DUE DEFERENCE: *KISOR*, *STINSON*, AND THE UNITED STATES SENTENCING COMMISSION

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Under Kisor v. Wilkie, *courts must defer to agencies' interpretations of regulations when certain conditions are met. Lower courts continue to diverge, however, when it comes to the deference due the United States Sentencing Commission's commentary. The Supreme Court has declined to come to the circuits' aid. Commission commentary interprets its Guidelines. Guidelines are necessarily subject to the Administrative Procedure Act's notice-and-comment requirements and congressional control; commentary is not. Given the heightened stakes inherent in sentencing, some argue that the rule of lenity should apply when a court considers deferring to commentary. This Note argues that such an approach should not be adopted.* Kisor *adequately protects the constitutional concerns underlying the rule of lenity. Judges should not use lenity to undercut policy judgments that Congress entrusted to the Commission. When there are legitimate reasons beyond those accounted for by* Kisor *to withhold deference in a given case, courts should instead carefully scrutinize whether an advisory note interprets or expands the relevant Guideline. This is an inquiry that the APA requires judges to make, and it preserves a meaningful role for judges in the* Kisor *framework.*

INTRODUCTION

Sentencing doctrine has consequences. Consider *United States v. Moses*[1] and *United States v. Campbell*,[2] which the Fourth Circuit decided a mere twelve days apart. Each opinion was well reasoned and arguably correct. Still, only one panel deferred to the Sentencing Commission's interpretation of its Guidelines, and that deference led to a three hundred percent increase in the length of the defendant's sentence.

On January 19, 2022, a panel for the Fourth Circuit affirmed a district court judgment that applied a career-offender enhancement to Lenair Moses' sentence.[3] Moses pleaded guilty to two counts of

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1 23 F.4th 347 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 640 (2023) (mem.).

2 22 F.4th 438 (4th Cir. 2022).

3 *Moses*, 23 F.4th at 348–49.

distributing cocaine after twice selling crack cocaine to confidential informants.[4] The two predicate offenses warranting enhancement under the Sentencing Guidelines were 2009 and 2013 felony convictions for possession with intent to distribute.[5] However, Moses argued that his 2013 conviction qualified as "relevant conduct" under section 1B1.3 for the conviction in question, and therefore could not serve as a predicate offense.[6] Rejecting Moses' argument, the Fourth Circuit deferred to the commentary's interpretation of section 1B1.3, which defines "relevant conduct" as excluding "offense conduct associated with a [prior] sentence."[7] In deferring to the commentary's interpretation, the court applied *Stinson v. United States*[8] and held that the commentary was binding unless it "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, [the] guideline."[9] The court also concluded that *Kisor v. Wilkie*[10] was inapplicable to the Commission's commentary.[11]

Twelve days earlier, a separate Fourth Circuit panel vacated the sentence in *United States v. Campbell* because the district court improperly imposed a career-offender enhancement.[12] Like Moses, the district court sentenced Campbell as a career offender based on two predicate convictions under section 4B1.1.[13] Campbell objected because the Guideline definition of "controlled substance offense" did not include attempt offenses.[14] If attempt offenses did not count as prior convictions, Campbell would not qualify as a career offender.[15] However, the relevant commentary provides that controlled substance offenses include "attempt[s] to commit such offenses."[16] The court declined to defer to the Commission's interpretation because it found

4 *Id.* at 349.

5 *Id.* at 349–50; *see* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a) (U.S. SENT'G COMM'N 2021) (requiring "at least two prior felony convictions of either a crime of violence or a controlled substance offense" to apply the career-offender enhancement). In this case, application of the enhancement increased Moses' offense level from twelve to thirty-two. *Moses*, 23 F.4th at 349. The Guidelines specify that the range for a conviction with an offense level of twelve should be "[m]ore than 1 year, but less than 5 years." U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b)(7). Conversely, the range for a conviction with an offense level of thirty-two is "20 years or more, but less than 25 years." *Id.* § 4B1.1(b)(3).

6 *Moses*, 23 F.4th at 350.

7 U.S. SENT'G GUIDELINES MANUAL § 1B1.3 cmt. n.5(C).

8 508 U.S. 36 (1993).

9 *Moses*, 23 F.4th at 354 (alteration in original) (quoting *Stinson*, 508 U.S. at 38).

10 139 S. Ct. 2400 (2019).

11 *Moses*, 23 F.4th at 349.

12 United States v. Campbell, 22 F.4th 438, 440 (4th Cir. 2022).

13 *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(a)(3) (U.S. SENT'G COMM'N 2021).

14 *Campbell*, 22 F.4th at 442.

15 *Id.*

16 U.S. SENT'G GUIDELINES MANUAL § 4B1.2 cmt. n.1.

the text of the Guideline and commentary plainly inconsistent under *Stinson*.[17] The panel also suggested that *Kisor* abrogated *Stinson*, but concluded the result would be the same regardless of which case applied.[18]

In light of the apparent discrepancy, Moses filed a petition for rehearing en banc. Since the panel in *Campbell* concluded that deference was inappropriate under both *Stinson* and *Kisor*, the Fourth Circuit disagreed as to whether there was an actual conflict between *Campbell* and *Moses*. Ultimately, a majority of the Fourth Circuit voted to deny the petition for rehearing, with Judge Niemeyer noting that both cases relied on *Stinson* for their holding and that any inconsistency concerning *Kisor* was dicta.[19] Four judges disagreed, with Judge Wynn arguing that *Moses*' conclusion concerning *Kisor* "flatly contradict[ed]" the holding in *Campbell* that *Kisor* did apply to the commentary.[20]

This issue is not endemic to the Fourth Circuit. The issue of how much deference to give the Commission's commentary has been splitting federal courts for years. To date, every circuit that hears criminal cases has spoken on the issue.[21] The results have been far from uniform.[22] And there is no sign of help from the Supreme Court.[23] Thus, lower courts have been left to themselves to find a workable solution.

The issue stems from two Supreme Court cases: *Stinson v. United States* and *Kisor v. Wilkie*. *Stinson*, decided in 1993, directly addressed the deference due the Commission's interpretations of its Guidelines.[24] It concluded that the Commission's commentary was binding on courts unless it "violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, [the] guideline."[25] The two cases are members of the same doctrinal family

17 *Campbell*, 22 F.4th at 444 (quoting Stinson v. United States, 508 U.S. 36, 43 (1993)).

18 *See id.* at 445–47.

19 United States v. Moses, No. 21-4067, 2022 U.S. App. LEXIS 7694, at *5–6 (4th Cir. Mar. 23, 2022) (Niemeyer, J., supporting the denial of rehearing en banc), *cert. denied*, 143 S. Ct. 640 (2023) (mem.).

20 *Id.* at *7–8 (Wynn, J., voting to grant rehearing en banc).

21 *See infra* Part II.

22 *See infra* Part II.

23 *See, e.g.*, United States v. Smith, 989 F.3d 575, 584–85 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 488 (2021) (mem.); United States v. Cingari, 952 F.3d 1301 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 835 (2020) (mem.); United States v. Crum, 934 F.3d 963 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2629 (2020) (mem.).

24 Stinson v. United States, 508 U.S. 36, 37–38 (1993).

25 *Id.* at 38.

tree; *Stinson* applied what was then known as *Seminole Rock* deference.[26] Over time, *Seminole Rock* deference was rebranded as *Auer* deference.[27] Then, in 2019, a splintered Court in *Kisor* significantly cabined *Auer*'s applicability.[28] Before affording deference under *Kisor*, federal courts must now engage in a multistep analysis to determine if deference is warranted.[29] For clarity's sake, I will refer to the doctrine as *Kisor* deference or agency deference unless specifically referring to other cases.

Recently, judges and commentators have suggested that courts use the rule of lenity when deciding whether to defer to commentary.[30] Under this approach, courts faced with an ambiguous Guideline could use lenity to resolve ambiguity in the defendant's favor rather than deferring to commentary. The result would be a fundamentally different form of deference in the criminal context. This would be problematic and unnecessary. *Kisor* already accounts for two primary concerns underlying criminal law and lenity specifically—due process and the separation of powers. And to the extent other considerations unique to criminal law weigh in favor of tweaking deference, lenity is the wrong tool to use. Lenity's application over the years can only be characterized as inconsistent.[31] For deference purposes, that flaw is critical. A weak form of lenity would never apply in the *Kisor* framework. A strong form would act as a categorical exception to agency deference in the criminal context and implicitly overrule *Stinson*. This Note argues that instead of applying lenity, courts should focus on whether the commentary interprets or expands the Guidelines.[32] The inquiry is mandated by the Administrative Procedure Act (APA) because the Act requires that legislative rules—

26 *See id.* at 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

27 *See* Auer v. Robbins, 519 U.S. 452 (1997); Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 98–102 (2019).

28 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

29 *Id.* at 2414–18.

30 *See, e.g.*, United States v. Nasir, 17 F.4th 459, 472–73 (3d Cir. 2021) (en banc) (Bibas, J., concurring); United States v. Havis, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), *rev'd*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam); Lacey Ferrara, *Uncommon Allies: Bridging the Gap Between* Auer *Deference and the Rule of Lenity in Criminal Cases*, 54 SUFFOLK. U. L. REV. 157, 161 (2021); Jarrett Faber, Comment, Kisor v. Wilkie *as a Limit on* Auer *Deference in the Sentencing Context*, 70 EMORY L.J. 905, 949–51 (2021); Liam Murphy, Note, *What's the Deference? Interpreting the U.S. Sentencing Guidelines After* Kisor, 75 VAND. L. REV. 957, 990–91 (2022).

31 *See infra* Section I.B.

32 I will refer to this by shorthand as "the inquiry." The inquiry's applicability to civil litigation is beyond the scope of this Note.

but not interpretive rules—satisfy statutory rulemaking procedures.[33] For commentary that does not satisfy those requirements, there are two possibilities. If the commentary *interprets* a Guideline, the court and Commission share interpretive authority, which is already the status quo under *Kisor*. If the commentary *expands* a Guideline, courts retain absolute interpretive authority and withhold deference, shifting the burden back to the Commission to amend the commentary or subject it to notice and comment.[34] That congressional control protects the separation of powers; it ensures that the Commission's substantive changes to sentencing rules reflect the values of the community. Since judges make the initial determination that the Commission is using commentary to expand or interpret Guidelines, this approach also maintains a meaningful role for judges in "say[ing] what the law is."[35] Moreover, the approach can help mend the circuit split and facilitate uniformity because only agency *interpretations* can warrant deference under *Stinson* and *Kisor*.

In the sentencing context, the stakes of deference are higher. An individual's liberty is often on the line. Provisions like the career-offender enhancement can lead to drastic increases in the length of a given sentence. But there is no need for a categorically different approach to deference. Such an approach would give the Sentencing Commission less interpretive authority than any other agency. In specific criminal cases, there may be legitimate reasons to refuse deference, reasons that *Kisor* does not account for.[36] If so, strictly

33 Administrative Procedure Act § 4(a), 5 U.S.C. § 553(b)(A) (2018).

34 John Acton argues that "just like the Guidelines' text, most amended guideline commentary now undergoes notice and comment and submission to Congress." John S. Acton, Note, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 HARV. J.L. & PUB. POL'Y 349, 357 (2022). He does not offer empirical support for this claim (for obvious reasons), but, at most, it just makes the inquiry start with a factual question. If a commentary provision has not undergone notice and comment, a judge would apply the inquiry. If a commentary provision has, a judge would apply *Kisor* or *Stinson*, depending on the circuit in which he or she sits. *See supra* Section III.A. Since the inquiry mirrors Step Two, the result under *Kisor* will often be similar either way. *See supra* Section IV.B.

35 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

36 I will not attempt to provide a comprehensive list of reasons. Those who argue for lenity's inclusion generally point to background principles of criminal law like the heightened "beyond a reasonable doubt" standard of guilt or America's presumption of liberty. *See* United States v. Nasir, 17 F.4th 459, 474 (3d Cir. 2021) (en banc) (Bibas, J., concurring); United States v. Havis, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), *rev'd*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam). Relatedly, Justice Gorsuch took issue with *Kisor*'s facilitation of expanding federal power. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment). I also do not pass on the legitimacy of those reasons. The point is that there are many considerations at play in the criminal context, and I cannot conclusively say that none should warrant tweaking deference doctrine when applicable. The inquiry gives courts ample flexibility to do so.

construing the inquiry—leaning toward finding commentary is a legislative rule—provides flexibility to withhold deference without flouting Supreme Court precedent. It also requires that the Commission check its approach for consistency with popular values by subjecting it to congressional control. Absent those legitimate reasons, a court should defer to commentary when appropriate under whichever case—*Kisor* or *Stinson*—its circuit follows.

This Note proceeds as follows: Part I introduces the United States Sentencing Commission, the rule of lenity, *Stinson*, and *Kisor*. Part II discusses the various circuit approaches to deference and commentary. Part III argues that distinguishing between interpretive and legislative rules presents a workable approach to deference in the sentencing context. Part IV responds to counterarguments and concludes.

I. BACKGROUND

A. The United States Sentencing Commission

Congress created the United States Sentencing Commission in 1984 through the Sentencing Reform Act.[37] The Act established the Commission as an independent agency within the judicial branch, with seven voting members and two nonvoting members.[38] The voting members are appointed by the President and confirmed by the Senate, and at least three of the members must be federal judges.[39] Congress identified several purposes the Commission would serve. These include providing certainty and fairness in sentencing, avoiding sentencing disparities among similarly situated criminal defendants, and retaining sufficient flexibility to tailor individual sentences when warranted.[40]

The Commission is tasked with promulgating Guidelines and general policy statements regarding the application of those Guidelines.[41] The Guidelines are subject to the APA's notice-and-comment requirements,[42] and Congress can revise or reject amendments to the Guidelines within 180 days of their proposal.[43] In addition to Guidelines and policy statements, the Commission

37 *See* 28 U.S.C. §§ 991–999 (2018).

38 *Organization*, U.S. SENT'G COMM'N, https://www.ussc.gov/about/who-we-are/organization [https://perma.cc/9E9P-KL8B].

39 *Id.*

40 28 U.S.C. § 991(b)(1)(B) (2018).

41 *Id.* § 994(a)(1)–(2).

42 *Id.* § 994(x).

43 *Id.* § 994(p); Stinson v. United States, 508 U.S. 36, 41 (1993) ("Amendments to the Guidelines must be submitted to Congress for a 6-month period of review, during which Congress can modify or disapprove them." (citing 28 U.S.C. § 994(p))).

publishes commentary. The Guidelines Manual specifies that, in relevant part, the commentary can "interpret the guideline or explain how it is to be applied."[44]

Originally, the Guidelines bound sentencing judges with limited exceptions.[45] However, the Supreme Court in *United States v. Booker* concluded that mandatory application of the Guidelines violated the Sixth Amendment and severed that provision.[46] Accordingly, the Guidelines are now formally advisory. However, they continue to heavily influence sentencing in practice. A judge cannot depart from the applicable Guidelines range without giving an "adequate explanation for the variance."[47] And the Guidelines continue to "exert a law-like gravitational pull on sentences"[48]—in 2021, roughly seventy percent of all sentences complied with the Guidelines Manual.[49]

Shortly after the Act was passed, the Commission's constitutionality was put to the test. In *Mistretta v. United States*, the Court addressed arguments that the Commission violated the separation of powers and constituted an excessive delegation of congressional power.[50] The Court rejected both claims.[51] It acknowledged that the Commission is a "peculiar institution within the framework of our Government," located within the "'twilight area' in which the activities of the separate Branches merge."[52] Moreover, the Court noted that the Commission, though located in the judicial branch, wields rulemaking power, not judicial authority.[53] The Court analogized the Commission's rulemaking authority to the Supreme Court's authority to promulgate procedural rules, but admitted that "the degree of political judgment about crime and criminality exercised by the Commission and the scope of the substantive effects

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44 U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 2021).

45 *See* 18 U.S.C. § 3553(b)(1) (2018).

46 United States v. Booker, 543 U.S. 220, 226, 244–45 (2005).

47 United States v. Havis, 927 F.3d 382, 385 (6th Cir. 2019) (en banc) (per curiam) (citing Peugh v. United States, 569 U.S. 530, 543 (2013)).

48 United States v. Nasir, 17 F.4th 459, 474 (3d Cir. 2021) (en banc) (Bibas, J., concurring) (first citing *Booker*, 543 U.S. at 265; then citing *Peugh*, 569 U.S. at 543–44; and then citing U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 8 (2020)).

49 *See* U.S. SENT'G COMM'N, 2021 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 8 (2022). This includes sentences within the Guidelines range as well as those for which judges cited a departure rationale from the Manual. *Id.* These statistics explain, at least in part, why deference to commentary is so controversial even after *Booker*.

50 Mistretta v. United States, 488 U.S. 361, 370 (1989).

51 *Id.* at 412.

52 *Id.* at 384, 386.

53 *See id.* at 385, 387.

of its work" made the analogy imperfect.[54] The Court concluded there was no separation-of-powers issue, however, because "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines as it sees fit" and because the Commission's rulemaking is subject to notice-and-comment requirements.[55] In a lone dissent, Justice Scalia argued that the Commission violated the separation of powers.[56] While Congress could grant agencies discretion ancillary to the exercise of judicial or executive power, he argued that Congress impermissibly granted the Commission pure rulemaking power.[57] The majority, however, was not convinced, and the Commission survived the constitutional challenge.

B. The Rule of Lenity

The rule of lenity is a rule of interpretation that instructs interpreters to "resolve ambiguity in criminal laws in favor of defendants."[58] The rule has a long history in the United States; it was imported from the British common law and adopted at least as early as 1820.[59] Still, courts have yet to pin down exactly when lenity should apply.[60]

A few things are settled though. The rule only applies when a statute or regulation is ambiguous.[61] Just how ambiguous—whether lenity should apply any time there is a "reasonable doubt" about a statute's meaning, or only when there is "grievous ambiguity"—is contested.[62] The rule also applies in the sentencing context. The Supreme Court has applied the rule of lenity to sentencing provisions nineteen times since 1952; it has also expressly noted that the rule

54 *Id.* at 392–93, 388.

55 *Id.* at 393–94.

56 *Id.* at 413 (Scalia, J., dissenting).

57 *Id.* at 417, 421.

58 Whitman v. United States, 574 U.S. 1003, 1005 (2014) (mem.) (Scalia, J., respecting the denial of certiorari).

59 *See* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

60 *See* Faber, *supra* note 30, at 945–46 (describing a lenity-first, lenity-last, and textualist approach); 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, 380–81 (2019) (describing four "unique conceptions of the rule of lenity," which vary in the degree of ambiguity required to operate); *see also* Shular v. United States, 140 S. Ct. 779, 787–88 (2020) (Kavanaugh, J., concurring) ("This Court's longstanding precedents establish that the rule of lenity applies . . . only in cases of 'grievous' ambiguity." (quoting Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016))).

61 *See Wiltberger*, 18 U.S. (5 Wheat.) at 95–96; Ferrara, *supra* note 30, at 165.

62 *See infra* notes 164–65 and accompanying text.

applies to sentencing provisions.[63] Lastly, several justifications underlie the rule of lenity. Two of these are due process and the separation of powers. The due-process justification is connected to notice; by preventing penal rules from operating when ambiguous, lenity requires that "citizens [have] fair warning of what conduct is illegal."[64] The separation-of-powers justification stems from the fact that defining criminal conduct is the unique task of the legislature.[65] When only Congress criminalizes conduct, it ensures that punishment is truly an expression of the community's moral values, not the idiosyncratic preferences of judges.[66] Together, these justifications give the rule of lenity a constitutional basis.[67] Lenity also promotes uniformity. If Congress has spoken unambiguously, a criminal defendant should not be subject to divergent outcomes when prosecuted in one jurisdiction as opposed to another.

C. Kisor *Deference*

While lenity and deference often point in opposite directions on the same facts,[68] many of the same considerations underlie both. *Kisor* deference has seen its share of twists and turns on the journey to its present form. Hints of deference began to appear as early as 1898. The Court in *United States v. Eaton* stated that "[t]he interpretation given to the regulations by the department charged with their execution . . . is entitled to the greatest weight."[69] Nearly fifty years later, *Eaton*'s principle was reformulated in *Skidmore v. Swift & Co.*[70] The Court concluded:

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63 Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 527–28 (2002).

64 United States v. Nasir, 17 F.4th 459, 472–73 (3d Cir. 2021) (en banc) (Bibas, J., concurring); *see* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004); Gillis, *supra* note 60, at 356.

65 *Nasir*, 17 F.4th at 473 (en banc) (Bibas, J., concurring) (quoting *Wiltberger*, 18 U.S. (5 Wheat.) at 95).

66 *See* Gillis, *supra* note 60, at 368 (quoting United States v. Bass, 404 U.S. 336, 348 (1971)).

67 *See* Faber, *supra* note 30, at 944; *see also* United States v. Bustillos-Pena, 612 F.3d 863, 868 (5th Cir. 2010) ("The rule-of-lenity fosters the constitutional due-process principle 'that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited.'" (quoting United States v. Rivera, 265 F.3d 310, 312 (5th Cir. 2001))).

68 *See* Gillis, *supra* note 60, at 353.

69 United States v. Eaton, 169 U.S. 331, 343 (1898). Justice Gorsuch argues that the Court only considered the issue of deference *after* it concluded that the agency's interpretation was "rendered necessary by a consideration of the text" of the statute and the regulations. Kisor v. Wilkie, 139 S. Ct. 2400, 2427 (2019) (Gorsuch, J., concurring in the judgment) (quoting *Eaton*, 169 U.S. at 342). Either way, the Court clearly addressed agency deference.

70 323 U.S. 134 (1944).

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon 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 power to persuade, if lacking power to control.[71]

Under *Skidmore*, then, an agency's interpretation warrants deference only to the extent it has the "power to persuade;"[72] it can never bind a court.

Skidmore's informal deference was undermined as the doctrine developed. In *Bowles v. Seminole Rock & Sand Co.*, issued the same Term as *Skidmore*, the Court stated that if the meaning of a regulation was ambiguous, the agency's interpretation was entitled to controlling deference unless it was "plainly erroneous or inconsistent with the regulation."[73] Still, the Court suggested that there was work for a court to do—"[o]ur only tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."[74] Eventually, the doctrine evolved into *Auer* deference. The *Auer* Court held that an agency's interpretation of its own regulation was "controlling unless "plainly erroneous or inconsistent with the regulation."[75] The results were striking. Courts began to defer "reflexive[ly]."[76] The *Kisor* Court acknowledged that when applying *Auer*, some courts gave agencies unreviewable interpretive authority.[77]

Stinson v. United States belongs in the same family tree. There, the Court directly addressed the deference due the Sentencing Commission's commentary.[78] The Eleventh Circuit concluded that commentary was not binding because Congress does not review

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71 *Id.* at 140.

72 *Kisor*, 139 S. Ct. at 2427 (Gorsuch, J., concurring in the judgment) (quoting *Skidmore*, 323 U.S. at 140); *see* Bradley Lipton, Note, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2099 (2010) (describing the conventional judicial interpretation of *Skidmore*).

73 Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414, 413–14 (1945).

74 *Id.* at 414.

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

76 *Kisor*, 139 S. Ct. at 2415 (quoting Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring)); *id.* at 2426 (Gorsuch, J., concurring in the judgment).

77 *Id.* at 2415 (majority opinion). The majority conceded that "Kisor has a bit of grist for his claim that *Auer* 'bestows on agencies expansive, unreviewable' authority." *Id.* (quoting Brief for Petitioner at 25, *Kisor*, 139 S. Ct. 2400 (No. 18-15)).

78 Stinson v. United States, 508 U.S. 36, 37–38 (1993).

changes to the commentary.[79] The Supreme Court reversed, holding that commentary that interprets a Guideline or explains how to apply it is binding unless it violates the Constitution or a federal statute or is "plainly erroneous or inconsistent with" the Guideline.[80] The Court bolstered its conclusion by focusing on agency expertise. It noted that since the Commission drafts both the Guidelines and commentary, "we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied."[81] The Court also focused on congressional delegation. Congress's directive to update the Guidelines indicated it "necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest."[82] Thus, the Court gave the Commission broad interpretive authority; under *Stinson*, commentary binds courts even if Congress does not have the opportunity to review it.[83]

Kisor v. Wilkie, decided more than twenty-five years later, took a markedly different approach to agency deference. The two decisions belong in the same family tree, but they hardly look related. Under *Kisor*, courts must engage in a multifactor analysis before they give controlling deference to an agency's interpretation. This test has three conjunctive steps.

First, agency deference only applies to regulations that are "genuinely ambiguous."[84] Before concluding that a regulation is genuinely ambiguous, a court must use all of the interpretive tools in its "legal toolkit," and the "interpretive question [must] still ha[ve] no single right answer."[85] The tools in this toolkit include the "text, structure, history, and purpose of a regulation."[86] And a court must take an actual, good-faith stab at interpretation; it must use these tools as if it had no agency interpretation to resort to.[87]

Second, the agency interpretation must be reasonable. The interpretive tools a court employs at Step One delineate the outer limits of reasonableness, and the agency's interpretation must fall

79 *Id.* at 39–40.

80 *Id.* at 42, 45 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

81 *Id.* at 45.

82 *Id.* at 46 (quoting Braxton v. United States, 500 U.S. 344, 348 (1991)).

83 *Id.*

84 Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (first citing Christensen v. Harris County, 529 U.S. 576, 588 (2000); and then citing *Seminole Rock*, 325 U.S. at 414).

85 *Id.* (citing Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)).

86 *Id.* (citing *Pauley*, 501 U.S. at 707 (Scalia, J., dissenting)).

87 *Id.*

within this "zone of ambiguity."[88] Even if a regulation is ambiguous—if both *X* and *Y* are permissible interpretations—an agency interpretation that said *Z* would not warrant deference.

Finally, the "character and context" of the interpretation must warrant controlling weight.[89] Several requirements are folded into this step. The interpretation must be an authoritative agency interpretation.[90] In other words, the context of the interpretation and the identity of the interpreter matter. The interpretation of a lower-level employee attached to an internal email would be less likely to satisfy Step Three than one promulgated in the Federal Register.[91] Moreover, the interpretive issue must fall closer to the agency's area of expertise than a court's.[92] Technical regulations and value-laden judgments—like those Congress entrusted to the Commission—are both firmly within an agency's wheelhouse.[93] An agency's interpretation must also represent its "fair and considered judgment."[94] If the agency adopted an interpretation for litigatory convenience or to rationalize its prior actions, that would not pass muster.[95] Similarly, new interpretations that give rise to "unfair surprise" would not warrant deference.[96]

When these conditions are satisfied, the agency's interpretation is entitled to controlling deference. When they are not, or when outside factors outweigh the rationale for deference, the agency's interpretation can serve only as persuasive authority.[97]

Justice Gorsuch concurred, joined in part by three other Justices. He attacked agency deference head-on. He argued that deference creates a "systematic judicial bias in favor of the federal government . . . and against everyone else."[98] He also argued that deference violates the APA. Since the APA "requires a reviewing court to resolve for itself any dispute over the proper interpretation of an

88 *Id.* at 2416, 2415–16.

89 *Id.* at 2416.

90 *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 257–59, 258 n.6 (2001) (Scalia, J., dissenting)).

91 *See id.*

92 *Id.* at 2417. The majority's example of an interpretive issue staunchly within an agency's purview was the definition of "moiety." *See id.*

93 *See id.*

94 *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

95 *Id.* at 2417, 2421.

96 *Id.* at 2418, 2417–18 (quoting Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170 (2007)).

97 *Id.* at 2414 (citing *Christopher*, 567 U.S. at 159).

98 *Id.* at 2425 (Gorsuch, J., concurring in the judgment) (quoting Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 641 (2019)).

agency regulation," deference to agency interpretations is impermissible.[99] Finally, he raised separation-of-powers concerns. He expressed skepticism that agency deference is compatible with the judiciary's responsibility "to say what the law is."[100] While he acknowledged the majority's confidence that "courts retain a firm grip on the interpretive function," he doubted that limiting that function to an inquiry into the reasonableness of an agency's interpretation was really enough.[101]

Justice Kagan's plurality opinion defended agency deference and laid out some of its underlying principles. Deference is based on the presumption that Congress would generally want agencies' interpretations of their ambiguous regulations to take primacy.[102] That is because, at least in theory, the author of a regulation is better situated to interpret it than a third-party judge.[103] Moreover, having a centralized actor like the issuing agency interpret ambiguous regulations facilitates uniformity.[104] Instead of piecemeal judicial interpretations, affected parties can be assured of a single interpretation across jurisdictions. This is particularly relevant when the regulation's subject matter is technical or concerns subjective value judgments.[105]

Justice Kagan also responded to Justice Gorsuch's arguments about *Kisor*'s inconsistency with the Constitution and APA. While conceding that § 706 requires judges to "determine the meaning or applicability of the terms of an agency action," she argued that *Kisor* ensures judicial interpretive authority by requiring that courts pass on the ambiguity of a given regulation and the reasonableness of an agency interpretation.[106] *Kisor* is consistent with the separation of powers for the same reason—courts retain a sufficient degree of interpretive authority.[107] She also argued that *Kisor* complies with the Act's notice-and-comment requirements because it only applies to interpretive rules. Interpretive rules do not bind private parties; they must apply to a valid legislative rule to have any legal force.[108]

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99 *See id.* at 2432.

100 *Id.* at 2437 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

101 *Id.* at 2440.

102 *Id.* at 2412 (plurality opinion).

103 *Id.*

104 *Id.* at 2413.

105 *See id.* at 2413–14 (quoting Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).

106 *Id.* at 2418, 2418–19 (quoting Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (2018)).

107 *Id.* at 2421.

108 *Id.* at 2420.

In sum, *Stinson* represents deference to commentary that is reflexive and offers little room for judicial interpretation. *Kisor* requires a more thorough analysis before affording deference. *Stinson* directly addressed the deference due the Commission's commentary. *Kisor* did not. And when it comes to commentary, courts do not agree whether *Kisor* or *Stinson* should apply.

II. THE CIRCUIT APPROACHES TO *STINSON* AND *KISOR*

Circuits that hear criminal cases have taken several approaches to deference and commentary. There is no clear-cut way to classify the approaches, but I will organize them into four general categories: circuits that follow *Stinson*, circuits that follow *Kisor*, circuits that apply a lenity-based exception to deference in the sentencing context, and circuits that have withheld deference because certain application notes impermissibly expand the Guidelines. Some circuits fall into more than one category depending on the Guideline in question, so the categories provide a rough sketch at best.

First, some circuits continue to follow *Stinson*. As an example, the Tenth Circuit in *United States v. Lovelace* affirmed the district court's decision to defer to commentary that expanded the definition of "crime[s] of violence" to include attempt offenses.[109] The defendant, a convicted felon, was charged with possession of a firearm and ammunition. Following the commentary, the district court counted his prior conviction as a crime of violence, which led to the addition of eight points to his base offense level.[110] The Tenth Circuit affirmed. This decision occurred in 2020, after *Kisor*, but the court applied *Stinson*.[111] It determined that it was bound by circuit precedent applying *Stinson* because there was no "intervening Supreme Court" decision that warranted a different approach.[112] In other words, the court suggested that it would continue to apply *Stinson* even if writing on a blank slate of precedent.[113]

109 794 F. App'x 793, 794–95 (10th Cir. 2020).

110 *Id.*

111 *See id.* at 795 (citing United States v. Martinez, 602 F.3d 1166, 1173–75 (10th Cir. 2010)). *Martinez* applied *Stinson*. *See Martinez*, 602 F.3d at 1173–74 (quoting United States v. Morris, 562 F.3d 1131, 1135 (10th Cir. 2009)).

112 *Lovelace*, 794 F. App'x at 795 (quoting Barnes v. United States, 776 F.3d 1134, 1147 (10th Cir. 2015)).

113 For other cases adopting a similar approach, see, for example, United States v. Smith, 989 F.3d 575, 584–85 (7th Cir. 2021), *cert. denied*, 142 S. Ct. 488 (2021) (mem.); United States v. Bass, 838 F. App'x 477, 481 (11th Cir. 2020) (per curiam); United States v. Lewis, 963 F.3d 16, 24 (1st Cir. 2020); United States v. Cruz-Flores, 799 F. App'x 245, 246 (5th Cir. 2020) (per curiam).

Other circuits have applied *Kisor*. The Sixth Circuit's opinion in *United States v. Riccardi*[114] represents this approach. In that case, the defendant stole 1,505 gift cards from the mail. The total value of the stolen goods was around $47,000.[115] However, applying the commentary definition of the term "loss," the district court imposed an enhancement based on a loss of around $750,000—more than fifteen times the actual value.[116] The Sixth Circuit reversed, concluding that because the commentary expanded the scope of the Guidelines, its purported interpretation was unreasonable and did not fall within *Kisor* Step Two's "zone of ambiguity."[117] The court went on to conclude that *Kisor*'s clarification of agency deference applies to *Stinson* and Commission commentary.[118]

Other circuits have applied a lenity-based exception to agency deference in the criminal setting. One example is the Eleventh Circuit's decision in *United States v. Phifer*.[119] That case did not concern a sentencing Guideline, but the court was explicit that agency deference was inapplicable to criminal cases generally. The DEA's purported interpretation of "positional isomer" would have qualified the defendant's ethylone as a controlled substance under the DEA's regulations.[120] Rejecting the government's position, the court concluded that the rule of lenity precluded agency deference when civil or criminal penalties were at stake.[121] The court's reasoning relied heavily on due-process and separation-of-powers concerns attendant to agency deference in criminal cases.[122] The Fifth Circuit adopted a similar approach in *United States v. Bustillos-Pena*,[123] although there the court found residual ambiguity after consulting *both* the Guideline and

114 989 F.3d 476 (6th Cir. 2021).

115 *Id.* at 479.

116 *Id.*

117 *Id.* at 479–80 (first citing United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (en banc) (per curiam); and then quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019)).

118 *Id.* at 485, 484–85 ("*Stinson* thus told courts to follow basic administrative-law concepts" when deferring to commentary, "[s]o *Kisor*'s clarification of the plain-error test applies just as much to *Stinson* (and the Commission's guidelines) as it does to *Auer* . . . ."). For other cases that follow a similar approach, see, for example, United States v. Campbell, 22 F.4th 438, 447 (4th Cir. 2022); United States v. Nasir, 17 F.4th 459, 472 (3d Cir. 2021) (en banc).

119 909 F.3d 372 (11th Cir. 2018).

120 *Id.* at 375.

121 *Id.* at 384–85 (quoting Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 528 F.2d 645, 649 (5th Cir. 1976)).

122 *See id.* It is difficult to say whether the Eleventh Circuit still follows this approach. It recently applied *Stinson* to the commentary without citing *Phifer*. United States v. Cingari, 952 F.3d 1301, 1308 (11th Cir. 2020).

123 612 F.3d 863 (5th Cir. 2010).

commentary,[124] and the Fifth Circuit has since declined to follow that case.[125]

Still other circuits have held that some commentary impermissibly expands the scope of the Guideline to the point where the commentary is no longer actually interpreting it.[126] In other words, they implicitly distinguish between legislative and interpretive rules. *United States v. Havis* is a case in point, although, as described above, the Sixth Circuit has since reformulated this approach in the *Kisor* framework. In *Havis*, the district court concluded that a sentencing enhancement was warranted under the Guidelines because the commentary instructs that "controlled substance offense[s]" include attempt offenses.[127] The Sixth Circuit decided en banc to overturn precedent and held that the relevant commentary was not binding because it failed to interpret the Guideline.[128] In the prior panel decision, Judge Thapar concurred and defended the court's distinction between interpreting and expanding. He argued that what the Commission did was not really interpretation at all. Instead, the Commission was expanding the scope of its Guideline "on the fly and without notice and comment"[129]:

> [O]ne does not "interpret" a text by adding to it. Interpreting a menu of "hot dogs, hamburgers, and bratwursts" to include pizza is nonsense. Nevertheless, that is effectively what the government argues here when it says that we must apply deference to a comment adding to rather than interpreting the Guidelines.[130]

Judge Thapar also addressed some of the fundamental issues at play. He expressed concern that *Auer* was inconsistent with the separation of powers, an issue he found particularly problematic in the criminal context.[131] He also pointed out that *Mistretta* implicitly conditioned the Commission's constitutionality on the fact that its rulemaking would be subject to notice and comment.[132]

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124 *See id.* at 868–69.

125 United States v. Smith, 977 F.3d 431, 435–36, 436 n.1 (5th Cir. 2020).

126 For other cases exemplifying a similar approach, see, for example, United States v. Nasir, 17 F.4th 459, 470–72 (3d Cir. 2021) (en banc); United States v. Winstead, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018).

127 *See* United States v. Havis, 927 F.3d 382, 383–84 (6th Cir. 2019) (en banc) (per curiam) (quoting U.S. SENT'G GUIDELINES MANUAL § 2K2.1(a)(4), (6) (U.S. SENT'G COMM'N 2021)).

128 *See id.* at 386.

129 United States v. Havis, 907 F.3d 439, 451 (6th Cir. 2018) (Thapar, J., concurring), *rev'd*, 927 F.3d 382.

130 *Id.* at 450.

131 *See id.* at 451.

132 *See id.* (citing Mistretta v. United States, 488 U.S. 361, 393–94 (1989)).

Overall, circuits generally agree that some deference is due the Sentencing Commission's commentary. However, they sharply disagree about whether *Stinson* or *Kisor* should apply. Circuits also disagree on the propriety of deference in criminal cases in general. I argue that courts addressing this issue should focus their analysis on whether the commentary expands or interprets the text of the Guidelines. While this inquiry works intuitively with Guidelines like section 4B1.1(b) where the Commission lists qualifying conduct in a Guideline and then adds to that list through commentary, it can apply generally via the distinction between interpretive and legislative rules.[133] This is a distinction courts must make under the APA whenever an agency promulgates a purported interpretive rule without subjecting it to notice and comment. I argue courts should lean on this distinction, not the rule of lenity, to work through deference doctrine in the sentencing context.

III. COURTS SHOULD START WITH THE INQUIRY WHEN ANALYZING DEFERENCE TO COMMENTARY

A. The Inquiry Is Mandated by the APA and Preserves a Broad Role for Judges

Courts confronted with an agency rule that has not satisfied certain procedural requirements must decide whether it is an interpretive or legislative rule. The process of enacting legislative rules is governed by § 553 of the APA. That section requires that agencies publish notice of proposed rules in the Federal Register.[134] After providing notice, agencies must give the public a chance to comment on the proposal.[135] Agencies must then consider all "relevant matter presented" before publishing the final rule in the Federal Register.[136] An agency must also provide "a detailed explanation for its rejection of comments that criticize the rule in various respects, and . . . its rejection of alternative rules proposed in comments."[137] These hurdles facilitate public participation in the rulemaking process. They also give politically accountable actors like Congress an opportunity to influence the rules' substance.[138] In addition, one rule specific to the

133 *See infra* Section III.A.

134 Administrative Procedure Act § 4(a), 5 U.S.C. § 553(b) (2018).

135 *Id.* § 553(c).

136 *See id.* § 553(c)–(d).

137 Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretative Rules*, 52 ADMIN. L. REV. 547, 550 (2000).

138 *Id.*

Commission is that Congress can revise or reject amendments to the Guidelines within six months of their proposal.[139]

Section 553(b)(A) exempts interpretive rules from these requirements.[140] Conversely, legislative rules that fail to satisfy them "can have no effect of any type."[141] So when a court is confronted with a rule that has not satisfied these requirements, it must first decide whether the rule is interpretive or legislative. If the rule is legislative, the court cannot give effect to it.

While courts have taken several approaches to distinguishing between interpretive and legislative rules, the Supreme Court has yet to speak definitively on the subject.[142] A common approach instructs judges to distinguish between interpretive and legislative rules based on whether the rule *construes* or *supplements* the regulation.[143] An agency decree that supplements a regulation is a legislative rule; an agency decree that construes a regulation is an interpretive rule. So in other words, a judge applying this approach to commentary must answer the inquiry—is the Commission using commentary to interpret the Guidelines, or to expand them?[144]

But it is impossible to determine whether an interpretation supplements or construes a regulation without some sort of benchmark to compare it to. Put another way, a judge must first determine what a regulation means to decide whether an

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139 *See supra* note 43 and accompanying text.

140 § 553(b)(A).

141 Pierce, *supra* note 135, at 549.

142 *See* Nadav D. Ben Zur, Note, *Differentiating Legislative from Nonlegislative Rules: An Empirical and Qualitative Analysis*, 87 FORDHAM L. REV. 2125, 2134 (2019).

143 *See id.* at 2141 ("The test for whether a rule creates new rights or duties, in its various formulations, has been the dominant test in this corner of administrative law."). While the D.C. Circuit no longer follows this approach, it fleshed out the idea in a prior case. *See* Nat'l Fam. Plan. & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 236–37 (D.C. Cir. 1992) ("An agency rule that reminds parties of existing statutory duties is also considered interpretative . . . . [A] rule is legislative if it attempts 'to supplement [a statute], not simply to construe it'" or if it "effect[s] a change in existing law or policy." (first citing Cabais v. Egger, 690 F.2d 234, 238 (D.C. Cir. 1982); then citing Citizens to Save Spencer Cnty. v. EPA, 600 F.2d 844, 876 n.153 (D.C. Cir. 1979); then quoting Chamber of Com. of the U.S. v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980); and then quoting Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983)). The Supreme Court for its part offered the following: "[I]nterpretive rules," by contrast, "are 'issued . . . to advise the public of the agency's construction of the statutes and rules which it administers.'" Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 97 (2015) (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995)).

144 There are various other tests to distinguish legislative from interpretive rules. These include the legal effect test, under which legislative rules "make[] new law, instead of interpreting existing law," Ben Zur, *supra* note 142, at 2132, and the substantial impact test, under which "agency actions that significantly impact the regulated parties are more likely to constitute a legislative rule." *Id.* at 2142. See *id.* at 2136–44 for a discussion of other common tests.

interpretation supplements or construes it. And that logic holds regardless of what test is used to distinguish between interpretive and legislative rules. This ensures a broad interpretive role for judges within the framework of agency deference.

In practice, a judge would first determine whether the commentary has passed through notice and comment. If it has, the judge would follow circuit precedent and apply *Kisor* or *Stinson*. If not, the judge would move on to the inquiry; he or she would interpret the Guideline and then define the range within which commentary is still construing the Guideline, rather than supplementing it. This may seem unworkable, but it simply mirrors what courts already do in *Kisor* Step Two. In the case of commentary, an application note could warrant deference if it is an interpretive rule, but a court would withhold deference from a legislative rule unless and until it satisfies notice and comment. This approach works intuitively with Guidelines like section 4B1.1(b), where the Guideline lists qualifying conduct and then the Commission adds to that list through commentary.[145] But it works with other Guidelines as well. Section 1B1.3 lies at the opposite end of the spectrum; it offers little more than "relevant conduct," with the majority of content left to the application notes.[146] But the inquiry works here too. A court should ask whether the commentary imports semantic content at odds with, or not already present in, the Guideline.[147] This may sound like a harsh check, but it is one the APA invites courts to make. In fact, a court *must* do this to ensure the Commission stays within its constitutional realm under *Mistretta*. The *Mistretta* Court relied on Congress's actual, meaningful review of Commission rulemaking when deciding it was constitutional.[148] The Commission could not simply pass a Guideline requiring "reasonable sentences" and then flesh out a comprehensive sentencing scheme using commentary. So the inquiry can and must apply regardless of how a Guideline is phrased.

In sum, the inquiry necessarily follows from *Mistretta*. It answers Justice Gorsuch's call for a meaningful interpretive role for judges. But it also does so without sacrificing *Kisor*'s presumption of congressional

145 *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.1(b) (U.S. SENT'G COMM'N 2021).

146 *Id.* § 1B1.3 & cmt. n.5(C).

147 *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1325 (1992) ("An interpretive rule is an agency statement that was not issued legislatively and that interprets language of a statute (or of an existing legislative rule) *that has some tangible meaning*." (emphasis added) (footnotes omitted)). Anthony goes on to say: "If the document goes beyond a fair interpretation of existing legislation, it is not an interpretive rule" and is not "*legally* binding on the courts, the agency, or the public." *Id.* at 1326, 1328 (footnote omitted).

148 *See supra* note 55 and accompanying text.

intent, because it is an inquiry that Congress asks courts to make in the first place.

B. The Inquiry Is Consistent with Both Kisor *and* Stinson

One issue that has received little attention is what to do with the fact that so many circuits continue to apply *Stinson*. Unfortunately, there is no easy way to reconcile *Stinson* with *Kisor*—the Court simply applied two different forms of deference. But because the inquiry applies before a court reaches the question of what deference to give, it can at least provide a workable way to reconcile the circuit split when deference is *not* due.

Under both *Kisor* and *Stinson*, deference expressly applies only to an agency's *interpretation* of its regulation. The *Stinson* Court analogized commentary to "an agency's interpretation of its own legislative rules."[149] Then, the Court concluded that if "an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight.'"[150] Similarly, the *Kisor* plurality staked its defense of the doctrine on the fact that deference applies only to interpretive rules, not legislative rules.[151] Thus, when commentary fails to merely interpret a Guideline, deference would not apply under *Stinson* or *Kisor*.

This matters for more than just conceptual consistency. Unless an approach like the inquiry is expressly foreclosed by circuit precedent, a court could apply it regardless of whether the circuit follows *Kisor* or *Stinson*. When a court uses the inquiry to determine that deference is unwarranted, it could come to the same conclusion on the same facts as a court in eleven other circuits. This is a result that is simply not probable as things stand. Thus, using the inquiry to disentangle deference doctrine permits the kind of court-to-court uniformity that both agency deference and the Sentencing Commission are tailored to achieve.

C. The Inquiry Is a Better Approach than Lenity

The rule of lenity, conversely, offers few of the same benefits and presents some significant drawbacks. Lenity could affect deference to commentary in two primary ways. First, it could highlight constitutional concerns—due process and separation of powers—that weigh against applying deference in a given case. Alternatively, it could

149 Stinson v. United States, 508 U.S. 36, 45 (1993).

150 *Id.* (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

151 Kisor v. Wilkie, 139 S. Ct. 2400, 2420 (2019) (plurality opinion) (citing Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 103 (2015)).

act as a traditional tool of statutory construction at *Kisor* Step One.[152] This would resolve ambiguity without the need to move on to Steps Two or Three, precluding deference in criminal cases generally. Neither of these provide an adequate solution to the problem.

1. There Is No Constitutional Basis to Prefer Lenity to *Kisor*

The two primary rationales for lenity are protecting due process and the separation of powers. Since these justifications are grounded in the Constitution, they could weigh in favor of prioritizing lenity over deference.[153] However, *Kisor* Step Three already protects both considerations, so lenity cannot provide a constitutional basis to trump *Kisor*.

To satisfy *Kisor* Step Three and receive controlling deference, an agency's interpretation must be authoritative and represent its fair and considered judgment. Whether an interpretation is authoritative is closely related to notice. For example, a midlevel officer's interpretation that is disclosed by memo would not be authoritative. On the other hand, an interpretation promulgated in the Federal Register could be.[154] The context of the interpretation's promulgation and the identity of its promulgator are thus crucial. Naturally, then, an authoritative interpretation will be more salient than an unauthoritative one, and will be more likely to put private parties on notice. So in theory, *Kisor* Step Three ensures that deference only applies in the absence of notice and due-process concerns. And in practice, the Commission's commentary is salient enough to dispel any such concerns; it is published in the Guidelines Manual right alongside the Guidelines themselves.[155]

152 I largely refrain from discussing lenity at Step Two. At that step, lenity could shrink the universe of agency interpretations that could qualify as "reasonable." *See* Justin Levine, Note, *A Clash of Canons: Lenity,* Chevron*, and the One-Statute, One-Interpretation Rule*, 107 GEO. L.J. 1423, 1436 (2019). There is an ongoing debate over the propriety of using interpretive canons at Step Two of *Kisor*'s sister-framework, *Chevron*. *See* Note, Chevron *and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 601 (2010) ("[Use of canons at Step Two] relies on a contested understanding of the Step Two inquiry and may . . . improperly expand courts' role in this area."). Instead of entering this debate, I focus on reasons specific to lenity weighing against its inclusion. However, lenity at Step Two could technically be used alongside the inquiry, which operates before Step One, so my argument does not turn on one's stance on interpretive canons at Step Two.

153 *See* Thomas Z. Horton, Note, *Lenity Before* Kisor*: Due Process, Agency Deference, and the Interpretation of Ambiguous Penal Regulations*, 54 COLUM. J.L. & SOC. PROBS. 629, 665–66 (2021).

154 *See supra* notes 90–91 and accompanying text.

155 *See* U.S. SENT'G GUIDELINES MANUAL *passim* (U.S. SENT'G COMM'N 2021).

An agency's interpretation must also represent its fair and considered judgment.[156] Relevant here is whether the agency's interpretation could result in unfair surprise for opposing litigants. This could occur when "an agency substitutes one view of a rule for another."[157] However, an agency about-face is not required to sink a deference claim. A court could decline to apply deference under *Kisor* whenever "the lack of 'fair warning' outweigh[s] the reasons to apply" it.[158]

The takeaway is that *Kisor* Step Three sufficiently protects due-process rights. In theory, the authoritative interpretation requirement ensures that only salient interpretations are given deference; in practice, commentary is not the sort of promulgation that would warrant concerns about notice in the first place. *Kisor*'s attentiveness to fair warning also supports the conclusion that lenity is simply unnecessary to address due-process concerns in the deference context.

Kisor also protects the separation of powers. The separation-of-powers concern arises from the notion that punishment is the expression of a community's moral outrage.[159] It is therefore the unique task of the legislature—a politically accountable actor—to criminalize conduct. While some discretion inheres in interpreting and applying statutes, there are limits; Congress could not enact a statute criminalizing the "violation of public morals." Such a law would give unelected judges the power to legislate from the bench based solely on their personal convictions. Lenity would uphold the separation of powers by preventing the statute from operating.

Like due process, however, *Kisor* adequately protects the separation of powers. In response to the petitioner's argument that deference "circumvents the APA's rulemaking requirements," Justice Kagan noted that interpretive rules like commentary do not have the force of law because they do not "form[] 'the basis for an enforcement action.'"[160] Each interpretive rule relies on a legislative rule for existence. Each legislative rule must pass through notice and comment, and the judiciary remains ultimately responsible for the interpretation of each legislative rule under *Kisor*.[161] This logic echoes the Court's reasoning in *Mistretta*—the Commission's rulemaking authority does not violate the separation of powers because it is subject to notice and comment and Congress retains ultimate control over the

156 *See supra* notes 94–96 and accompanying text.

157 Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019).

158 *Id.* (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012)).

159 *See supra* notes 65–66 and accompanying text.

160 *Kisor*, 139 S. Ct. at 2420 (plurality opinion) (quoting Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014)).

161 *See supra* notes 107–08 and accompanying text.

rules' substance.[162] Therefore, by extending deference only to interpretive rules, *Kisor* protects the separation of powers and ensures the Commission operates within its constitutional realm under *Mistretta*. Again, there is no constitutional basis to prefer lenity to *Kisor*.

2. Lenity Does Not Work as a Traditional Tool of Statutory Construction at *Kisor* Step One

Lenity fares no better as a traditional tool of construction at *Kisor* Step One. The Supreme Court has vacillated between formulations of the rule over the years.[163] This indecision is problematic because lenity's applicability depends entirely on which form a court chooses to apply. At opposite ends of the spectrum lie "grievous ambiguity" and "reasonable doubt" formulations.[164] The grievous ambiguity form would apply only when a court has no more than a guess about what Congress intended, even after considering the text, structure, history, and purpose of the provision.[165] In short, this form would never apply under *Kisor*; deference would always trump it. By its terms, *Kisor* Step One is satisfied by a showing of *genuine*, not grievous, ambiguity.[166] A judge applying both would have no need to go further after finding genuine ambiguity—they would simply move on to *Kisor* Step Two. Moreover, *Kisor*'s presumption that Congress would want the agency's interpretation to govern does provide more than a guess about congressional intent. On the other hand, the reasonable doubt form would apply any time there is a "'reasonable doubt' about a penal

162 Mistretta v. United States, 488 U.S. 361, 393–94 (1989).

163 *Compare* Wooden v. United States, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring) ("If a federal criminal statute is grievously ambiguous, then the statute should be interpreted in the criminal defendant's favor." (citing Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016))), *with id.* at 1081 (Gorsuch, J., concurring in the judgment) ("Under [the rule of lenity], any reasonable doubt about the application of a penal law must be resolved in favor of liberty.").

164 *Compare* Horton, *supra* note 153, at 633 (arguing that lenity's reasonable doubt ambiguity threshold is lower than *Kisor*'s genuine ambiguity threshold, so lenity "necessarily precedes and precludes the application of *Kisor* in the penal context"), *with* Gillis, *supra* note 60, at 360 (emphasizing the lower ambiguity threshold required for *Chevron* deference than lenity). *Chevron* deference is conventionally considered analogous to *Kisor*. *See, e.g.*, Paul J. Larkin, Jr., *Agency Deference After* Kisor v. Wilkie, 18 GEO. J.L. & PUB. POL'Y 105, 108 (2020) ("[*Auer*] now is tantamount to the parallel one the Court created in 1984 in *Chevron*.").

165 Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 103 (2016) (quoting Abramski v. United States, 573 U.S. 169, 188 n.10 (2014)).

166 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (first citing Christensen v. Harris County, 529 U.S. 576, 588 (2000); and then citing Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).

regulation's meaning."[167] This form would preclude deference entirely, since a judge applying it would have no need to go further after finding reasonable doubt. They would just apply lenity.

Lenity as a traditional tool of construction, then, could only have no effect or a drastic effect. It would either fail to influence a court's analysis at all, or it would act as a categorical exception to deference in the criminal context. And determining which of those is the case relies on the Supreme Court clarifying a notoriously unclear canon of construction—and sticking with that approach over time. Even if the Supreme Court adopted and adhered to a stronger form of lenity (like lenity triggered by reasonable doubt), it makes little sense to apply it with *Kisor*. Absent from *Kisor* is any indication that deference is inapplicable in the criminal context. To arrive at that conclusion, one would have to read *Kisor* as not only limiting agency deference—which two opinions expressly pointed out[168]—but also rejecting *Stinson*'s premise that deference is appropriate in the criminal context at all. The case simply doesn't lend itself to that interpretation. And that reading becomes even more implausible in light of the fact that the Supreme Court has suggested multiple times that deference *should* apply in the criminal context.[169] The consequences of lenity could reach even further, though. Many have argued that lenity could apply to both criminal *and civil* defendants.[170] If that is true, then using lenity at *Kisor* Step One could preclude agency deference from ever applying. It would make *Kisor* entirely self-defeating. This is simply not a plausible reading of the case.

IV. COUNTERARGUMENTS

Several objections can be raised against the inquiry, but none of them materially detract from its merits.

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167 Horton, *supra* note 153, at 633.

168 *See Kisor*, 139 S. Ct. at 2424 (Roberts, C.J., concurring in part); *id.* at 2425 (Gorsuch, J., concurring in the judgment).

169 *See* Horton, *supra* note 153, at 649 ("When it comes to agency interpretations of their own regulations, however, Supreme Court precedent leans troublingly—though hardly definitively—towards deference doctrine. . . . [T]he Court has deferred to agency regulatory interpretations that result in criminal convictions, penal civil sanctions, and longer prison sentences . . . .").

170 *See, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16 (2011); Leslie Salt Co. v. United States, 55 F.3d 1388, 1398 (9th Cir. 1995) (O'Scannlain, J., dissenting in part). Application of lenity in the civil context is particularly likely if the sanction is punitive. *See* Horton, *supra* note 153, at 636 (noting that in terms of sanctions, civil and criminal law have become "blurred").

A. The Inquiry Is No More Workable than Lenity

When it comes to legal rules that are easy to apply, neither lenity nor the inquiry will top any judge's list. Drawing a line between interpretive and legislative rules is far from mechanical.[171] But there are several reasons why the inquiry is still a sound approach.

First, the inquiry must apply regardless of what form the test takes. Lower courts have adopted a variety of tests to distinguish interpretive from legislative rules,[172] and the Supreme Court has yet to directly speak to the issue.[173] But unlike the rule of lenity, no formulation could preclude the inquiry's effect. Since courts have to decide whether commentary is an interpretive or legislative rule anyway, the inquiry will necessarily apply in *Kisor* regardless of form. This contrasts sharply with lenity, whose effect turns entirely on the formulation adopted.

The similarities between the inquiry and *Kisor* Step Two also suggest the former is not as unworkable as it may seem. The inquiry mirrors *Kisor* Step Two. Instead of distinguishing reasonable from unreasonable agency interpretations, the court distinguishes supplementary rules from construing rules.[174] Neither can be done mechanically. But passing on the nature or quality of a given interpretation is hardly outside a judge's wheelhouse.

B. The Inquiry Adds Nothing over Kisor *Step Two*

While the inquiry mirrors *Kisor* Step Two, it still adds to the analysis. It allows courts to refuse deference to commentary without deciding whether *Kisor* or *Stinson* should govern at all. By distinguishing between interpretive and legislative rules before affording deference, a judge can obviate the question of which case to apply. Otherwise, a judge applying *Stinson* would start by asking whether commentary conflicts with the Constitution, a federal statute, or the Guideline itself. A judge applying *Kisor* would ask if the Guideline is ambiguous. When commentary impermissibly supplements the Guidelines, why address the issue at all? Circuits

171 Graham Haviland, Comment, *Not So Different After All: The Status of Interpretive Rules in the Medicare Act*, 85 U. CHI. L. REV. 1511, 1517 (2018) (describing the line between the two as "far from clear" and noting that "courts have had a great deal of difficulty articulating a test to distinguish between the two").

172 *See* Ben Zur, *supra* note 142, at 2136–44 (describing six different tests courts use).

173 *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015). The Court suggested that agencies could substantially alter interpretive rules without notice and comment, but expressly declined to address the distinction between legislative and interpretive rules: "We need not, and do not, wade into the [interpretive versus legislative] debate here." *Id.*

174 *See supra* note 88 and accompanying text.

employing either approach could instead refuse deference on that legitimate basis. And they could do so without even trying to disentangle *Kisor* from *Stinson*.[175]

C. The Inquiry Promotes Ad Hoc Adjudication

Given the importance of uniformity and certainty under *Kisor*, the Sentencing Commission, and criminal law in general, one could ask whether a case-by-case approach like the inquiry is really appropriate. It is for several reasons. First, the status quo under *Kisor* is nothing if not ad hoc. Each time a judge is asked to give agency deference, he or she must independently decide whether the Guideline is ambiguous and whether the commentary's interpretation of it is reasonable. Divergent outcomes are risked because those are questions about which reasonable judges can disagree. So asking judges to distinguish between interpretive and legislative rules hardly alters the status quo. And ad hoc adjudication is unavoidable with a doctrine like *Kisor* where two actors share interpretive responsibility. Giving agencies unreviewable interpretive authority would violate the separation of powers and was expressly rejected by *Kisor*. Conversely, giving judges total interpretive authority would detract from the agency expertise regarding technical regulations, policy judgments, and the meaning of an agency's own regulations that deference was built to utilize. The result is a compromise. Since judges get the first pass at interpreting regulations, ad hoc adjudication will always be necessary under *Kisor*.

Moreover, the point has never been uniformity and certainty at the cost of flexibility. Congress explicitly stated one of the purposes of the Sentencing Reform Act was permitting flexibility in sentencing when circumstances called for it.[176] Discretion in sentencing is inherent and unavoidable—that's why judges can grant variances or

175 The Sixth Circuit seemingly disagrees. Its recent decision in *Riccardi* reformulated *Havis*'s distinction between expanding and interpreting commentary to fit into *Kisor* Step Two. The court then concluded that because the commentary impermissibly expanded the text of the Guidelines, it was not a reasonable interpretation and withheld deference. United States v. Riccardi, 989 F.3d 476, 484–85 (6th Cir. 2021). This approach is meritorious, but second best. Beyond the doctrinal consistency described above, Step Two is the wrong place to look for a broad judicial role. Step Two is generally considered highly deferential to agency interpretations. *Cf.* Note, *supra* note 152, at 601. Moreover, at Step Two, the agency has interpreted an ambiguous regulation—the only question is whether that interpretation is reasonable. The *Mistretta* argument loses force because at Step Two, it is necessarily the case that the Commission's substantive rulemaking was subjected to congressional control and notice and comment, even if its interpretation was unreasonable. And the interpretive-versus-legislative-rules distinction becomes moot as well.

176 *See supra* note 40 and accompanying text.

departures from the Guideline range.[177] There is certainly some tension between the goals of uniformity, certainty, and flexibility. But that is what is required to sentence defendants fairly. With criminal law's heightened stakes, it is good that judges retain enough flexibility to get each case right. This requires ad hoc adjudication, but that's hardly a problem—it's the way Congress intended sentencing to operate.

D. The Inquiry Violates the Presumption of Agency Interpretive Primacy

Kisor deference is founded on the presumption that Congress wants agencies to have primacy when it comes to interpreting their ambiguous regulations.[178] If courts decide the Commission is not interpreting its Guideline through commentary and decline to defer, they could undercut that presumption. However, that is not the result of a court seizing interpretive primacy. Rather, the court functions as a check to make sure that the agency is interpreting its regulation in the first place. When an agency is interpreting its own regulation, it will be entitled to interpretive primacy just as often. Even strict construction of the inquiry hardly disrupts the status quo by shifting power to courts at Congress's or the agency's expense—the Commission would simply subject its interpretation to notice and comment, and the procedural defect would be remedied.[179]

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177 Since the Guidelines are formally advisory, one might also ask what the inquiry permits that judges cannot already do with a variance or departure. One could similarly ask why deference to commentary remains controversial after *Booker* made the Guidelines advisory. There are several answers. In practice, the Guidelines continue to exert a law-like influence on sentencing judges. *See supra* notes 47–49 and accompanying text. Declining deference also allows judges to avoid the scrutiny—from the public, Congress, or a reviewing court—that can accompany material departure from the Guidelines. *See* Ian Millhiser, *Josh Hawley's Latest Attack on Ketanji Brown Jackson Is Genuinely Nauseating*, VOX (Mar. 18, 2022, 1:20 PM), https://www.vox.com/2022/3/18/22983877/supreme-court-josh-hawley-ketanji-brown-jackson-child-pornography-sentencing [https://perma.cc/D9KM-TUPW]; *see also* OFF. OF THE GEN. COUNS., U.S. SENT'G COMM'N, PRIMER ON DEPARTURES AND VARIANCES 42 (2022) (noting that a variance based on "[policy] disagreement with the [G]uidelines" could be subject to "closer review" (quoting Kimbrough v. United States, 552 U.S. 85, 109 (2007))). The inquiry also involves different considerations. The inquiry relates to the substance of the Guidelines and commentary and the process by which they came into existence. Departures often relate specifically to the facts of a case. *See* OFF. OF THE GEN. COUNS., *supra*, at 5–13.

178 *See supra* note 102 and accompanying text.

179 This might seem like a meaningless hurdle, but it matters for more than just formality's sake. In the wake of the D.C. Circuit's decision to withhold deference in *United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018), the Commission tried—and *failed*—to change the relevant commentary into an actual Guideline. *See* Adrian E. Simioni, Comment, *Don't Round Up the Usual Suspects: The Sentencing Commission, Career Offenders, and*

All this aside, even if the inquiry did undermine the presumption of agency interpretive primacy, it would do so at Congress's command. Since the APA requires legislative but not interpretive rules pass through notice-and-comment procedures, courts have to inquire whether a purported interpretive rule actually is one. Rejecting the inquiry on this ground would allow a court-created presumption of congressional intent to supersede Congress's actual statutory directives.

CONCLUSION

When it comes to the United States Sentencing Commission and agency deference, navigating precedent can feel like an insurmountable task. *Stinson v. United States* directly addressed the deference due commentary and gave the Commission nearly unreviewable interpretive power. *Kisor v. Wilkie* cabined the scope of agency deference but took place outside the sentencing context. Circuit courts employ a variety of approaches, but a strong number continue to apply *Stinson* in lieu of *Kisor*. The Supreme Court does not seem to be coming to the lower courts' aid, so it is up to the circuits to find a workable path forward. Any attempt to disentangle the deference due commentary should start by asking whether it interprets or expands the Guidelines. For commentary that has not passed through notice and comment, the APA already requires that courts decide whether it comprises an interpretive or legislative rule. If it is an interpretive rule, the Commission continues to share interpretive authority. If it is a legislative rule, the court is able to protect the separation of powers and ensure the Commission operates within its constitutionally permissible realm under *Mistretta*.

The inquiry also presents the best option to mend the circuit split. It is hard to get around the fact that *Stinson* and *Kisor* represent fundamentally different approaches to agency deference. But since courts must distinguish between interpretive and legislative rules before deciding whether deference is due a given interpretation, the inquiry at least offers consistency when declining to afford deference.

Deference to commentary in the sentencing context can seem draconian at times. The call to use the rule of lenity to withhold deference makes sense. But lenity is the wrong tool to use. *Kisor* Step Three already protects the separation-of-powers and due-process rights that warrant lenity in the first place. Courts have also failed to settle on a consistent way to apply the rule. A weak form of lenity would never apply over agency deference, while a strong form of lenity would

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Narrowing the Definition of a Controlled Substance Offense, 56 WAKE FOREST L. REV. 1191, 1194 (2021).

always apply and render *Kisor* self-defeating. The latter makes little sense in light of *Stinson* and would undercut the Commission's interpretive authority based solely on policy disagreement. Distinguishing between interpretive and legislative rules offers a better solution. When it is a close call and there are legitimate reasons to strictly construe the inquiry in a criminal case, judges can withhold deference without flouting Supreme Court precedent and kick the question back to the Commission. The Commission can then amend its interpretation or subject it to notice and comment. Absent those circumstances, courts should continue to defer to commentary under whichever case their circuit follows.