt."[103] The Supreme Court acknowledged that congressional intent and constitutional principles may be relevant in choosing between "various constructions" of an ambiguous regulation; however, it concluded that "the ultimate criterion is the administrative interpretation[,] which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[104] As such, the Supreme Court indicated that the "only tools" available to reviewing courts in determining whether to grant deference to an agency's interpretation of its own regulations are "the plain words of the regulation and any relevant [agency] interpretations."[105]

Application of this doctrine was limited in nature following the Supreme Court's initial decision in *Seminole Rock*, though courts began to grant *Seminole Rock* deference more frequently in the 1960s and 1970s.[106] The doctrine largely operated with an unenumerated rationale until the 1990s, when the Supreme Court finally explained why "courts should extend strong deference to an agency's interpretation of its own regulation."[107] In *Martin v. Occupational*

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100 4 KOCH & MURPHY, *supra* note 93.

101 Auer v. Robbins, 519 U.S. 452, 461 (1997).

102 Stinson v. United States, 507 U.S. 36, 38, 45 (1993) (citations omitted).

103 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

104 *Id.*

105 *Id.*

106 *See* Sanne H. Knudsen & Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 EMORY L.J. 47, 69, 91 (2015).

107 4 KOCH & MURPHY, *supra* note 93, § 11.38.

Safety & Health Review Commission, the Supreme Court explained that deference to an agency's interpretation of its own regulation is proper "[b]ecause applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives."[108] The Court further explained that agencies have "historical familiarity and policymaking expertise [that] account . . . for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court."[109] And, it was against this background that the Supreme Court affirmed the validity of *Seminole Rock* deference in *Auer v. Robbins*, despite some early criticism of the doctrine.[110]

C. Auer*—Deference to an Agency's Interpretation of Its Own Regulations Under a Modern Rationale*

While the application of *Seminole Rock* deference had been rapidly expanding since the 1960s,[111] the Supreme Court "provide[d] important information regarding the potential scope of the doctrine" in *Auer v. Robbins*.[112] At issue in *Auer* was an agency's interpretation of a regulation that was presented in an amicus brief filed by an agency official—something far different from the interpretation that the Supreme Court had considered in *Seminole Rock*.[113] Nonetheless, the Supreme Court concluded that, because the official's interpretation was a "creature of the [agency's] own regulations, his interpretation . . . [was] controlling unless 'plainly erroneous or inconsistent with the regulation.'"[114]

The Supreme Court ultimately held that the official's interpretation of the regulation received deference because the "deferential standard [was] easily met."[115] Challenges on the ground that the interpretation was asserted for the first time in a legal brief were rejected by the Court.[116] Importantly, the Court found that the form of the interpretation itself did not "make it unworthy of

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[108] 499 U.S. 144, 151 (1991); *see* 4 KOCH & MURPHY, *supra* note 93, § 11.38.

[109] *Martin*, 499 U.S. at 153.

[110] *See* 1 KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 353 (6th ed. 2019).

[111] *See supra* note 106 and accompanying text.

[112] 4 KOCH & MURPHY, *supra* note 93, § 11.38.

[113] *See* Auer v. Robbins, 519 U.S. 452, 461 (1997). Interestingly, the amicus brief was filed at the request of the court. *Id.* While the Supreme Court never explained why it requested that the official file an amicus brief with his interpretation, it was presumably because of his "historical familiarity and policymaking expertise" with the regulations and underlying statute. *See Martin*, 499 U.S. at 153.

[114] *Auer*, 519 U.S. at 461.

[115] *Id.*

[116] *See id.* at 462.

deference" in this case, because (1) the interpretation was "in no sense 'a *post hoc* rationalization' advanced by an agency seeking to defend past agency action," and (2) there was "no reason to suspect that the interpretation d[id] not reflect the agency's fair and considered judgment on the matter in question."[117]

Thus, the Supreme Court's decision in *Auer* affirmed that the deferential standard originally set forth in *Seminole Rock* was valid, though it suggested that there were some limits on the types of interpretations that would receive deference.[118] This decision served as the start of a new era for the doctrine, which is reflected by the fact that courts now refer to the doctrine as *Auer* deference, not *Seminole Rock* deference.[119]

D. Criticism of Auer *Deference and Increased Skepticism Toward the Doctrine*

Courts and scholars largely accepted this deference doctrine as uncontroversial after the Supreme Court's decision in *Seminole Rock*,[120] though criticisms of the doctrine began to arise in the 1990s.[121] After the Supreme Court unanimously affirmed the doctrine in *Auer*, however, criticism was largely quelled (at least until the early 2010s).[122] At that time, the Supreme Court again took "note of the doctrinal concerns inherent in the *Seminole Rock* deference regime,"[123] with renewed scholarly attention soon to follow.

1. Early Criticism of Seminole Rock *Deference*

In the period before the Supreme Court's unanimous decision in *Auer*, members of the judiciary began to raise concerns with the application of

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117 *Id.*

118 *See id.* at 461–62.

119 *See* 1 HICKMAN & PIERCE, *supra* note 110, at 353; 4 KOCH & MURPHY, *supra* note 93, § 11.38. Hereafter, the doctrine will be referred to as *Seminole Rock* deference if the opinion or scholarship was written before *Auer*, and *Auer* deference if the opinion or scholarship was written after *Auer*.

120 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414; *see supra* Part II.B. Most of the academic commentary on *Seminole Rock* deference arose from one scholar, who "argued that courts should generally accept an agency's reasonable, consistently applied interpretation of its own regulations." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614 n.12 (1996).

121 *See* Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 102 (1995) (O'Connor, J., dissenting); Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 518 (1994) (Thomas, J., dissenting); Manning, *supra* note 120; Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN L.J. AM. U. 1 (1996).

122 *See infra* notes 138–40 and accompanying text.

123 Kevin O. Leske, *Splits in the Rock: The Conflicting Interpretations of the* Seminole Rock *Deference Doctrine by the U.S. Courts of Appeals*, 66 ADMIN. L. REV. 787, 791 (2014).

Seminole Rock deference and its underlying rationale, though this criticism was limited.[124] More importantly, scholars began to critique *Seminole Rock* deference on the grounds that it (1) circumvented the requirements of the APA and (2) threatened constitutional separation-of-powers requirements.[125] These criticisms retain significance today and merit an examination because members of the judiciary have repeated these criticisms of *Auer* deference—ultimately setting the stage for the Supreme Court's decision in *Kisor v. Wilkie*.[126]

In this early period, scholars challenged that *Seminole Rock* deference circumvented the requirements of the APA by (1) enforcing interpretations that were promulgated outside the requirements of notice-and-comment rulemaking and (2) disregarding the provisions for judicial review.[127] Generally, the APA requires agencies to comply with the requirements of notice-and-comment rulemaking when they promulgate regulations under delegated rulemaking authority.[128]An exception to these requirements exists, however, for "interpretative rules."[129]An agency's interpretation of its own regulations would presumably fall within this exception, but courts routinely fail to ask if the interpretation at issue "genuinely interprets the regulation."[130] And, importantly, this failure poses the danger that interpretations that do not actually interpret will "acquire binding force [under this exception] while remaining cut off from congressional intent, . . . the APA requirements, and . . . meaningful judicial control."[131] An argument was also made that courts shirk their duty to "determine the meaning . . . of the terms of an agency action"—as required by the judicial review provisions of the APA—when they grant *Seminole Rock* deference to an agency's interpretation of its own regulations.[132]

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[124] *See Guernsey Mem'l Hosp.*, 514 U.S. at 102 (O'Connor, J., dissenting); *Thomas Jefferson Univ.*, 512 U.S. at 518 (Thomas, J., dissenting). For example, in *Thomas Jefferson University*, Justice Thomas noted that *Seminole Rock* deference incentivized the promulgation of vague regulations and contravened the requirement that agencies make their rules and regulations sufficiently clear, so that "affected parties have adequate notice concerning the agency's understanding of the law." 512 U.S. at 525 (Thomas, J., dissenting).

[125] *See generally* Anthony, *supra* note 121 (discussing APA-based criticisms of *Seminole Rock* deference); Manning, *supra* note 120 (discussing the ways in which *Seminole Rock* deference threatens constitutional separation-of-powers arguments).

[126] *See infra* Part II.E.

[127] *See* Anthony, *supra* note 121, at 4–12; *see also* 5 U.S.C. §§ 553, 706 (setting forth the requirements of notice-and-comment rulemaking and the provisions for judicial review, respectively).

[128] § 553. To satisfy the requirements of notice-and-comment rulemaking, agencies must publish a notice in the Federal Register that contains "(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved." *Id.*

[129] *Id.*

[130] Anthony, *supra* note 121, at 6.

[131] *Id.* at 8.

[132] § 706; *see* Anthony, *supra* note 121, at 89. This view holds that "it is wrong for courts to abdicate their

Scholars also challenged that *Seminole Rock* deference threatened constitutional separation-of-powers requirements by undermining (1) the due process requirements of notice and (2) external political controls on agencies.[133] Scholars argued that the due process requirement of notice is undermined when courts allow "agencies to adopt imprecise or indeterminate regulations" and grant *Seminole Rock* deference to later interpretations, as this binds "courts and the public to improbable or hard-to-predict constructions of [an agency's] regulations."[134] They also contended that *Seminole Rock* deference undermined external political controls on agencies by accumulating "rulemaking, enforcement, and adjudicative authority in the typical administrative agency,"[135] which made it much "easier for agencies to use ambiguous or vague language to conceal regulatory outcomes that benefit small interest groups at the expense of the public at large."[136]

Despite these early criticisms of *Seminole Rock* deference, the Supreme Court unanimously affirmed the vitality of the doctrine in *Auer v. Robbins.*[137] And, while criticism was largely quelled in the wake of this decision, the Supreme Court[138] and scholars[139] took renewed interest in critiquing the doctrine

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office of determining the meaning of agency regulation and submissively giv[ing] controlling effect to a not-inconsistent agency position," which is what courts do when they grant *Auer* deference. Anthony, *supra* note 121, at 9. By granting *Auer* deference, courts allow agencies to "issue self-serving interpretations with impunity[,] . . . [that] will have at least as much binding force as the regulation," so long as the interpretation is not "plainly erroneous or inconsistent with the regulation." *Id.* at 10.

133 Manning, *supra* note 120, at 654–80.

134 *Id.* at 669. Due process requires that "legal rules . . . give persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly." *Id.* (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). But, granting *Seminole Rock* deference to imprecise or indeterminate regulations could result in interpretations that "would not be obvious to 'the most astute reader'" or "diverge significantly from what a first-time reader of the regulations might conclude was the 'best' interpretation of the language." *Id.* (quoting Gen. Elec. Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995)).

135 *Id.* at 675. Typical political constraints on the administrative process include legislative appropriations and confirmations (legislative), and the powers of appointment, removal, and regulatory oversight (executive). *See id.* at 675–76 nn.301–05.

136 *Id.* at 676–77. The imprecise and misleading rulemaking that *Seminole Rock* deference incentivizes may "mak[e] it more costly for the political system to detect, and assign, responsibility for political bargains that benefit the few at the expense of the many." *Id.* at 678.

137 *See supra* Part II.C.

138 For a discussion of cases in which members of the Supreme Court questioned *Auer* deference, see generally Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 24–26 (2018); Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L.J. 813, 821–25 (2015); Leske, *supra* note 123, at 796–800.

139 *See, e.g.*, Kristin E. Hickman & Mark R. Thomson, *The Chevronization of* Auer, 103 MINN. L. REV. HEADNOTES 103 (2019) (arguing that the practical rationale for *Auer* deference is undermined as the standard becomes more difficult to apply); Adler, *supra* note 138 (arguing that *Auer* deference allows agencies to evade the constraints that are placed upon agency behavior); Jefferey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO J.L. & PUB. POL'Y 87 (2018) (arguing that *Auer* deference is grounded in a misunderstanding of *Bowles v.*

in the early 2010s, ultimately leading the Supreme Court to reconsider *Auer* deference in *Kisor v. Wilkie*.[140]

2. *Growing Discontent: The March Toward* Kisor

Justice Scalia became the first member of the Supreme Court to openly question the merits of *Auer* deference in *Talk America, Inc. v. Michigan Bell Telephone Co*., decided in 2011.[141] Justice Scalia opined that he had "become increasingly doubtful of [the] validity" of *Auer* deference, even though he had "uncritically accepted that rule" in the past.[142] Justice Scalia also noted his belief that *Auer* deference "encourages the agency to enact vague rules[,] . . . frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."[143] As such, Justice Scalia indicated that he would "be receptive" to reconsidering *Auer* deference in the future.[144]

Next, the Supreme Court refused to grant *Auer* deference to an agency's interpretation of its own regulation in *Christopher v. SmithKline Beecham Corp.*, decided in 2012.[145] This decision was significant, as it presented "a rare case where the Court declined" to grant deference to the agency.[146] The Court began its decision by defining the scope of the deference doctrine as it had developed in *Auer* and subsequent decisions,[147] before highlighting the criticisms of the doctrine as set forth by Justice Scalia in his *Talk America* concurrence.[148] The Court then concluded that granting *Auer* deference to the agency's interpretation

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Seminole Rock & Sand Co.); Sanne H. Knudsen & Amy J. Wildermuth, *Lessons from the Lost History of* Seminole Rock, 22 GEO. MASON L. REV. 647 (2015) (arguing that *Seminole Rock* deference has expanded from its constitutional origins without an adequate explanation by courts and other commentators); Leske, *supra* note 123 (identifying substantial differences in the applications of *Auer* deference by the circuit courts).

140 *See infra* Part II.E.

141 564 U.S. 50, 68 (Scalia, J., concurring).

142 *Id.* Interestingly, Justice Scalia authored the unanimous opinion in *Auer*, though he later became sharply critical of *Auer* deference and described it as "one of the Court's 'worst decisions ever.'" Clarence Thomas, *A Tribute to Justice Antonin Scalia*, 126 YALE L.J. 1600, 1603 (2017).

143 *Talk Am.*, 564 U.S. at 69 (Scalia, J., concurring).

144 *Id.*

145 567 U.S. 142, 155–61 (2012).

146 Leske, *supra* note 123, at 798.

147 *SmithKline Beacham*, 567 U.S. at 155. Previously, the Court made clear that interpretations cannot be "plainly erroneous or inconsistent with the regulation," Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945), and must "reflect the agency's fair and considered judgment on the matter in question." Auer v. Robbins, 519 U.S. 452, 462 (1997). Moreover, an agency's interpretation will not be "fair and considered," and cannot receive *Auer* deference, when the interpretation (1) "conflicts with a prior interpretation," Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994), (2) serves only as the agency's "convenient litigating position," Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988), or (3) is "a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." *Auer*, 519 U.S. at 462.

148 *See supra* notes 141–44 and accompanying text.

in this case would "seriously undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[149]

After these early decisions in *Talk America* and *SmithKline Beecham*, the Supreme Court began to seriously question the validity of the deference doctrine in *Decker v. Northwest Environmental Defense Center*, decided in 2013.[150] Opposition to *Auer* deference began to climax in *Decker*, as Chief Justice Roberts and Justice Alito indicated their willingness to reconsider the doctrine for the first time, and Justice Scalia continued his forceful critiques.[151] Similar to his concurrence in *Talk America*, Justice Scalia authored an opinion in which he critiqued *Auer* deference on separation-of-powers grounds, though he did so in much stronger terms than he had previously used.[152] But, more significantly, Chief Justice Roberts and Justice Alito indicated in a concurrence that it might "be appropriate to reconsider" *Auer* deference "in an appropriate case," before concluding that "this [was] not that case."[153]

Finally, in 2015, the Supreme Court cemented its interest in reconsidering *Auer* deference in a series of concurring opinions authored by Justices Alito, Scalia, and Thomas in *Perez v. Mortgage Bankers Ass'n*.[154] Like in *Decker*, Justice Alito did not substantively critique *Auer* deference, but again opined that he "await[ed] a case in which the validity" of it could be explored.[155] To the contrary, Justices Scalia and Thomas each offered substantive critiques of *Auer* deference and openly called for its end.[156]

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149 *SmithKline Beacham*, 567 U.S. at 156. The Court also highlighted the "threat posed by allowing agenc[ies] to offer definitive interpretations of 'vague and open-ended regulations' long after the regulations were first issued." Adler, *supra* note 138, at 25 (quoting *SmithKline Beacham*, 567 U.S. at 158).

150 *See* Leske, *supra* note 123, at 798.

151 Decker v. Nw. Env't. Def. Ctr., 568 U.S. 597, 615 (2013) (Roberts, C.J., concurring). Justice Scalia authored a separate opinion in which he critiqued *Auer* deference. *Id.* at 616 (Scalia, J., concurring in part and dissenting in part).

152 *See id.*; Leske, *supra* note 123, at 799. In his opinion, Justice Scalia concluded that "[e]nough is enough" and that *Auer* deference's beneficial effects "cannot justify a rule that not only has no principled basis but contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." *Decker*, 568 U.S. at 616, 621 (Scalia, J., concurring in part and dissenting in part).

153 *Id.* at 615 (Roberts, C.J., concurring).

154 135 S. Ct. 1199 (2015).

155 *Id.* at 1210 (Alito, J., concurring in part and concurring in the judgment).

156 *See id.* at 1211–13 (Scalia, J., concurring in the judgment) (critiquing *Auer* deference on the ground that it contravenes the APA); *id.* at 1213–25 (Thomas, J., concurring in the judgment) (critiquing *Auer* deference on the ground that it violates separation-of-powers principles); *see also* Barmore, *supra* note 138, at 824 (discussing the opinions of Justices Scalia and Thomas in *Perez*).

Unsurprisingly, the Supreme Court's divergent views as to the continued vitality of *Auer* deference replicated themselves in the circuit courts.[157] Despite this confusion, however, lower courts continued to grant *Auer* deference to agency interpretations in the vast majority of cases in which the doctrine was raised.[158] Thus, the Supreme Court ultimately agreed to reconsider *Auer* deference in *Kisor v. Wilkie*, as there was (1) ongoing confusion regarding the doctrine and (2) open hostility toward it by members of the Supreme Court, lower court judges, and legal scholars.[159]

E. Kisor*—A New Test Limiting the Scope of* Auer *Deference*

Reflecting the conflict among members of the Supreme Court, lower court judges, and administrative law scholars, the Supreme Court issued a series of spirited opinions in *Kisor v. Wilkie* that addressed the future of *Auer* deference.[160] Most significantly, the Supreme Court enumerated a new multi-step test[161] for courts to use in determining whether *Auer* deference is

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[157] *See generally* Hickman & Thomson, *supra* note 139 (discussing *Auer* deference's increased complexity and the difficulties of the lower courts in applying it); Barmore, *supra* note 138, at 825–38 (identifying trends among the circuit courts in their applications of *Auer* deference after the Supreme Court's opinions in *Talk America*, *SmithKline Beacham*, and *Decker*); Leske, *supra* note 123 (describing the ways in which the circuit courts differed in applying *Auer* deference).

[158] *See generally* Barmore, *supra* note 138 (presenting an empirical analysis of lower courts' application of *Auer* deference in the period after *Talk America*). After *Talk America*, lower courts granted deference to an agency's interpretation of its own regulations in 82.3% of the cases in which that question was presented, though this percentage decreased in the period between the Supreme Court's decisions in *SmithKline Beacham* and *Decker*, and in the period since *Decker*. *Id.* at 828.

[159] Kisor v. Wilkie, 139 S. Ct. 2400, 2430–31 nn.37–39 (2019) (Gorsuch, J., concurring in the judgment). On numerous occasions, lower court judges explicitly called for the Supreme Court to reconsider *Auer* deference. *See, e.g.*, Forrest Gen. Hosp. v. Azar, 926 F.3d 221, 230 (5th Cir. 2019) ("*Auer*'s hours seem numbered."); *Havis I*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring) ("If there was ever a case to question deference to administrative agencies under *Auer v. Robbins*, . . . or more specifically to the Sentencing Commission under the *Auer*-like *Stinson v. United States*, . . . this is it."), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019); Egan v. Del. River Port Auth., 851 F.3d 263, 279 (3d Cir. 2017) ("As though that were not bad enough, our hands are also tied when an agency interprets or reinterprets its own rules. Those fetters were put in place by *Auer v. Robbins*.").

[160] *Kisor*, 139 S. Ct. 2400.

[161] The Supreme Court has never explicitly stated how many steps the new test for *Auer* deference has, though some scholars have proposed that there are as many as five. *See.*, *e.g.*, Christopher J. Walker, *What* Kisor *Means for the Future of* Auer *Deference: The New Five-Step* Kisor *Deference Doctrine*, YALE J. ON REG.: NOTICE & COMMENT (June 26, 2019), https://yalejreg.com/nc/what-kisor-means-for-the-future-of-auer-deference-the-new-five-step-kisor-deference-doctrine/. This Comment is primarily concerned with Step One and Step Two of the new test and lumps the remaining factors together as Step Three.

warranted[162]—a tool that courts can use in the sentencing context to limit the detrimental effects of *Auer* deference.[163]

First, "a court should not afford *Auer* deference" to an agency's interpretation of its own regulation "unless the regulation [at issue] is genuinely ambiguous."[164] If there is no uncertainty as to the meaning of a regulation, then there is no "plausible reason" for courts to grant deference to the agency.[165] In "concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."[166] This effort entails a court carefully considering "the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[167] When courts undertake this process, "*many* seeming ambiguities" will be resolved without courts having to resort to *Auer* deference.[168]

Second, "the agency's reading" of a genuinely ambiguous regulation "must still be '*reasonable*.'"[169] Agencies can fail this requirement, and "[u]nder *Auer*, as under *Chevron*, the agency's reading must fall 'within the bounds of reasonable interpretation,'"[170] which are set by the regulation's "text, structure, history, and so forth."[171] Thus, even if a regulation turns "out to be truly ambiguous" after the court has used its interpretive tools in Step One, application of these tools still will have value in determining if the interpretation is "reasonable" in Step Two.[172]

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[162] *Kisor*, 139 S. Ct. at 2414–18. While the Supreme Court appeared to split on *Auer* deference based on political ideology, an empirical analysis of lower courts' application of *Auer* deference indicates that "[t]here is little evidence that political ideology plays a role" in a court's decision to grant or deny deference. Barmore, *supra* note 138, at 833–34.

[163] *See supra* Part III.B.

[164] *Kisor*, 139 S. Ct. at 2415 (citations omitted). The Supreme Court "expressly adopt[ed] *Chevron* step one for *Auer* deference." Walker, *supra* note 161.

[165] *Kisor*, 139 S. Ct. at 2415.

[166] *Id.* (citing Chevron, U.S.A. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

[167] *Id.* (citation omitted).

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

[169] *Id.* (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994)). Again, the Supreme Court expressly adopted *Chevron* Step Two. Walker, *supra* note 161.

[170] *Kisor*, 139 S. Ct. at 2416 (citation omitted). Some scholars have suggested that "*Chevron* step two in the circuits has largely been a nonfactor." Walker, *supra* note 161; *see also* Kent Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 6 (2017) ("Of the 70.0% of the interpretations that moved to *Chevron* step two . . . , the agency prevailed 93.8% of the time."). Nonetheless, a stronger *Chevron* Step Two, such as that advocated by Justice Kagan elsewhere, has been embraced by some circuit courts. *See generally* Kent Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018) (discussing the ways in which "circuit courts have applied *Chevron* step two to invalidate agency statutory interpretations").

[171] *Kisor*, 139 S. Ct. at 2416.

[172] *Id.*

Third, "a court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[173] As part of this inquiry, the interpretation in question must be "the agency's 'authoritative' or 'official position,' rather than any more *ad hoc* statement not reflecting the agency's views."[174] Additionally, "the agency's interpretation must in some way implicate its substantive experience," as this is part of the rationale underlying the delegation of interpretive authority.[175] Finally, the agency's interpretation of the rule "must reflect 'fair and considered judgment' to receive *Auer* deference."[176] So, "convenient litigating position[s]" and "*post hoc* rationalization[s] advanced . . . to defend past agency action against attack" will not qualify for *Auer* deference.[177]

At bottom, an agency will receive deference only when the underlying regulation is genuinely ambiguous, and its interpretation is reasonable and of the "character and context . . . [that] entitles it to controlling weight."[178] Thus, "[w]hat emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear."[179]

In a lengthy concurrence, Justice Gorsuch vigorously objected to the Court's characterization of *Auer* deference and the Court's rejection of challenges to the doctrine.[180] Justice Gorsuch's opinion largely mirrored the structure of the Court's opinion and explored the concerns traditionally raised by courts and scholars regarding the use of *Auer* deference.[181] Most significant, however, was

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[173] *Id.* (citing Christopher v. SmithKline Beecham, 567 U.S. 142, 155 (2012)). Notably, the Supreme Court departs from the test for *Chevron* deference in this step, instead relying on its *Auer* deference jurisprudence. *See, e.g.*, *supra* note 147.

[174] *Kisor*, 139 S. Ct. at 2416 (citation omitted). There is no requirement that the interpretation come from the "Secretary [of the agency] or his chief advisers"; instead, the agency's interpretation only has to "emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id.* (citations omitted).

[175] *Id.* at 2417. Without any substantive experience, "Congress presumably would not grant it that authority." *Id.*

[176] *Id.* (citing *SmithKline Beacham*, 567 U.S. at 155).

[177] *Id.* (citing *SmithKline Beacham*, 567 U.S. at 155).

[178] *Id.* at 2416.

[179] *Id.* at 2418. A plurality of the Supreme Court rejected challenges to *Auer* deference that were based on the APA and broader policy concerns. *Id.* at 2418–22 (plurality opinion). The Court first rejected the APA-based arguments that *Auer* deference (1) is "inconsistent with the judicial review provision of the [APA]" and (2) "circumvents the APA's rulemaking requirements." *Id.* at 2418–20. The Court then rejected the policy-based arguments that *Auer* deference (1) "encourages agencies to issue vague and open-ended regulations" and (b) "violates 'separation of powers principles.'" *Id.* at 2421–22. The Court also rejected the petitioner's arguments on stare decisis grounds. *See id.* at 2422.

[180] *Id.* at 2425–48 (2019) (Gorsuch, J., concurring in the judgment).

[181] *Id.* at 2425–43, 2430–2431 nn.37–39. While most of his objections were familiar, Justice Gorsuch did offer a unique objection to *Auer* deference on the ground that it was inconsistent with Section 706 of the APA.

Justice Gorsuch's prediction that the Supreme Court's "remodel[ing] [of] *Auer*'s rule into a multi-step, multi-factor inquiry . . . leaves *Auer* so riddled with holes that . . . courts may find that it does not constrain their independent judgment any more than *Skidmore*."[182] Given that *Auer* deference now "requires courts to exhaust all the traditional tools of construction" before deference is even considered, Justice Gorsuch concluded that courts "will rarely, if ever, have to defer to an agency regulatory interpretation that differs from what they believe is the best and fairest reading."[183]

In a similar strain, Justice Kavanaugh noted in a concurrence that an application of "all the traditional tools of construction . . . will almost always reach a conclusion about the best interpretation of the regulation at issue," leaving courts "no need to adopt or defer to an agency's contrary interpretation."[184] Thus, strict application of the traditional tools of statutory construction will almost always allow a reviewing court to avoid granting *Auer* deference.[185]

While the limited scholarly writing after the Supreme Court's decision in *Kisor* suggests that the bounds of *Auer* deference are far from settled,[186] the new

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Id. at 2433. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, the Supreme Court held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." 545 U.S. 967, 982 (2005). In light of the holding in *Brand X*, Justice Gorsuch argued that "courts have interpreted *Auer* as forbidding a court from ever 'determin[ing] the meaning' of a regulation with the force that normally attaches to precedent, because an agency is always free to adopt a different view and insist on judicial deference to its new judgment." *Kisor*, 139 S. Ct. at 2433 (citations omitted). For a more detailed discussion of this objection, see Sasha Volokh, Auer *Deference and the* Brand X *Problem*, REASON.COM: VOLOKH CONSPIRACY (June 26, 2019, 4:44 PM), https://reason.com/2019/06/26/auer-deference-and-the-brand-x-problem/.

[182] *Kisor*, 139 S. Ct. at 2447–48 (Gorsuch, J., concurring in the judgment). *Skidmore* deference applies when courts are determining whether an agency's interpretation of a statute that lacks the force of law receives deference. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). Under *Skidmore* deference, an interpretation receives deference only to the extent of the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade." *Id.*

[183] *Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring in the judgment). Chief Justice Roberts made a similar point in his concurrence and indicated that there is great overlap between "cases in which *Auer* deference is warranted . . . [and] cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation." *Id.* at 2424–25 (2019) (Roberts, C.J., concurring in part). That is, because of the commonalities between *Auer* deference, as championed by Justice Kagan, and *Skidmore* deference, as championed by Justice Gorsuch, there are few circumstances in which application of one instead of the other would have a substantive impact on the outcome of a case. *Id.*

[184] *Id.* at 2448 (Kavanaugh, J., concurring in the judgment).

[185] *Id.* at 2448–49.

[186] *See, e.g.*, Paul J. Larkin, Jr., *Baseball, Legal Doctrines, and Judicial Deference to an Agency's Interpretation of the Law:* Kisor v. Wilkie, 2018 CATO SUP. CT. REV. 69, 74 (2018–2019) (noting that "[s]ome

test articulated provides courts a toolkit that they can and should use in some cases to avoid granting deference to an agency's interpretations of its own regulations.[187] In the sentencing context, it is particularly advisable that courts make full use of the new multi-factor test to avoid granting *Auer* deference to commentary that interprets the sentencing guidelines in a manner that is contrary to the interests of criminal defendants.[188]

III. THE INTERSECTION OF THE SENTENCING GUIDELINES AND *AUER* DEFERENCE

While administrative law and criminal law have traditionally been viewed as two spheres that exist separate from one another, they do overlap in one important manner, namely that *Auer* deference plays a substantial role in criminal sentencing.[189] And, the "alarm bells should be going off" regarding this interaction, because the use of *Auer* deference in the sentencing context poses problems far and above those posed in the administrative context more generally—deference might be granted at the expense of a criminal defendant's liberty.[190] This Part begins by examining the Supreme Court's decision in *Stinson v. United States*, which held for the first time that *Auer* deference applies to the *Guidelines Manual*'s commentary. This Part then highlights the unique problems that are created for criminal defendants when courts grant *Auer* deference to such commentary.

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scholars lament the lost opportunity to rein in some of the excesses of the regulatory state . . . [while] [o]thers take heart from the numerous limitations that the Court placed on what henceforth should be known as the *Kisor* deference doctrine"); Jonathan H. Adler, Auer *Deference Post*-Kisor, REASON.COM: VOLOKH CONSPIRACY (July 31, 2019, 7:44 PM), https://reason.com/2019/07/31/auer-deference-post-kisor/ (discussing an early difficulty faced by a circuit court in working within the confines of the new *Auer* regime); Daniel E. Walters, *A Turning Point in the Deference Wars*, REG. REV. (July 9, 2019), https://www.theregreview.org/2019/07/09/walters-turning-point-deference-wars/ (arguing that "the decision is . . . a restatement of existing law"); Michael Herz, *In "*Gundy II*,"* Auer *Survives by a Vote of 4.6 to 4.4*, SCOTUS BLOG (June 27, 2019, 11:30 AM), https://www.scotusblog.com/2019/06/symposium-in-gundy-ii-auer-survives-by-a-vote-of-4-6-to-4-4/ (arguing that the Supreme Court expressed an anti-deferential view in the opinion); *see also Kisor*, 139 S. Ct. at 2448 (Gorsuch, J., concurring in the judgment) ("[T]his case hardly promises to be this Court's last word on *Auer*. If today's opinion ends up reducing *Auer* to the role of a tin god—officious, but ultimately powerless—then a future Court should candidly admit as much and stop requiring litigants and lower courts to pay token homage to it. Alternatively, if *Auer* proves more resilient, this Court should reassert its responsibility to say what the law is and afford the people the neutral forum for their disputes that they expect and deserve.").

187 See *infra* Part IV.

188 *See infra* Part III.

189 *See* Andrew Hessick*,* Auer*,* Mead*, and Sentencing*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 15, 2016), http://yalejreg.com/nc/auer-mead-and-sentencing/. *Auer* deference, however, is not used to "determine[e] whether a substantive criminal violation has occurred." *Id.*

190 *Havis I*, 907 F.3d 439, 450 (6th Cir. 2018) (Thapar, J., concurring), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019).

A. Stinson*—The Applicability of Auer Deference to the* Guidelines Manual*'s Commentary*

Although the application of *Auer* deference was initially limited to "the context of traditional agency regulations,"[191] the Supreme Court greatly expanded its application by applying it to criminal sentencing in *Stinson v. United States*.[192] At issue in *Stinson* were the career offender provisions of the *Guidelines Manual*, which enhance the sentences of persons that have previously been convicted of certain crimes.[193] The Sentencing Commission had amended the commentary to the career offender provisions after the Eleventh Circuit decided a criminal defendant's initial appeal, prompting the defendant to file a petition for rehearing.[194] The Eleventh Circuit subsequently denied this petition and adhered to its earlier decision, because it found that the commentary to the career offender provisions was of limited authority and not binding on the court, even though it was persuasive.[195]

On appeal to the Supreme Court, the question was whether courts should grant *Auer* deference to the Sentencing Commission's interpretations of the sentencing guidelines as published in the commentary.[196] The Supreme Court unequivocally answered this question in the affirmative, concluding that commentary that "does not violate the Constitution or a federal statute . . . must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'"[197]

In reaching this decision, the Supreme Court first determined that the sentencing guidelines were analogous to legislative rules adopted by federal agencies, because the guidelines are promulgated "by virtue of an express

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[191] Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1214 (2015) (Thomas, J., concurring in the judgment).

[192] 508 U.S. 36, 45 (1993).

[193] *Id.* at 38–39. The career offender provisions are designed to ensure that career offenders "receive a sentence of imprisonment 'at or near the maximum term authorized.'" 2018 GUIDELINES MANUAL, *supra* note 3, § 4B1.1 cmt. background (quoting 28 U.S.C. § 994(h)). To qualify as a career offender, a criminal defendant must meet several requirements, one of which is "that the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense." *Id.* § 4B1.1. The criminal defendant in *Stinson* challenged that the crime for which he was being sentenced did not meet this requirement. 508 U.S. at 39.

[194] 508 U.S. at 39. The amended commentary provided that "the term 'crime of violence' [did] not include the offense of unlawful possession of a firearm by a felon," the crime for which the defendant was being sentenced. *Id.*; SENTENCING GUIDELINES MANUAL § 4B1.1–4B1.2 (U.S. SENT'G COMM'N 1992) [hereinafter 1992 GUIDELINES MANUAL]. This amendment stood in contrast to the decision of several circuit courts on the same issue. *See Stinson*, 508 U.S. at 39 n.1.

[195] 508 U.S. at 39.

[196] *Id.* at 37–38.

[197] *Id.* at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

congressional delegation of [rulemaking] authority" and subject to the requirements of notice-and-comment rulemaking.[198] The Court then reasoned that commentary is analogous to an agency's interpretation of its own regulations, because its "functional purpose . . . is to assist in the interpretation and application of those rules, which are within the Commission's particular area of concern and expertise."[199] Therefore, because commentary is similar to an agency's interpretations of its own regulations, the Supreme Court concluded that *Auer* deference to it may be appropriate.[200]

The Supreme Court also explained that this understanding of commentary was "consistent with the role [that] the Sentencing Reform Act contemplate[d] for the Sentencing Commission" for two reasons.[201] First, the Supreme Court reasoned that interpretations of the sentencing guidelines that are advanced in commentary are likely to be the best reflection of how the Sentencing Commission believes the guidelines should be applied.[202] Because the Commission drafts both the guidelines and the commentary, it is a safe presumption that these interpretations are consistent with the *Guidelines Manual* and the authorizing statute itself.[203] Second, the Supreme Court reasoned that "Congress necessarily contemplated that the Commission would periodically review the work of the courts . . . [and] make whatever clarifying revisions to the [g]uidelines [that] conflicting judicial decisions might suggest."[204] And, the

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[198] *Id.* at 44–45. The Supreme Court rejected the idea that commentary is analogous to "an agency's construction of a federal statute that it administers," which would make it eligible for *Chevron* deference. *Id.* at 44. The Court explained that commentary, unlike a legislative rule, is "not the product of delegated authority for rulemaking" and does not have to "yield to the clear meaning of a statute." *Id.*

[199] *Id.* at 45. The Supreme Court noted that an understanding of commentary as the agency's authoritative interpretation of a sentencing guideline conflicted with the Supreme Court's own understanding of the relationship between the two. *Id.* at 45–46. Commentary in the *Guidelines Manual* at the time that *Stinson* was decided predicted that "courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." 1992 GUIDELINES MANUAL, *supra* note 194, § 1B1.7 cmt. This provision was amended the year after *Stinson* was decided to reflect the central holding in the case. 2018 GUIDELINES MANUAL, *supra* note 3, § 1B1.7 cmt.

[200] *Id.*; *see supra* note 197 and accompanying text. The Supreme Court had a broader understanding of commentary than the one embraced today. *Stinson*, 508 U.S. at 44. The Court explained that "commentary explains the guidelines and provides concrete guidance as to how even *unambiguous* guidelines are to be applied in practice." *Id.* (emphasis added). Notably, this statement directly contradicts later limitations placed on *Auer* deference by the Court. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) ("[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous."); Christensen v. Harris Cnty., 529 U.S. 576, 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous.").

[201] *Stinson*, 508 U.S. at 45.

[202] *Id.*

[203] *Id.*

[204] *Id.* at 46 (citation omitted). Congress demonstrated this understanding by delegating to the Sentencing Commission the affirmative statutory obligation to "'periodically review and revise' the guidelines in light of its consultation with authorities on and representatives of the federal criminal justice system." *Id.* at 45 (quoting

Supreme Court noted that one way to make such clarifying revisions was to amend the commentary, provided that "the guideline which the commentary interpret[ed] [would] bear the construction."[205]

Fundamentally, the decision in *Stinson* is significant in showing the lengths to which the Supreme Court was willing to go to give authoritative weight to commentary in the absence of congressional approval or adherence to the requirements of notice-and-comment rulemaking, even in the sentencing context. Some courts, however, have recognized the dangers inherent in this decision and have begun resisting the grant of *Auer* deference in the criminal sentencing context[206]—something that is made easier with the new multi-step inquiry that the Supreme Court set forth in *Kisor*.

B. Problems with Auer *Deference in the Sentencing Context*

Courts have long recognized that the sentencing guidelines "raise some of the same concerns as substantive criminal law" because they "result in criminal punishment."[207] Consequently, courts have limited the application of *Auer* deference to the commentary itself—other statements of the Sentencing Commission do not receive *Auer* deference.[208] So, in theory, "potential criminals can stick to reviewing the *Guidelines Manual*, which contains both [the] guidelines and [the] commentary" to determine the criminal consequences of their actions.[209]

But, in reality, potential criminals that only reviewed the *Guidelines Manual* before committing a crime may not be sure of the criminal consequences of their actions because courts differ so sharply in how they apply *Auer* deference to the

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28 U.S.C. § 994(o)); *see supra* note 70.

[205] *Stinson*, 508 U.S. at 46. The Supreme Court also offered that "[a]mended commentary is binding on the courts even though it is not reviewed by Congress, and prior judicial constructions of a particular guideline cannot prevent the Sentencing Commission from adopting a conflicting interpretation that satisfies" the requirements of *Auer* deference. *Id.* The latter point was also addressed by the Supreme Court in the *Chevron* context and raised by Justice Gorsuch in *Kisor* as an objection to *Auer* deference. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).

[206] *See, e.g.*, *infra* note 223.

[207] Hessick, *supra* note 189. For this reason, the sentencing guidelines are subject to some of the same requirements as substantive criminal law. *Id.* First, the guidelines "must satisfy at least some of the heightened notice requirements applied to criminal law." *Id.* Second, the guidelines are limited by the ex post facto clause and cannot be applied retroactively in a manner that disadvantages criminal defendants. *Id.* Third, the guidelines cannot be overly vague. *Id.*

[208] *Id.*

[209] *Id.* Because *Auer* deference is only granted to commentary, potential criminals do not "hav[e] to review everything the Commission says." *Id.*

commentary.[210] Disparities in the application of *Auer* deference in the administrative context more generally are problematic because they undermine uniformity and consistency, resulting in a system where "the determination of a regulation's meaning could . . . differ depending on which circuit hears the case."[211] However, disparities in the application of *Auer* deference in the sentencing context substantially amplify these concerns because these disparities can result in terms of imprisonment that greatly differ from one court to the next,[212] undermining the purposes of the Sentencing Reform Act.[213]

As one example, courts sharply disagree on whether *Auer* deference should be granted to the commentary that accompanies the career offender guidelines[214] because they differ on whether the commentary impermissibly expands on the underlying guidelines or actually interprets them.[215] In *United States v. Havis*, a sharply divided three-judge panel of the Sixth Circuit issued four separate opinions on the question of whether *Auer* deference was due to these commentary provisions.[216] The underlying guideline at issue in *Havis* defined a "controlled substance offense" and did not include attempt offenses within that definition, whereas the commentary to that guideline expanded the definition to include attempt offenses.[217] Given this disparity between the narrower definition provided in the sentencing guideline itself and the broader definition given in the commentary that purported to interpret the guideline, the Sixth Circuit concluded that the Sentencing Commission was impermissibly attempting to expand the category of offenses that qualified a defendant for a sentencing enhancement under the career offender guidelines.[218]

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[210] *See, e.g.*, United States v. Havis (*Havis II*), 927 F.3d 382, 387 (6th Cir. 2019) (per curiam) (refusing to grant deference to § 4B1.2's commentary because the guideline will not bear the construction); *Havis I*, 907 F.3d 439, 442–43 (6th Cir. 2018) (granting deference to the § 4B1.2's commentary because of earlier precedent), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019); United States v. Winstead, 890 F.3d 1082, 1091–92 (D.C. Cir. 2018) (holding that § 4B1.2's commentary impermissibly expanded the definition of a "controlled substance offense" that was provided in the underlying guideline); United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017) (granting deference to the expanded definition of a "controlled substance offense" presented in § 4B1.2). *See generally* Petition for Writ of Certiorari of Defendant-Appellant, Allen v. United States, 139 S. Ct. 1575 (2019) (No. 18-8265) (discussing intra- and inter-circuit splits in the grant of *Auer* deference to commentary provisions).

[211] Leske, *supra* note 123, at 832.

[212] *Havis I*, 907 F.3d at 450 (Thapar, J., concurring) ("Were this a civil case, these problems with *Auer* deference would merit close attention. But as this is a criminal case, and applying *Auer* would extend [the defendant's] time in prison, alarm bells should be going off.").

[213] 2018 GUIDELINES MANUAL, *supra* note 3, at ch. 1, pt. A; *see supra* Part I.

[214] *See supra* notes 193–95 and accompanying text.

[215] *See supra* note 210.

[216] *Havis I*, 907 F.3d 439.

[217] *Id.* at 441–44; *see supra* note 26–27 and accompanying text.

[218] *Havis I*, 907 F.3d at 443. For this change to be permissible, the Sentencing Commission would have

Nonetheless, the Sixth Circuit begrudgingly ruled against the criminal defendant and denied his appeal on the ground that it was bound to its prior precedent, which relied on the definition of a "controlled substance offense" that was presented in the commentary.[219] Despite this holding, the Sixth Circuit highlighted the "problem . . . [that] arises when the [Sentencing] Commission bypasses" the formal requirements for promulgating and amending the sentencing guidelines "by adding offenses to the [g]uidelines through commentary rather than amendment."[220] When commentary is amended, the Sentencing Commission "does not have to give Congress a chance to review [it] . . . nor must the Commission float commentary through notice and comment," unlike the guidelines themselves.[221] The court also noted that *Stinson* made clear that "the Commission may only use commentary to *interpret* the text that is already there."[222] As such, the court indicated that the Commission "must keep [g]uidelines text and . . . commentary, which are two different vehicles, in their respective lanes" for the Commission to remain "in its proper constitutional position," though the court was ultimately unable to take any action to save the criminal defendant in this case.[223]

Other courts, however, have reached the opposite conclusion regarding the same commentary provisions.[224] For example, in *United States v. Nieves-*

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had to amend the underlying guideline to include attempt offenses in a manner that complied with the requirements of notice-and-comment rulemaking and congressional acquiescence. *See* 28 U.S.C. § 994. The Sentencing Commission is currently taking this approach and has proposed an amendment that would move the "attempt" language from § 4B1.2's commentary to the guideline itself. U.S. SENT'G COMM'N, PROPOSED AMENDMENTS TO THE SENTENCING GUIDELINES 43–49 (Dec. 20, 2018), https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20181219_rf-proposed.pdf. However, the Sentencing Commission currently lacks the necessary quorum to actually vote on this amendment. *See infra* note 314.

219 *Havis I*, 907 F.3d at 442.

220 *Id.* at 443.

221 *Id.* (citations omitted).

222 *Id.* The Court noted that "a comment that increases the range of conduct that the [g]uidelines cover has [clearly] . . . taken things a step beyond interpretation." *Id.* (citing United States v. Winstead, 89 F.3d 1082, 1090–91 (D.C. Cir. 2018); United States v. Rollins, 836 F.3d 838, 842 (7th Cir. 2016) (en banc)).

223 *Id.* (citations omitted). Subsequently, on rehearing, the Sixth Circuit issued a per curiam opinion and refused to grant *Auer* deference to the commentary provision, because it found that the commentary was plainly inconsistent with the guideline that it purported to interpret. *Havis II*, 927 F.3d 382, 385–87 (6th Cir. 2019). Other courts have reached the same conclusion and found that *Auer* deference should not be granted to the commentary provisions that add "attempt" crimes when the underlying guidelines themselves do not include them. *See, e.g.*, *Winstead*, 890 F.3d at 1091–92; *cf.* United States v. Soto-Rivera, 811 F.3d 53, 59–60 (1st Cir. 2016) (refusing to grant *Auer* deference to commentary that defined a "crime of violence" as including the crime of unlawful possession of a firearm when the definition provided in the underlying guideline did not include this crime); United States v. Bell, 840 F.3d 963, 969 (8th Cir. 2016) (reaching the same result as *Soto-Rivera* in the context of robbery).

224 *See, e.g.*, United States v. Nieves-Borrero, 856 F.3d 5, 9 (1st Cir. 2017); United States v. Lange, 862

Borrero, the First Circuit concluded in a cursory opinion that the commentary including "attempt" offenses merited *Auer* deference, which subjected the criminal defendant to a prior offense enhancement that substantially increased his sentence—nearly two years of imprisonment was added to the defendant's sentence.[225] While the court recognized that the commentary to the guidelines is not gospel, it concluded that the commentary provision including "attempt" offenses was authoritative because (1) the circuit had previously treated it as such, and (2) the commentary was not "arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law."[226]

Thus, *Auer* deference to the *Guidelines Manual*'s commentary poses the same threat of sentencing disparities and arbitrariness that the Sentencing Reform Act was initially passed to remedy due to the circuit splits that have developed regarding some commentary provisions.[227] Moreover, the use of commentary today drastically departs from that originally intended by Congress and the Sentencing Commission.[228] The Sentencing Reform Act itself did not explicitly authorize the issuance of commentary,[229] and the *Guidelines Manual* predicted that courts would "treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter" when it was originally published.[230] As compared to this original vision, the Supreme Court's decision in *Stinson* greatly expanded the role of commentary. And the Supreme Court even went so far as to explain that "commentary explains the guidelines and provides concrete guidance as to how even *unambiguous* guidelines are to be applied in practice,"[231] an understanding that is plainly inconsistent with the Court's modern *Auer* jurisprudence.[232]

Stated simply, the Sentencing Commission's use of commentary today is not what the drafters of the Sentencing Reform Act intended; instead, commentary has morphed into a tool that the Sentencing Commission has used and will continue to use to harm criminal defendants. The new test articulated by the Supreme Court in *Kisor*, however, can be used as tool by the courts to return

F.3d 1290, 1293–96 (11th Cir. 2017); United States v. Chavez, 660 F.3d 1215, 1225–28 (10th Cir. 2017).

225 *Nieves-Borrero*, 856 F.3d at 9; *see supra* note 30 and accompanying text. The Sixth Circuit's decision in *Nieves-Borrero* is discussed in much greater detail in the Introduction.

226 *Nieves-Borrero*, 856 F.3d at 9.

227 *See supra* Part I.

228 *See infra* notes 229–32 and accompanying text.

229 The Act refers to commentary but does not explicitly authorize its issuance like it does the sentencing guidelines and policy statements. 18 U.S.C. § 3553(b)(1); 28 U.S.C. § 994(a).

230 *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.7 cmt. (U.S. SENT'G COMM'N 1987).

231 Stinson v. United States, 508 U.S. 36, 44 (1993) (emphasis added).

232 *See supra* note 200.

commentary to its proper place and embody the original goals of the Sentencing Reform Act.

IV. A SOLUTION—USING THE NEW MULTI-FACTOR TEST FROM *KISOR* TO LIMIT *AUER* DEFERENCE IN THE SENTENCING CONTEXT

As Justice Kavanaugh noted in his *Kisor* concurrence, "[i]f a reviewing court employs all the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue."[233] And, when the tools of construction are used in this manner, courts will rarely grant *Auer* deference to an agency's interpretation of its own regulation because a regulation must be genuinely ambiguous after an application of these tools for *Auer* deference to be appropriate.[234]

Thus, when guided by the policies underlying the Sentencing Reform Act, it is clear that judges should strictly apply their interpretive tools and use the rule of lenity when determining if the *Guidelines Manual*'s commentary should receive *Auer* deference. So construed, the Sentencing Commission will be substantially limited in its ability to use commentary as a tool that harms criminal defendants in the absence of the protections provided by the Sentencing Reform Act. To begin, this Part argues that the traditional interpretive tools, including text, structure, history, and purpose, should be rigorously used by courts to avoid finding ambiguity in the sentencing guidelines. This Part then argues that the rule of lenity—often invoked in sentencing—should also be used by courts to avoid finding ambiguity when the traditional interpretive tools do not resolve any apparent ambiguity. Finally, this Part concludes by examining the more limited role that commentary would play if judges utilize the above approach, something that would benefit criminal defendants and society more generally.

A. Text, Structure, History, and Purpose of the Sentencing Guidelines

In Step One of the *Auer* analysis, courts "should not afford *Auer* deference unless the regulation [at issue] is genuinely ambiguous."[235] And, to reach the conclusion that a regulation is "genuinely ambiguous," courts must "exhaust all

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[233] Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring in the judgment); *see supra* notes 184–85 and accompanying text.

[234] *See Kisor*, 139 S. Ct. at 2415–17; *see supra* notes 164–68 and accompanying text.

[235] *Kisor*, 139 S. Ct. at 2415 (citing Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000)).

the 'traditional tools' of construction."[236] Thus, only when these tools are exhausted can a court find that *Auer* deference to an agency is appropriate."[237]

Further, when the Supreme Court expressly adopted Step One of *Chevron* as the first step of the *Auer* analysis in *Kisor v. Wilkie*, it imported the myriad tools of statutory interpretation that courts have traditionally used as part of their interpretive toolbox.[238] This toolbox includes "a range of diverse but familiar devices [of statutory interpretation], from analysis of statutory text, to consideration of legislative history and purpose, to application of selected canons of construction."[239] And, this toolbox appears to be "no different from those [tools] used to apply statutes [more] generally," which also "finds support in other of the Court's decisions."[240]

That is not to say that courts agree entirely on what tools comprise the traditional tools of statutory construction.[241] Instead, there is a "growing debate within the Court regarding the tools to be employed at Step One, [which] mirrors the broader debate among the Justices regarding interpretive methods [more]

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[236] *Id.* (citing Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 843 n.9 (1984)). "[O]nly when [the court's] legal toolkit is empty and the interpretive question still has no right answer can a judge conclude that it is 'more one of policy than of law,'" and an appropriate decision for the agency to make. *Id.* (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).

[237] *Id.*

[238] *See* Walker, *supra* note 161.

[239] Liu, *supra* note 97, at 308–09. *See generally* VALERIE C. BRANNON & JARED P. COLE, CONG. RSCH SERV., *CHEVRON* DEFERENCE: A PRIMER 14–15 (2017) (describing traditional tools used by courts in determining the meaning of statutes and regulations); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pts. 1 & 2), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014) (discussing the knowledge and use of interpretive principles by legislative drafters). Canons of construction are generally split into two categories: textual canons and substantive canons. *See, e.g.*, Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 7 (2006). "Textual canons provide guidance in discerning the meaning of a particular word or phrase through the examination of its context within the text of the statute." *Id.* (quoting WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 824 (3d ed. 2002)). Substantive canons, however, "reflect particular policy judgments or normative values," such as the rule of lenity and the doctrine that "courts should avoid interpreting statutes in ways that would render them unconstitutional." *Id.* (citations omitted). Textual canons are addressed in this section while substantive canons, specifically the rule of lenity, are addressed in much greater detail in the next section.

[240] Liu, *supra* note 97, at 309 (citations omitted). This view is further supported by the fact that "the Court has invoked the 'traditional tools of construction' . . . in ordinary cases of statutory interpretation, in which no administrative interpretation was at issue." *Id.* (citing *Chevron*, 467 U.S. at 843 n.9).

[241] *See* BRANNON & COLE, *supra* note 239, at 14–15 (highlighting specific tools on which courts disagree); Gluck, *supra* note 97, at 618 ("The problem . . . is that the Court never sets out what those 'traditional tools' are, likely because it could not agree on them if it wanted to."); Liu, *supra* note 97, at 309–10 (highlighting conflicts that arise regarding the use of the tools of construction among different interpretive schools).

generally."[242] Textualist judges generally argue that the tools considered as part of the Step One inquiry should "be confined to an examination of statutory text and structure," while intentionalist and purposivist judges generally argue that "other sources of statutory meaning, particularly legislative history, should be consulted as well."[243] The Supreme Court added little to this discussion in *Kisor*, and only made clear that courts should not conclude that a regulation is genuinely ambiguous unless it has carefully considered "the text, structure, history, and purpose of [the] regulation, in all the ways it would if it had no agency to fall back on."[244]

The Court also made clear, however, that *Auer* deference is "rooted in a *presumption* about congressional intent—a *presumption* that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."[245] Importantly, presumptions about Congress's intent can be limited by other indications of intent regarding the delegation of rulemaking authority.[246] And, in the sentencing context, this means that courts should defer to Congress's intent in delegating rulemaking authority to the Sentencing Commission—as reflected in the Sentencing Reform Act—not just the general presumption about congressional intent.

The *Guidelines Manual* itself makes explicit Congress's goals in creating the Sentencing Commission and delegating rulemaking authority to it, and this should guide how the interpretive tools are used by the courts.[247] Because Congress indicated that it was concerned with (1) treating criminal defendants fairly and (2) reducing arbitrary and excessive punishments, courts should utilize their interpretive toolbox in a manner that is consistent with these goals.[248] As a result, the *Guidelines Manual*—and its sentencing guidelines,

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[242] Liu, *supra* note 97, at 309; *see* 4 KOCH & MURPHY, *supra* note 93, § 11.35. Empirical studies have reported that differences in the usage of interpretive tools by judges across the ideological spectrum are not as great as previously imagined. *See, e.g.*, Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1328 (2018) (finding that the vast majority of circuit court judges identified purpose as an appropriate interpretive tool).

[243] Liu, *supra* note 97, at 309–10. Interestingly, the Court considered legislative history as part of Step One in *Chevron* itself. 467 U.S. at 862–64. The discussion of legislative history in *Chevron*, however, "may simply reflect the fact that the opinion was written by Justice Stevens, or the fact that in 1984 the new textualism had yet to emerge as a viable alternative to intentionalism and purposivism." Liu, *supra* note 97, at 310.

[244] Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

[245] *Id.* at 2412 (plurality opinion) (emphasis added).

[246] The presumption that Congress intends "the agency to play the primary role in regulatory ambiguities" derives itself from the broader delegation of rulemaking authority. *Id.*

[247] *See generally* 2018 GUIDELINES MANUAL, *supra* note 3, at ch. 1, pt. A (describing the goals of the Sentencing Reform Act of 1984 and the statutory basis for the *Guidelines Manual*); *supra* Part I.

[248] *See* 2018 GUIDELINES MANUAL, *supra* note 3, at ch. 1, pt. A.

policy statements, and commentary—should be construed in light of the goals of fairness and the reduction of arbitrary and excessive punishments. Such an approach is consistent with a robust use of interpretive tools at Step One of the *Auer* analysis to ensure that the sentencing guideline at issue is genuinely ambiguous before deferring to commentary that purports to interpret it. And, importantly, such an approach would increase the likelihood that a criminal defendant would have fair warning of how their conduct would be treated by the *Guidelines Manual*, unlike the current system.

Thus, by strictly applying the traditional tools of statutory construction that compose the interpretive toolbox, courts can properly determine the meaning of the sentencing guidelines in a manner that is just and equitable to both criminal defendants, victims of crime, and society more generally. In the event that a sentencing guideline still appears to be ambiguous after a strict application of the above tools, courts should then use the rule of lenity and other substantive canons to determine the unambiguous meaning of the guideline at issue. Such an approach is highly desirable, as it will substantially limit the ability of the Sentencing Commission to use commentary in a manner that is adverse to criminal defendants.

B. Lenity and Other Substantive Canons of Construction

Significantly, some substantive canons[249] have been treated as part of the traditional tools of statutory construction and utilized by courts as part of *Chevron* Step One,[250] now incorporated as part of the *Auer* analysis.[251] When properly applied, courts can use these canons to avoid a finding of genuine ambiguity, which precludes the grant of *Auer* deference to an agency's interpretation of that regulation.[252] And, in the sentencing context, finding that a sentencing guideline is not genuinely ambiguous could have the effect of substantially reducing the length of a criminal defendant's incarceration.[253]

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[249] Substantive canons are "policy-based background norms or presumptions." Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 826 (2017).

[250] *See* Gluck, *supra* note 97, at 618; Liu, *supra* note 97, at 308–09; Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2110 (1990). It appears that most judges are willing to consider canons when issues of statutory interpretation arise. *See, e.g.*, Gluck & Posner, *supra* note 242, at 1328. In an empirical study, each of the forty-two circuit court judges that were interviewed reported using both canons and legislative history to some extent. *Id.* Moreover, "there [did] not seem to be any link between their canon use and the political party of their nominating Presidents, or their denominations as conservative or liberal." *Id.*

[251] *See Kisor*, 139 S. Ct. at 2415.

[252] *See, e.g.*, Liu, *supra* note 97, at 336.

[253] *See, e.g.*, *supra* note 30 and accompanying text.

While courts could use other substantive canons of construction as part of the *Auer* analysis, one that is unique to the sentencing context is the rule of lenity,[254] which "counsels that criminal laws should be narrowly interpreted in favor of criminal defendants."[255] While courts and scholars disagree on how lenity applies when it overlaps with *Chevron* deference, it can be used by courts in a manner that favors criminal defendants and furthers the substantive goals of the Sentencing Reform Act Specifically, courts can use lenity to avoid a finding that (1) a sentencing guideline is genuinely ambiguous,[256] and (2) commentary that purports to interpret a sentencing guideline contains a reasonable interpretation of it.[257] Thus, a liberal use of lenity by the courts will appropriately protect criminal defendants and limit the potential for overstep by the Sentencing Commission.

1. The Origin, Application, and Operation of Lenity

The rule of lenity "first emerged in 16th-century England . . . , though it did not gain broad acceptance [there] until the following century."[258] American courts first invoked lenity in the 1810s as they were faced with the "task of interpreting ambiguous language in early criminal statutes, . . . [and] looked to the [British] rule of lenity for assistance."[259] The Supreme Court initially explained that "[t]he rule that penal laws are to be construed strictly . . . [was] founded on the tenderness of the law for the rights of individuals; and on the plain principal that the power of punishment is vested in the legislature, not in

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[254] In a survey of judges, thirteen federal circuit court judges (out of forty-two respondents) "singled out lenity and/or constitutional avoidance as 'actual rules' and distinguished them from the other [substantive] canons, in terms of their mandatory application." Gluck & Posner, *supra* note 242, at 1331–32; *see also* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 512–13 (2002) (internal citation omitted) (identifying the rule of lenity "as one of the . . . most 'venerable' canons of statutory interpretation").

[255] *Id.* at 511–12.

[256] This corresponds with Step One of the *Auer* analysis.

[257] This corresponds with Step Two of the *Auer* analysis.

[258] Johnson v. United States, 135 S. Ct. 2551, 2567 (2015) (Thomas, J., concurring in the judgment). One scholar posits that the "rule of lenity, as we understand it today, . . . [is] a distinctively American creation, driven by distinctively American concerns." Spector, *supra* note 254, at 520. Spector argues that "[t]he vast preponderance of evidence . . . indicates that the British rule of lenity was a sentencing rule of lenity," while the substantive rule of lenity, which applies to criminal statutes, "is an American creation, forged in the furnace of American constitutionalism." *Id.* at 521.

[259] *Id.* at 522; *see* United States v. Wiltberger, 18 U.S. 76, 95 (1820) (noting that "penal laws are to be construed strictly"); United States v. Sheldon, 15 U.S. 119, 121 (1817) (cautioning against "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"); *see also* Spector, *supra* note 254, at 522–27 (discussing the rule of lenity's early history in the United States). While this early usage of lenity reflects the canon's long history in the United States, the Supreme Court contemplated strict construction of criminal statutes even before its decisions in *Wiltberger* and *Sheldon*. *See* Insitar A. Rabb, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 193 n.73 (2018).

the judicial department."[260] The Supreme Court then expanded on this rationale a century later and indicated that there was "a due process requirement that a 'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain law is passed."[261] Thus, since its import to the United States, the rule of lenity has been grounded constitutionally, with (1) the liberty rights of defendants,[262] (2) legislative supremacy,[263] and (3) the due process requirements of fair warning[264] each justifying its continued use.[265]

The use of lenity, however, has changed over time, with an increasing number of cases focusing on "the imposition of punishment as the gravamen of the rule."[266] The result of this transition is that "nearly half of all the cases in which the Supreme Court has invoked the rule of lenity have been sentencing cases," something that has significant implications in the context of the *Guidelines Manual*.[267] While the Supreme Court has not directly considered "whether the rule of lenity applies to the Sentencing Guidelines,"[268] the vast

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[260] *Wiltberger*, 18 U.S. at 95; *see* Rabb, *supra* note 259, at 193.

[261] Rabb, *supra* note 259, at 194 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). There is a broader understanding of this notice rationale that recognizes that "the requirement of a clear statement checks the discretion of aggressive prosecutors . . . [and] counteracts the natural tendency of an agency to strengthen itself and make its task of enforcement easier by broadly construing its authorizing statute." Greenfield, *supra* note 233, at 57–58. Moreover, "lenity is one of several canons 'intended to respond to systemic biases in governmental processes and thus to promote principles of fair dealing.'" *Id.* at 58 (quoting Sunstein, *supra* note 250, at 2115).

[262] This rationale has been largely ignored by the Supreme Court; "[o]nly the Warren Court consistently used the defendants' rights justification for lenity." Rabb, *supra* note 259, at 194, 194 n.76.

[263] *See generally id.* at 194 n.77 (2018) (summarizing arguments that legislative supremacy and fair warning are the bases of the rule of lenity).

[264] Several federal circuit court judges responding to a survey "deemed lenity to be a binding rule justified on the basis of legislative supremacy alone." Rabb, *supra* note 259, at 194 (citing Gluck & Posner, *supra* note 242, at 1331–32).

[265] Some scholars have rejected each of these bases as sufficient to justify the rule of lenity. *See, e.g.*, Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886, 906–10 (2004) (rejecting notice and legislative supremacy as flawed grounds upon which to rationalize the rule of lenity). Other scholars have suggested that there are other nonconstitutional rationales that justify the rule of lenity. *See, e.g.*, *id.* at 886–87 (positing that the rule of lenity's best justification "may be found in its role in structuring the processes of criminal lawmaking and law enforcement"); Spector, *supra* note 254, at 556–64 (discussing several nonconstitutional rationales for the rule of lenity).

[266] *Id.* at 527. Hereafter, the rule of lenity as applied to criminal statutes will be referred to as the substantive rule of lenity and the rule of lenity as applied to sentencing statutes will be referred to as the sentencing rule of lenity.

[267] *Id.* at 513. One scholar describes the rule of lenity as the "rule against applying punitive sanctions if there is ambiguity underlying criminal liability or criminal penalty," which clearly encompasses a sentencing rule of lenity. Greenfield, *supra* note 239, at 8 (quoting William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 104 (1994)).

[268] United States v. Wright, 607 F.3d 708, 717 (11th Cir. 2010) (Pryor, J., concurring).

majority of the circuit courts have considered the issue and concluded that the rule of lenity applies to the *Guidelines Manual* with the same force as it applies to substantive criminal statutes.[269] The Second Circuit justified an application of lenity to the sentencing guidelines on the ground that it worked toward lenity's goals, namely "to promote fair notice to those subject to criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts."[270] Other circuit courts, however, have not embraced a sentencing rule of lenity with the same zeal in the context of the *Guidelines Manual*.[271]

Courts also differ as to how they apply lenity, which informs the canon's use in the context of both *Chevron* deference and *Auer* deference.[272] Some courts use a *lenity-first* approach, in which courts first "identify all *plausible interpretations* [of a provision] based on the usual interpretive considerations," before choosing "the narrowest [of] such reading[s]."[273] Other courts use a *lenity-last* approach, in which courts first "identify[] all plausible interpretations through their preferred methods of statutory interpretation . . . [and] then apply what they deem to be the *most plausible or fair reading* [of the provision]."[274] Under the *lenity-last* approach, "courts only resort to lenity if, after considering every other interpretive tool available, they still cannot make sense of the statute

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[269] *See, e.g.*, United States v. D.M., 869 F.3d 1133, 1144 (9th Cir. 2017) ("We have held that the rule of lenity applies to the Sentencing Guidelines."); United States v. Flemming, 617 F.3d 252, 269 (3d Cir. 2010) ("The rule [of lenity] covers criminal prohibitions as well as penalties, and applies to the Sentencing Guidelines."); United States v. Bustillos-Pena, 612 F.3d 863, 868 (5th Cir. 2010) ("Although the provisions of the Sentencing Guidelines are not statutes, we apply the rule of lenity to them when we find that they are ambiguous."); United States v. Simpson, 319 F.3d 81, 86 (2d Cir. 2002) ("We join several of our sister circuits in applying the rule of lenity to the Guidelines."); United States v. Lazaro-Guadaramma, 71 F.3d 1419, 1421 (8th Cir. 1995) ("[T]he rule of lenity applies to ambiguous provisions of the Sentencing Guidelines.").

[270] *Simpson*, 319 F.3d at 86–87 (quoting United States v. Kozminski, 487 U.S. 931, 952 (1988)).

[271] *See, e.g.*, *Wright*, 607 F.3d at 716–19 (arguing that "the purposes of the rule of lenity suggest that it plays no role in the interpretation of advisory guidelines" post-*Booker*); United States v. White, 888 F.2d 490, 497–98 (7th Cir. 1989) (arguing that the rule of lenity does not apply to the Sentencing Guidelines because the purposes underlying the rule of lenity are not in play), *abrogated on other grounds by* Stinson v. United States, 508 U.S. 26 (1993); Spector, *supra* note 254, at 535–64 (arguing that the purposes underlying the rule of lenity do not support a sentencing rule of lenity).

[272] *See, e.g.*, Rabb, *supra* note 259, at 188–93.

[273] *Id.* at 189. This approach to lenity "was common on the Supreme Court when lenity was first incorporated into American law and continued to be in use until relatively recently." *Id.* Unlike other approaches to lenity, *lenity-first* operates as a "'front end presumption effectively shaping the interpretive process' when judges use it to adopt a (plausible) narrow construction of a criminal statute." *Id.* at 192 (quoting James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1208 (2010)).

[274] *Id.* at 190. Under the *lenity-last* approach, courts can include "broad constructions [of provisions] based on a purpose gleaned from the overall policy or legislative history that they read as informing the text." *Id.*

and 'grievous ambiguity' persists."[275] Finally, Justice Scalia has advocated a *textualist rule of lenity*, in which courts only use the textual tools of interpretation to identify each plausible reading of an ambiguous provision, before using the rule of lenity to counsel "a narrow construction . . . based on a smaller set of plausible interpretations from the *lenity-first* approach."[276] As such, the way that each court applies lenity will affect the role that the canon will play in the proposed solution.

2. *How Lenity Interacts with Chevron Deference*

While *Chevron* deference and the rule of lenity are often viewed as competing doctrines that each occupy their own lane, there are circumstances in which the doctrines overlap and interact with one another.[277] Significantly, this interaction informs how the *Auer* analysis can accommodate lenity in the sentencing context, because the Supreme Court incorporated the test for *Chevron* deference as part of the *Auer* analysis in *Kisor*.[278] This interaction also informs how lenity can be used in a manner that favors criminal defendants and protects them from the whims of the administrative state.

Chevron deference and lenity intersect when a statute is regulatory in nature and provides for criminal and civil enforcement mechanisms.[279] While such statutes are not common, courts must decide whether to "choose the more lenient . . . of [the permissible interpretations] or defer to the government's

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[275] *Id.* (citations omitted). The *lenity-last* approach "puts lenity 'dead last,' replacing the Court's once-dominant *lenity-first* approach." *Id.* at 190–91 (quoting Price, *supra* note 265, at 891–99); *see* Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 698 (2017). Unlike other approaches to lenity, "[*l*]*enity last* works more like a tiebreaker when judges invoke it only 'at the back end of that process' to adopt a narrow construction only when there is no other means of resolving the meaning of a disputed provisions of a criminal statute." Rabb, *supra* note 259, at 192 (quoting Brudney, *supra* note 273, at 1208).

[276] Rabb, *supra* note 259, at 191. Justice Scalia "argued that the rule was the best means of respecting three important values: legislative supremacy, fair warning (with prosecutorial restraint), and defendants' rights." *Id.* (citation omitted). Functionally, this "*textualist rule of lenity* works more like a clear statement rule when, at the slightest hint of ambiguity, [Justice Scalia] advocates for lenity as a way of requiring Congress to clearly speak to the issue at hand in lieu of declaring criminal liability." *Id.* at 192.

[277] *See, e.g.*, Kristin E. Hickman, *Of Lenity,* Chevron*, and* KPMG, 26 VA. TAX REV. 905, 909–10 (2007). The Supreme Court has rejected *Chevron* deference in criminal cases for two reasons. *See id.* at 918. First, the Department of Justice "does not 'administer' the criminal code," which is required for *Chevron* deference. *Id.* Second, "government prosecutors have an incentive to construe [criminal statutes] broadly, meaning that to defer to such interpretations would 'replac[e] the doctrine of lenity with a doctrine of severity.'" *Id.* (quoting Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring)).

[278] *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019); *supra* Part II.E.

[279] Hickman, *supra* note 277, at 912. The Internal Revenue Code is an example of a statute that has both civil and criminal enforcement mechanisms. *Id.* ("[T]he problem at hand arises when a provision in the Code, or any regulatory statute with both criminal and civil enforcement mechanisms, is susceptible of two or more identifiable and equally defensible alternative interpretations.").

preference for a different choice."[280] In most cases, the Supreme Court has come down on the side of lenity and construed the statutes in favor of defendants.[281] But in other cases, the Supreme Court has rejected lenity in favor of *Chevron* deference to the government's interpretation.[282] Despite these disparate holdings, the framework that courts and scholars have deduced from these decisions instructs how lenity can be incorporated into the *Auer* framework, so as to restrain agencies from substantively changing criminal law through administrative interpretations.[283]

First, some scholars propose that courts should use lenity as a traditional tool of construction in Step One of the *Chevron* analysis.[284] In Step One, lenity would

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[280] *Id.*

[281] *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 11–12 n.8 (2004) (observing that lenity required the Court to interpret an immigration statute in an immigrant's favor because the relevant provision had "both criminal and noncriminal applications"); United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992) (applying lenity in determining the meaning of a regulatory statute that could serve as the basis of criminal liability); *Crandon*, 494 U.S. at 168 (applying lenity to reject the government's broader interpretation of a criminal statute in a civil case). *See generally* Hickman, *supra* note 277, at 912 (discussing cases in which the Supreme Court has applied lenity when determining the meaning of hybrid statutes).

[282] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 704 n.18 (1995) (rejecting an argument that lenity required a narrower interpretation of a hybrid regulatory statute when the government had publicly communicated its longstanding interpretation of the relevant provision); *see also* Hickman, *supra* note 277, at 921 (attempting to reconcile the holding in *Babbitt* with the Supreme Court's other jurisprudence regarding the interaction between lenity and *Chevron* deference). While the Supreme Court's decision "came down on the side of *Chevron* deference, instead of lenity for a longstanding, legally-binding regulation, . . . the Court's jurisprudence to date has not addressed the question of lenity versus deference for guidance formats that are less formal than binding regulations published in the Code of Federal Regulations." Hickman, *supra* note 277, at 933; *see also* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1031 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (noting that "cases since *Babbitt* have not followed the reading the court [found] itself constrained to follow"), *rev'd*, Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

[283] For a discussion of this framework by scholars, see Hickman, *supra* note 277, at 933–40; Greenfield, *supra* note 239, at 48–55; Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 574–82 (2003); Justin Levine, Comment, *A Clash of Canons: Lenity,* Chevron*, and the One-Statute, One-Interpretation Rule*, 107 GEO. L.J. 1423, 1434–38 (2019); William T. Gillis, Note, *An Unstable Equilibrium: Evaluating the Third Way Between* Chevron *Deference and the Rule of Lenity*, 12 N.Y.U. J.L. & LIBERTY 352, 353–59 (2019); Caitlin Miller, Comment, *The Balancing Act Between* Chevron *Deference and the Rule of Lenity*, 18 TEX. TECH. ADMIN. L.J. 193, 209–16 (2017); David Hahn, *Silent and Ambiguous: The Supreme Court Dodges* Chevron *and Lenity in* Esquivel-Quintana v. Sessions, MINN. L. REV. (Nov. 29, 2017), https://minnesotalawreview.org/2017/11/29/silent-and-ambiguous/#post-2596-endnote-34. For a discussion of this framework by courts, see Perez v. United States, 885 F.3d 984, 991 (6th Cir. 2018); *Esquivel-Quintana*, 810 F.3d at 1027–32; Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring). Other scholars have also focused on the relationship between the *Chevron* framework and the substantive canons more generally. *See, e.g.*, Liu, *supra* note 97, at 335–43.

[284] *See* Hickman, *supra* note 277, at 934; Greenfield, *supra* note 239, at 48–51. The Supreme Court has previously used language indicating that lenity is a substantive canon that courts can use to determine if a statute is ambiguous, which comports with Step One of the *Chevron* analysis. *See* Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005); Hickman, *supra* note 277, at 934. *But see supra* note 282

"operate as a tie-breaker between competing statutory interpretations to establish [the] statute's supposed plain meaning."[285] The result of lenity's use in this manner would be that a "court applying [it] [would] never get[] past that first-level inquiry and . . . [would] not have the opportunity to defer to the government."[286] This use of lenity best resolves the tension between the canon and *Chevron* deference, as it properly recognizes that *Chevron* deference is largely predicated on a presumed delegation of interpretive power to an agency, whereas lenity exists as a protector of the liberty and due process rights of criminal defendants and the legislative supremacy of Congress in the sentencing context.[287] But, the use of lenity in this manner might not always be desirable, as it could "foreclose the opportunity for the agency subsequently to adopt an alternative interpretation, even through the notice-and-comment process, and thus would put courts rather than the agency in the position of resolving statutory ambiguity."[288]

Second, some scholars propose that courts should use lenity in Step Two of the *Chevron* analysis to limit the permissible range of interpretations that an agency could adopt.[289] Using lenity in Step Two would "modify lenity somewhat from a dispositive tie-breaker canon to a canon that acts as a factor," but this change "would not lessen [lenity's] value."[290] Instead, lenity would retain significant importance and "set the scope of possible constructions, helping to determine the reasonableness of the agency interpretation."[291] As such, a strong application of lenity in this manner would restrict the permissible constructions of an ambiguous statute to those that are least detrimental to criminal defendants.

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and accompanying text.

[285] Hickman, *supra* note 277, at 934.

[286] *Id.* The Supreme Court has previously found that other "manners of presumptions, substantive canons, and clear statement rules" operate at Step One of the *Chevron* analysis and "take precedence over conflicting agency views." *Carter*, 736 F.3d at 731.

[287] Hickman, *supra* note 277, at 934–36. Whether lenity is "an absolute constitutional requirement rather than a quasi-constitutional canon of construction is questionable," as some states have even "rejected the rule of lenity in drafting their own criminal statutes." *Id.* at 935 (citations omitted).

[288] *Id.* at 936; *cf.* Slocum, *supra* note 283, at 542. ("[If] the immigration rule of lenity is a 'traditional tool of statutory construction' in the sense meant by the Court in *Chevron*, reviewing courts would never defer to the agency's interpretation because the issue would be resolved at Step One.").

[289] *See, e.g.*, Greenfield, *supra* note 239, at 51–53; Slocum, *supra* note 283, at 574–82; Levine, *supra* note 283, at 1436. Courts differ in how they understand Step Two of the *Chevron* analysis. Slocum, *supra* note 283, at 575. Some courts find that Step Two merely entails seeing if the agency's interpretation can be supported. *Id.* Other courts find that Step Two entails a more searching inquiry into whether the agency's interpretation "is supported by a reasonable explanation and is logically coherent." *Id.* at 576 (citations omitted). The latter view is often associated with a merger of Step Two of the *Chevron* analysis and "review under the [APA's] arbitrary and capricious standard." *Id.* at 576 n.374.

[290] *Id.* at 577–78.

[291] *See* Levine, *supra* note 283, at 1436.

Because the Supreme Court has adopted the test for *Chevron* deference as part of the *Auer* analysis, an understanding of the interaction between the rule of lenity and *Chevron* deference can guide how lenity applies in the context of *Auer* deference. And, in fact, the sentencing context itself substantially heightens the need for a strong rule of lenity to appropriately protect criminal defendants.

3. *How Lenity Should Interact with* Auer *Deference*

When there is ambiguity in the criminal context, the defendant is typically favored, as demonstrated by the maxim that one cannot be criminally convicted if there is reasonable doubt as to their guilt.[292] Lenity also favors criminal defendants when statutes are ambiguous by "constru[ing] the [ambiguous] statute in the criminal defendant's favor."[293] But, when *Auer* deference applies in the sentencing context because there is ambiguity, the criminal defendant is not favored.[294] Instead, an application of *Auer* deference "mean[s] that rather than benefitting from any ambiguity in the [g]uidelines, [a criminal defendant] would face the possibility of more time in prison than [they] otherwise would," which "threatens the separation of powers . . . [and] endangers fundamental legal precepts as well."[295] As such, there is a strong argument for an account of *Auer* deference that appropriately accommodates lenity. Stated simply, "[a]gencies, no less than courts, must honor the rule of lenity."[296]

The new framework for *Auer* deference as presented in *Kisor*,[297] however, leaves sufficient room for lenity and allows it to serve as a powerful tool to limit the Sentencing Commission's ability to interpret ambiguous sentencing guidelines in a manner contrary to the interests of criminal defendants through commentary. When coupled with a strict application of the tools of construction,[298] lenity can limit *Auer* deference in a way that is protective of criminal defendants, and still leave the Sentencing Commission the flexibility

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[292] *See Havis I*, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring) (citation omitted) ("[I]n criminal cases, ambiguity typically favors the defendant[,] [and] [i]f there is reasonable doubt, no conviction."), *vacated by reh'g en banc*, 921 F.3d 628 (6th Cir. 2019).

[293] *Id.* (citation omitted).

[294] *Id.*

[295] *Id.* (citing Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 732–33 (6th Cir. 2013) (Sutton, J., concurring); Perez v. United States, 885 F.3d 984, 990–91 (6th Cir. 2018)). If lenity yielded to both *Chevron* deference and *Auer* deference, unseemly consequences could also result. *Carter*, 736 F.3d at 732–33. Such a rule would "give each agency two ways of construing criminal laws against the defendant—by resolving ambiguities in the criminal statute and by resolving ambiguities in any regulation." *Id.* at 733.

[296] *Id.* at 736

[297] *See supra* Part II.E.

[298] *See supra* Part IV.A.

that is necessary to act through commentary to best effectuate the goals of the Sentencing Reform Act.

Courts could uniformly go the way of the Fifth and Eleventh Circuits and find that "*Auer* deference does not apply in criminal cases."[299] Underlying these decisions is the idea that (1) "the public is entitled to 'fair warning' of prohibited conduct if it can be penalized for engaging in such behavior,"[300] and (2) the law "must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents."[301] Such an approach would favor criminal defendants and deny *Auer* deference to commentary that is harmful to criminal defendants. In the event that courts are not willing to go that far, however, the framework used at the intersection of *Chevron* deference and the rule of lenity can be imported and modified to have a similar, beneficial impact when *Auer* deference potentially applies.

As such, in the sentencing context, courts should treat lenity as a traditional tool of construction and utilize it in Step One of the *Auer* analysis, especially "in this era of overcriminalization and excessive punishment."[302] An application of lenity in this manner would require a return to the *lenity-first* approach that dominated the Supreme Court's early understanding of the canon or an embrace of Justice Scalia's *textualist rule of lenity*.[303] Such a return, however, should be welcome, because it would substantially limit ambiguity in the sentencing guidelines that would lend itself to interpretation in commentary, possibly to the detriment of criminal defendants. Additionally, such an understanding of lenity correctly reflects that Congress would not intend to delegate the Sentencing Commission interpretive authority when such a delegation compromises the "certainty and predictability that the justice system as a whole derives from ensuring that [provisions] providing for criminal punishments contain clear statements."[304] And, as a matter of policy, this understanding of lenity would

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[299] United States v. Phifer, 909 F.3d 372, 385 (11th Cir. 2018); *see also* United States v. Moss, 872 F.3d 304, 314 (5th Cir. 2017) ("If this case involved only civil sanctions against the appellees, the government would perhaps ask this court to apply *Auer* deference to its interpretation of the regulations."); Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 528 F.2d 645, 649 (5th Cir. 1976) ("If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."). The Fifth Circuit had previously found that the rule of lenity applied to the sentencing guidelines, while the Eleventh Circuit had not previously reached that decision. *See* United States v. Bustillos-Pena, 612 F.3d 863, 868 (5th Cir. 2010) ("Although the provisions of the Sentencing Guidelines are not statutes, we apply the rule of lenity to them when we find that they are ambiguous.").

[300] *Phifer*, 909 F.3d at 384 (citing *Diamond Roofing Co.*, 528 F.2d at 649).

[301] *Id.* (quoting *Diamond Roofing Co*., 528 F.2d at 649) (internal quotation marks omitted).

[302] Hopwood, *supra* note 275, at 699.

[303] *See id.* at 700–01; *supra* notes 273, 276, and accompanying text.

[304] Elkan Abromwitz & Barry A. Bohrer, *The Rule of Lenity in Sentencing*, 239 N.Y.L.J., Mar. 4, 2008

allow courts to ensure that the Sentencing Commission formulates the *Guidelines Manual* in the manner that best effectuates the policies underlying the Sentencing Reform Act.[305]

An application of lenity in Step Two of the *Auer* analysis could be similarly beneficial for criminal defendants. While this step is generally viewed as highly deferential to the agency's interpretation,[306] an application of lenity here could greatly restrict the range of permissible interpretations of ambiguous sentencing guidelines to those that are least detrimental to criminal defendants. Under this approach, courts are "require[d] . . . to accept only those agency interpretations that are reasonable in light of [the] principles of construction [that] courts normally employ,"[307] which leaves room for the use of lenity in Step Two, "even if [the] canon did not have a dispositive effect in Step One."[308] Thus, when the Sentencing Commission interprets sentencing guidelines in a manner that is detrimental to the interests of criminal defendants through commentary, this approach could lead to the conclusion that the Commission's interpretation is not reasonable in light of the presumption that ambiguous sentencing guidelines are to be interpreted in favor of criminal defendants.

C. The Result—A More Limited Role for Commentary

By strictly applying the traditional tools of statutory construction in Step One of the *Auer* analysis, courts can drastically restrict the number of cases in which sentencing guidelines are found to be genuinely ambiguous, foreclosing *Auer* deference to the guidelines' commentary. And, even if the traditional tools of statutory construction fail to resolve the apparent ambiguity in a sentencing guideline, an application of lenity in either Step One or Step Two of the *Auer* analysis would substantially restrict the ability of the Sentencing Commission to interpret sentencing guidelines in a manner that is contrary to the interests of

(quoting Brief of the Nat'l Ass'n of Criminal Def. Lawyers and Families Against Mandatory Minimums as Amici Curiae in Support of Petitioner at 11–12, Burgess v. United States, 553 U.S. 124 (2008) (No. 06-11429), 2008 WL 261196)).

[305] *See supra* Part I.B. (discussing the policies underlying the Sentencing Reform Act of 1984).

[306] *Cf. supra* note 170 (describing how deferential courts are at Step Two of the *Chevron* analysis). An insufficient amount of time has elapsed since the Supreme Court adopted the test for *Chevron* deference as part of the test for *Auer* deference for scholarship to have examined the same issue in the context of *Auer* deference.

[307] Greenfield, *supra* note 239, at 51–52 (quoting Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 259–60 (1991) (Scalia, J., concurring) (internal quotation marks omitted)).

[308] *Id.* at 52. The rule of lenity "may . . . constrain the possible number of reasonable ways to read an ambiguity in a statute, though the application of the canon alone may not suffice to make the intent of the statute sufficiently clear for the court to pronounce" what the agency intended. *Id.* (quoting Massachusetts v. U.S. Dep't of Transp., 93 F.3d 890, 893 (D.C. Cir. 1996) (internal quotation marks omitted)).

criminal defendants through commentary.[309] In either case, the Sentencing Commission would no longer be able to use commentary in an impermissible manner, and the function of commentary would return to that originally intended by Congress.[310]

Notably, the Sentencing Commission would not be handcuffed by the decision of a court to deny *Auer* deference to a commentary provision.[311] Instead, the Sentencing Commission would be free to amend the sentencing guidelines to effectuate the substantive change attempted by the commentary, subject to the restrictions contained in the Sentencing Reform Act.[312] By adopting a more uniform approach to the *Auer* analysis, courts would limit the intra- and inter-circuit differences that abound in the current system and reduce the threat to criminal defendants from the actions of the Sentencing Commission in the absence of its usual rulemaking process.[313]

Implementation of this proposal would affect the ways in which commentary can be used by the Sentencing Commission in the future. No longer could the Sentencing Commission use commentary as a stopgap measure to avoid amending the sentencing guidelines when the commentary is detrimental to criminal defendants. Instead, the Sentencing Commission would have to be more purposeful in amending the sentencing guidelines when the desired changes negatively affect criminal defendants. While such a change could pose problems for the Sentencing Commission in the short run,[314] it would be unlikely to have large impacts on the Commission's operations in the long run.

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[309] If commentary is rejected because the underlying guideline is not genuinely ambiguous or the commentary is not a reasonable interpretation of it, courts would be left with the tools of statutory construction to resolve any ambiguity. As such, this schema represents a partial return to the system that existed before the Sentencing Reform Act was enacted and may raise some of the same concerns that led to the Act in the first place. *See supra* Part I.A.

[310] *See supra* notes 231–32 and accompanying text.

[311] Nor would Congress be handcuffed, for that matter, as Congress is always able to take legislative action to affect criminal sentencing.

[312] *See supra* note 70.

[313] Today, the threat to criminal defendants is substantially heightened because the Sentencing Commission's composition does not resemble what Congress envisioned when it originally passed the Sentencing Reform Act. *See supra* notes 21, 54, and 61.

[314] Currently, the Sentencing Commission has two voting members and two non-voting members. *About*, U.S. SENT'G COMM'N, https://www.ussc.gov/about-page (last visited Feb. 12, 2021). The Sentencing Commission, however, "must have at least four voting commissioners for a quorum." *U.S. Sentencing Commission Publishes for Comment Proposed Amendments to the Federal Sentencing Guidelines*, U.S. SENT'G COMM'N (Dec. 13, 2018), https://www.ussc.gov/about/news/press-releases/december-13-2018. Thus, the Sentencing Commission will be unable to amend the sentencing guidelines until additional members are appointed, and it is unclear when the Commission will regain a quorum.

That is not to say, however, that commentary would cease to have any use for the Sentencing Commission. Instead, the Sentencing Commission could continue to use commentary to interpret sentencing guidelines that are ambiguous, so long as the commentary does not interpret the guidelines in a manner that is adverse to criminal defendants.[315] Thus, what would emerge is a system that appropriately protects criminal defendants while still allowing the Sentencing Commission the flexibility to interpret sentencing guidelines through commentary, provided that criminal defendants are not adversely affected.[316]

CONCLUSION

While there has been increased attention on the necessity of criminal justice reform in the United States, limited attention has been paid to the role that the Sentencing Commission has played in exacerbating the very problems that it was designed to address. Because the Supreme Court sanctioned the application of *Auer* deference to the *Guidelines Manual*'s commentary in *Stinson v. United States*, the Sentencing Commission has enacted commentary that purports to interpret ambiguous sentencing guidelines, but actually makes substantive changes to the underlying guidelines in the absence of the protections included in the Sentencing Reform Act. When the Sentencing Commission acts in this arbitrary manner, it is subject only to the limited check on federal agencies that accompanies its position in the executive branch, something that is not desirable given the dominant role the Commission plays in determining whether and how long criminal offenders will be incarcerated by the State.

Nonetheless, the Supreme Court provided courts a tool in *Kisor v. Wilkie* that can be used to eliminate the Sentencing Commission's use of commentary in this manner. By importing the test for *Chevron* deference as part of the *Auer* analysis, the Supreme Court gave courts an opportunity to take a more active role in restricting the ability of the Sentencing Commission to act in a manner that is detrimental to criminal defendants and contrary to the wishes of Congress. Significantly, courts can deny *Auer* deference to commentary that was drafted

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[315] Commentary could be used to interpret the sentencing guidelines in a manner that is neutral or benefits criminal defendants. For example, the Sentencing Commission could continue to use commentary to explain what actions qualify criminal defendants for a sentence reduction when they accept responsibility for their offenses. *See* 2018 GUIDELINES MANUAL, *supra* note 3, § 3E1.1 cmt. n.1.

[316] It is possible that strictly applying the traditional tools of statutory construction in Step One of the *Auer* analysis would render most of the sentencing guidelines unambiguous, which would limit the utility of commentary. But this result is unlikely, as tools like the rule of lenity apply much more strongly when commentary is detrimental to criminal defendants.

in a manner that could be abusive to criminal defendants by (1) strictly applying the traditional tools of statutory construction and (2) using the rule of lenity. As a result, *Auer* deference would no longer handcuff courts in how they apply the sentencing guidelines; instead, courts would be free to interpret the sentencing guidelines as they would normally interpret statutes and regulations when *Auer* deference is not warranted, a result that would be beneficial for both criminal defendants and society at large.

JARRETT FABER*

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