Vanderbilt Law Review

Volume 75 | Issue 3 Article 5

4-2022

What's the Deference? Interpreting the U.S. Sentencing Guidelines After Kisor

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NOTES

What's the Deference? Interpreting the U.S. Sentencing Guidelines After *Kisor*

For more than three decades, the U.S. Sentencing Guidelines have constrained the punishment doled out by federal judges, limiting discretion that was once nearly unlimited and bringing standardization to the penological decisionmaking process. For twice as long, the Supreme Court has constrained judges in a different way—by requiring that administrative agencies receive deference when they interpret the meaning of their own regulations. At the convergence of these two domains sits "commentary," or interpretive notes the U.S. Sentencing Commission appends to the otherwise congressionally approved Guidelines. In Stinson v. United States*, the Court made clear that commentary should be reviewed and deferred to as an agency's view of its own regulations. This classification has since rendered numerous examples of commentary, including those that enhance punishment, the last word on what the Guidelines mean and how they should be applied. Recently, however, in* Kisor v. Wilkie*, the Supreme Court clarified its regulatory deference doctrine, narrowing the circumstances in which it should be applied. This Note examines the historical interplay between federal sentencing and regulatory deference and considers whether, in light of* Kisor*, deference to commentary is appropriate. Specifically, by analyzing one example of commentary already dividing the circuit courts, this Note contends that* Kisor *and the rationales underlying the Guidelines and regulatory deference caution against their commingling—particularly where, as here, commentary only adds punishment.*

INTRODUCTION

In 1984, Congress passed the Sentencing Reform Act and created the U.S. Sentencing Commission, an independent judicial branch agency responsible for promulgating Guidelines for judges to use during the sentencing phase of federal criminal proceedings.[1] Although these Guidelines were originally meant and understood to be mandatory, they are now non-binding and judges need only "consult" them.[2] Over both the mandatory and advisory eras of the Guidelines, the Commission has reshaped federal criminal sentencing, simultaneously achieving the kind of greater uniformity that originally spurred the Commission's creation and drawing pushback from critics who contend that too much rigidity and severity in sentencing is problematic.[3] Whatever the future holds for the Guidelines and their

1. *See* 28 U.S.C. §§ 991–98 (establishing the U.S. Sentencing Commission).

2. *Compare* United States v. Booker, 543 U.S. 220, 258–59 (2005) (striking as unconstitutional the provisions that rendered the Sentencing Guidelines binding on judges), *with* Mistretta v. United States, 488 U.S. 361, 367 (1989) (acknowledging that Congress had specifically chosen to make its Sentencing Guidelines "mandatory").

3. *See, e.g.*, Lydia Brashear Tiede, *The Impact of the Federal Sentencing Guidelines and Reform: A Comparative Analysis*, 30 JUST. SYS. J. 34 (2009) (finding the Guidelines have led to reductions in sentencing disparities when applied but also recognizing wide variety in rates of departure from the Guidelines—e.g., regarding whether to apply them in specific situations).

role in shaping the federal-sentencing process, judges have been confronted with how to interpret them from their inception. For almost as long, judicial deference to the Commission's views on interpretive questions has loomed large, with the commentary accompanying the Guidelines providing a basis for doling out protracted punishment. For example, the Guidelines concerning career offenders, particularly those Guidelines dealing with non-violent drug offenses, include commentary notes that interpret qualifying offenses capaciously.[4] But is so-called regulatory deference to these accompaniments appropriate?

In light of the growing import and impact of the Guidelines in federal sentencing,[5] the Supreme Court decided in *Stinson v. United States*[6] that it was indeed appropriate for courts to defer to the Commission's commentary,[7] which purports to supplement and clarify the more formalized (and congressionally approved) Guidelines.[8] Since then, in conjunction with the regulatory deference doctrine established in *Bowles v. Seminole Rock & Sand Co.*[9] and its progeny, federal courts generally have deferred to the Commission's commentary unless an interpretation provided therein is "plainly erroneous or inconsistent" with the Guidelines, its authorizing statute, or the Constitution.[10] In a

4. *See e.g.*, U.S. SENT'G GUIDELINES MANUAL § 4B1.1–2 (U.S. SENT'G COMM'N 2018); *see generally id*. Ch. 4.

5. *See* Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. CRIM. L. & CRIMINOLOGY 239, 241 (1999) ("[T]he guidelines have significantly reduced overall inter-judge disparity in sentences imposed," suggesting "meaningful" but "uneven" success.); *see also* U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 1 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf [https://perma.cc/YX7N-XECV] (noting that the Commission was created "[i]n response to both concern regarding sentencing disparities and also a desire to promote transparency and proportionality"). *But see* Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES (Mar. 5, 2012), https://www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html [https://perma.cc/PNT2-YXNU] ("A new analysis of hundreds of thousands of cases in federal courts has found vast disparities in the prison sentences . . . .").

6. 508 U.S. 36, 38 (1993).

7. The constitutionality of the Commission and the Guidelines had been confirmed in *Mistretta v. United States*, 488 U.S. 361, 393–94 (1989).

8. *See Stinson*, 508 U.S. at 41 (explaining the Commission's view that the purpose of the commentary is to interpret the Guidelines); U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (providing that commentary "may interpret the guideline or explain how it is to be applied" and that "[f]ailure to follow such commentary could constitute an incorrect application of the guidelines").

9. 325 U.S. 410 (1945).

10. For the circuits continuing to defer in this context, see *United States v. Lewis*, 963 F.3d 16, 21–24 (1st Cir. 2020); *United States v. Tabb*, 949 F.3d 81, 87–88 (2d Cir. 2020); *United States v. Davis*, 801 F. App'x 457, 458 (8th Cir. 2020); *United States v. Crum*, 934 F.3d 963, 965–66 (9th Cir. 2019); *United States v. Lovelace*, 794 F. App'x 793, 795 (10th Cir. 2020); and *United States v. Bass*, 838 F. App'x 477, 480–81 (11th Cir. 2020). For the circuits opting against deference, see *United States v. Winstead*, 890 F.3d 1082, 1091 (D.C. Cir. 2018); *United States v. Havis*, 927 F.3d 382, 385–87 (6th Cir. 2019); and *United States v. Nasir*, 982 F.3d 144, 160 (3d Cir. 2020) (en banc).

line of cases stemming from *Auer v. Robbins*,[11] the Supreme Court has clarified and constrained the regulatory deference doctrine, complicating the consistency of its application in a variety of contexts, including the role of the Guidelines commentary in federal sentencing. Now, a divide has emerged among the circuit courts concerning the impact of the Court's latest doctrinal formulation, *Kisor v. Wilkie*,[12] and the soundness of deference to the commentary generally.[13] At least one circuit has interpreted *Kisor* as an invitation to rethink *Stinson*'s conclusion as to the appropriateness of deference in this context.[14] Others have stuck with *Stinson* by leaning on precedent[15] and *Kisor*'s declared aim not to disturb the "settled constructions of rules."[16] Finally, some have found *Stinson* was wrong all along—that notwithstanding *Kisor*, deference to the commentary was inappropriate from the outset.[17] In short, these splintering views merit reconciliation.

This Note endeavors to resolve the split regarding deference to the commentary and to assess the implications of the divide for regulatory deference more broadly. Part I describes the history of the Guidelines, *Seminole Rock* deference, and their collision in *Stinson*. Part II discusses the Supreme Court's latest clarification of regulatory deference in *Kisor* and probes section 4B1.2(b) of the Guidelines and its accompanying commentary, which are at issue in the current divide among the circuit courts. Finally, Part III offers a resolution to the specific whether-to-defer question at the heart of that divide and considers how judges should apply *Kisor* in light of this case study.

Ultimately, this Note argues deference to this particular example of Guidelines commentary is inappropriate, both as a matter of "traditional" regulatory interpretation and in light of recent developments in the doctrinal space. First, *Kisor* demands a rigorous initial screening of regulatory text for genuine ambiguity. In addition, scholarship on interpreting regulations touts the value of using

11. 519 U.S. 452 (1997).

12. 139 S. Ct. 2400 (2019) (plurality opinion).

13. *See supra* note 10(laying out recent circuit cases concerning relevant precedents regarding deference to the commentary and whether deference is legally sound in this context).

14. *Nasir*, 982 F.3d at 158–60 (overruling circuit precedent in light of "*Kisor*'s limitations on deference" and concluding Guidelines section 4B1.2(b) does not include inchoate offenses).

15. *See, e.g.*, *supra* note 10 (listing the circuit courts and their positions on this question).

16. *See Kisor*, 139 S. Ct. at 2422 (explaining that the Court seeks to preserve regulatory deference in part because "abandoning [it] would cast doubt on many settled constructions of rules"). *But see id.* at 2447 (Gorsuch, J., concurring) (contending that "decisions construing particular regulations might retain stare decisis effect even if the Court announced it would no longer adhere to [deferential] interpretive methodology").

17. *See* United States v. Winstead, 890 F.3d 1082, 1092 (D.C. Cir. 2020) (refusing to defer to commentary language that adds to an underlying Guidelines provision); United States v. Havis, 927 F.3d 382, 386 (6th Cir. 2019) (reaching the same conclusion).

indicators of enacted purpose as tiebreakers. Finally, the rule of lenity can help resolve close calls in criminal cases where (as here) deference would only add punishment. In short, Guidelines section 4B1.2(b) is a cautionary tale in regulatory deference and appropriate applications.

I. THE SENTENCING GUIDELINES, REGULATORY DEFERENCE, AND THEIR COLLISION

Federal sentencing and regulatory deference represent distinct legal domains, with their own historical origins, animating principles, and doctrinal quirks. Yet, as this Note explores, these areas of law also interact, importantly, in articulating the interpretive function of the Guidelines commentary in judges' sentencing decisions. This Part provides necessary context: first, by examining the modern history of federal sentencing; second, by considering how deference impacts regulatory interpretation; and third, by explicating the Supreme Court case in which these two seemingly unrelated legal domains collided.

A. Indeterminate Federal Sentencing, Calls for Reform, and the Emergence of the Guidelines

Before the passage of the Sentencing Reform Act of 1984 ("the Act"), federal criminal sentencing was "indeterminate," with the punishments to be imposed guided by a range of congressionally established maximums and the individual discretion of district court judges.[18] The flexibility inherent in this indeterminate approach, constrained primarily by the discretion of judges and parole officers, reflected the prevailing view that rehabilitation was both the central aim of the penal system and one that might vary considerably in its achievability from defendant to defendant.[19] Yet rehabilitation "as a sound penological theory came to be questioned," and by the 1980s, disparities in sentences for comparable offenses and the uncertainty these disparities produced among parties and lawyers in criminal cases prompted Congress to contemplate holistic sentencing reform.[20]

18. *E.g.*, Mistretta v. United States, 488 U.S. 361, 363 (1989); *see, e.g.*, Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1169–70 (2017) (noting the "unregulated" nature of sentencing prior to the Act and how judges generally were not required to justify sentencing decisions).

19. *See Mistretta*, 488 U.S. at 363 (explaining the goal of rehabilitation and how judges had "very broad discretion" in making "assessments of the offender's amenability to rehabilitation").

20. *Id.* at 365–66.

The Act created the U.S. Sentencing Commission (the "Commission"), an independent panel within the judicial branch tasked with establishing federal "sentencing policies and practices" and developing "means of measuring" their effectiveness.[21] Both the policies and practices themselves and, intuitively, the means of measuring their effectiveness were to be evaluated based on the Commission's enumerated purposes—or the statutory goals specified by Congress.[22] These aims included the need for sentences to reflect the seriousness of the offense, provide proportionate punishment, deter criminal conduct, and prevent further crimes.[23] In addition to these priorities rooted in retributivism and deterrence punishment theories, however, the Act also specifically emphasized that the Commission must provide "certainty and fairness" in sentencing, such as by "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . ."[24] These goals reflected the concerns over uncertainty and inconsistency that instigated the Act,[25] but the emphasis on fairness—elaborated in this context in terms of similarity and proportionality—was also important.[26] Here, one sees an explicit expectation that judges consider the priority of many lawmakers to use sentencing reform as a way to ensure the delivery of far more severe punishments alongside the distinct desire for reforms that would provide greater certainty and standardization in sentencing.[27] Thus, from its inception, the Commission was designed to achieve so-called toughness on crime as

21. 28 U.S.C. § 991(b).

22. *See* 28 U.S.C. § 991(b)(1) (calling for a sentencing regime that serves enumerated aims).

23. 18 U.S.C. § 3553(a)(2)(A)–(C).

24. 28 U.S.C. § 991(b)(1)(B).

25. *See, e.g.*, Newton & Sidhu, *supra* note 18, at 1174. In 1988, Stephen Breyer, then the first U.S. Sentencing Commissioner, called the prior system "confusing," contending that in addition to concerns over disparities in sentencing for comparable offenses, the "dual sentencing authorities" of judges and parole boards perpetuated a dynamic in which initial determinations and actual time served varied considerably and unpredictably. *Id.*

26. *See* 28 U.S.C. § 991(b)(1)(B) (emphasizing the goal that sentencing avoid disparities in punishment for "similar criminal conduct"); 18 U.S.C. § 3553(a) (calling on courts to impose sentences that are "sufficient, but not greater than necessary" or those which are efficient in achieving the Act's stated penological purposes).

27. *See* Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069, 1072–73 (2004) (discussing how the desires in Congress that drove the Sentencing Reform Act were achieving greater uniformity and public confidence in sentencing and shifting the impetus behind federal sentencing policy away from rehabilitation and toward retribution and deterrence). Notably, Howell cites several times to Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993). *See* Howell, *supra*. Mr. Hatch was one of the Act's cosponsors, alongside a bipartisan contingent that included then-Senator Joe Biden. *Id.*

well as fairness in punishment.[28] But insofar as judges would prioritize one aim, the question became: Which master do the standards serve?[29]

To understand the impact of the Act, the Commission, and the Guidelines, it is helpful to examine how these aspects of the sentencing regime were meant to interact. The Act calls on the Commission to promulgate, by majority vote, "guidelines . . . for use of a sentencing court in determining the sentence to be imposed in a criminal case," which include determinations as to whether a term of imprisonment is appropriate and what the length of such a term should be for a given offense.[30] The Act also envisions "general policy statements regarding the application of the guidelines" but does not mention the term "commentary" nor otherwise suggest that ad hoc interpretive clarifications should necessarily append to the Guidelines.[31] Indeed, to see how the commentary emerged and came to function, one must look to the Guidelines themselves.

The Commission included and explicated the commentary in the very first Guidelines Manual it promulgated in 1987.[32] Section 1B1.7, labeled "Significance of Commentary," explains that the text that "accompanies" the Guidelines (that is, appears beneath the relevant section) "may serve a number of purposes."[33] Specifically, in the Commission's view, "[the Commission] may interpret the guideline or explain how it is to be applied" and "may suggest circumstances which . . . may warrant departure from the guidelines."[34] The same section explains that "commentary is to be treated as the legal equivalent of a policy statement" and that failure to follow it "could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal."[35] This language has remained unchanged from the original 1987 Guidelines Manual to the most recent formal update, the 2018 Guidelines Manual, and is not currently

28. *See* Newton & Sidhu, *supra* note 18, at 1181 ("Related to sentencing disparities was Congress's strong concern that, for some classes of federal offenders, the sentences being imposed were too lenient.").

29. The consensus appears to be that the toughness goal, or the ostensibly conservative impetus for the Act, was the main driver of the Commission's early activities; there was considerable political pressure during and after the Reagan administration to utilize sentencing policy as part of a larger tough-on-crime strategy. *See, e.g.*, *id.* at 1182 ("Congress generally believed that significantly more severe federal sentences should be imposed.").

30. 28 U.S.C. § 994(a)(1).

31. 28 U.S.C. § 994(a)(2).

32. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 1987) (providing a representative example of so-called "commentary" and explaining the intended function thereof across the Guidelines Manual more generally).

33. *Id.*

34. *Id.*

35. *Id.*

subject to any proposed amendments.[36] The language thus reflects the Commission's longstanding view that commentary serves a valuable explanatory purpose, aimed at providing an authoritative interpretation of operative language. As the above discussion of the Act suggests, however, this supplemental interpretive assistance appears to have been the brainchild of the Commission itself, rather than an additional gap-filling prerogative assigned to the Commission by Congress—a prerequisite for interpretive deference elsewhere.[37] In sum, the Commission has, from its inception, viewed commentary as decisive in guiding judges' use of the Guidelines, but it is less apparent that Congress envisioned this material—much less its eventual interpretive heft.[38] Still, courts would have to discern what, if any, legal force the commentary had in order to measure its interpretive heft.

B. Regulatory Interpretation and the Historical Role of Deference

1. Deferential Regulatory Interpretation at the Supreme Court

Until at least the late twentieth century, judicial review of regulation was hardly a crucible of U.S. litigation or scholarship.[39] Few questioned that courts were preeminent in resolving questions of legal interpretation.[40] But while statutory and constitutional provisions were familiar interpretive battlegrounds for judges and lawyers by the 1940s, regulations as meaningful sources of law and interpretive mystery were still in their nascency.[41] It was not until decades later that federal

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36. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 2018) (using the same language as the 1987 Guidelines Manual); U.S. SENT'G COMM'N, *Proposed Amendments to the Sentencing Guidelines* (Dec. 20, 2018) (not addressing section 1B1.7).

37. Again, the Act does not expressly address "commentary" or even characterize "policy statements" in terms of providing interpretive clarifications. 28 U.S.C. §§ 991, 994. By contrast, doctrines like *Seminole Rock* presuppose that the promulgating agency has authority to clarify interpretive ambiguities. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).

38. *Compare* U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 1987) (explaining the role of the commentary in the first edition of the Guidelines), *with* 28 U.S.C. § 991(b) (expressly identifying the purposes of the Commission but making no mention of the commentary or the Commission needing to provide authoritative interpretations of its policies).

39. For purposes of this Note, unless otherwise indicated, "regulation" will refer to rules that bind with the force of law, namely, those promulgated under § 553(a) of the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553. By contrast, § 553(b) interpretive rules, which do not bind parties, are frequently at issue in cases and debates involving regulatory deference. *See id.*

40. *See, e.g.*, Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule . . . must of necessity expound and interpret that rule.").

41. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 128 (1928) ("Obscurity of statute . . . may leave the law unsettled, and cast a duty upon the courts to declare it . . . ."); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 395 (1950) ("One does not progress

regulation begin to look as voluminous and complex as it does today and debates begin to percolate about regulatory interpretation as an endeavor unto itself.[42] And yet in the infancy of the modern administrative state—when the Code of Federal Regulations was hardly a pamphlet,[43] but legal conceptions of the federal government seemingly grew every day[44]—the Supreme Court weighed in on interpreting regulations and the role of agencies therein.

In *Seminole Rock*, the Supreme Court reviewed the meaning of a key term in Maximum Price Regulation No. 188, which had been issued by the Administrator of the Office of Price Administration by authorization of § 2(a) of the Emergency Price Control Act of 1942.[45] In doing so, the Court itself interpreted the regulation, focusing on its text and concluding that the phrase "charged . . . for delivery . . . during March" meant the applicable price was that which pertained to instances in which actual deliveries occurred during March, as opposed to when a charge for but no delivery occurred.[46] The Court bolstered their conclusion by noting how the regulation provided a rule for the alternative instance in which "the seller made no such delivery during March."[47] Thus, the Court's own regulatory analysis, confined to the text, seemingly resolved the interpretive question at hand—begging the question of why the Court chose to "defer" to the agency's view at all.

Seminole Rock's importance lies in its legacy as the first example of the Supreme Court explicitly relying upon an agency's interpretation of its own regulation—here, the Price Administrator's view of the

far into legal life without learning that there is no single right and accurate way of reading one case.").

42. *See generally* Russell L. Weaver, *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681 (1984); Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 257 (2000); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355 (2012); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81 (2015).

43. As late as 1955, there were fewer than twenty pages in the Code. *See Total Pages Published in the Code of Federal Regulations (1950–2019)*, GEO. WASH. REGUL. STUD. CTR. (2020), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs3306/f/image/RegStats/July_9_2020_Update/GW%20Reg%20Studies%20-%20Pages%20in%20the%20Code%20of%20Federal%20Regulations%20-%20Reg%20Stats_July%202020.pdf [https://perma.cc/K3RB-A7ZZ].

44. After the passage of various New Deal laws, the Supreme Court began weighing in on the power of the federal government in lasting ways. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding a regulation of activity that affected interstate commerce only when aggregated); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943) (permitting delegation of regulatory authority based on public interest, convenience, and necessity).

45. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413 (1945).

46. *Id.* at 414–16.

47. *Id.*

language described above.[48] Before scrutinizing the regulation, the Court declared that it "must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt"; this interpretation is then the "ultimate criterion" and "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[49] When interpreting regulations, the Court declared, its "only tools . . . are the plain words of the regulation and any relevant interpretations of the Administrator."[50] It later clarified that any "doubts" concerning the meaning in this case were "removed by reference to the administrative construction," referring to an interpretive "bulletin" provided by the Administrator.[51] The Court so concluded because its view and that of the agency were "consistent" in resolving the interpretive question.[52]

Curiously, the *Seminole Rock* Court sought to afford the Price Administrator strong deference despite also providing its own assessment as to the soundest reading of the regulation.[53] This new policy of deferring to agency self-interpretation had no declared constitutional or statutory basis—it represented the Court's prudential view that an agency was well situated to resolve such questions of regulatory construction.[54] This newly elucidated form of deference also lacked a clear analog in the statutory interpretation domain.[55] Instead,

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48. *Id.* at 413–18. Some have asserted that this discussion, described below, therefore constitutes nonbinding dicta, in that it did not decide the issue at bar. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2428–29 (2019) (contending that "readers at the time didn't perceive *Seminole Rock*'s dictum as changing anything" and noting that the Court's discussion was not cited until twenty years later); *see also Judicial Dictum*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An opinion by a court on a question . . . that is not essential to the decision and therefore not binding.").

49. *Seminole Rock*, 325 U.S. at 414.

50. *Id.*

51. *Id.* at 417.

52. *Id.* at 418.

53. *Id.*

54. The Court in *Seminole Rock* did not attempt to ground its deference principle in any particular constitutional or statutory provisions, but the separation-of-powers and APA-based critiques that have since emerged further illustrate the judicially created nature of deference on questions of regulatory interpretation. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996) (developing constitutional and statutory critiques of *Seminole Rock* deference); *see also* Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1454–56 (2011) (explaining the two most prominent prudential rationales supporting *Seminole Rock* deference, which both tout agencies' "special insight" into the meaning of their own regulations and their institutional competence for dealing with policy choices and political value judgments).

55. At the time, the Court was decades away from its landmark decision in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The historical roots of deference in judicial interpretation prior to *Seminole Rock* have been contested, but there is at least consensus that no formalized doctrines existed. *See, e.g.*, Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 926–29 (2017) (evaluating the use of precedents in cases like *Chevron* and *Seminole Rock* and considering scholarship on the history of deference).

the closest possible inspiration was a case in which the Court had afforded only discretionary and persuasive deference to the reasoning provided by an agency on a question of statutory interpretation.

The year before, in *Skidmore v. Swift & Co.*, the Supreme Court had addressed what deference was owed to the "conclusions" of the Administrator of the Department of Labor's Wage and Hour Division regarding the meaning of "work time" under the Fair Labor Standards Act (FLSA).[56] It found the agency's interpretations were "not controlling upon the courts by reason of their authority" but that they did "constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance."[57] Writing for the Court, Justice Jackson further clarified that the weight afforded to such an interpretation in any given case will depend upon (1) the thoroughness evident in its consideration, (2) the validity of its reasoning, (3) its consistency with earlier and later pronouncements, and (4) "all those factors which give it power to persuade, if lacking power to control."[58] Notably, as it would in *Seminole Rock*, the Court still performed its own independent interpretation—a degree of diligence that would not last.

The Supreme Court declined to formally return to its dictum in *Seminole Rock* until 1965. In *Udall v. Tallman*, the Court reemphasized its deferential attitude toward agency interpretations, explaining that it "shows great deference to the interpretation given the statute by the officers or agency charged with its administration. . . . When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."[59] In the decades following *Udall*, the Court frequently considered and applied *Seminole Rock* deference, in a variety of contexts.[60] In these cases, the Supreme Court indicated its deferential attitude toward agency interpretations and emphasized some characteristics of agency views that ostensibly entitle their interpretations to weight, but the Court only cursorily

56. 323 U.S. 134 (1944).

57. *Id.* at 140.

58. *Id.*

59. 380 U.S. 1, 16 (1965).

60. For example, in *Ehlert v. United States*, the Court declared: "[S]ince the meaning of the language is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation . . . ." 402 U.S. 99, 105 (1971). The Court there characterized the interpretation of the Selective Service regulation at issue as "a plausible construction of the language of the actual regulation, though admittedly not the only possible one." *Id.* In a later case, the Court explained that it "need not tarry . . . over the various ambiguous terms and complex interrelations of the regulations," and it would accept as correct the proffered interpretation unless it was "plainly inconsistent with the wording of the regulations." United States v. Larionoff, 431 U.S. 864, 872–73 (1977). Finally, *Gardebring v. Jenkins* saw the Court defer to an interpretation not advanced by the agency until litigation, which the Court justified in terms of reluctance to contradict the agency absent contrary textual language. 485 U.S. 415, 429–30 (1988).

considered the text and intent of the regulations—to the extent it performed its own interpretation at all.[61]

By the 1990s, invocations of deference on issues of regulatory interpretation had become routine,[62] but the Court's interpretive approach in those cases raising questions of deference had grown obscure and inconsistent. In the now-classic case *Auer v. Robbins*, Justice Scalia wrote for a unanimous Court in applying *Seminole Rock* deference to an interpretation of FLSA provided by the Secretary of Labor in a legal brief.[63] The Court found that the Secretary had "reasonably interpreted" the relevant language, the interpretation represented "the agency's fair and considered judgment on the matter," and the agency interpretation therefore controlled.[64] It also emphasized the "Secretary's power to resolve ambiguities in his own regulations."[65]

Auer has come to be viewed as the high-water mark of *Seminole Rock* deference applied by the Supreme Court, in no small part because the author of the decision, Justice Scalia, eventually disavowed the doctrine and fostered skepticism toward it on the Court.[66] But while *Auer*'s unanimous statement of doctrinal parameters has been consistently invoked ever since,[67] the Court's regulatory interpretation was yet another example of its perfunctory approach: it identified the language at issue (the phrase "subject to" within a salary-basis-test regulation under FLSA), described the opposing constructions of the parties, and elected to defer to the Secretary of Labor's amicus brief.[68]

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61. This line of cases entrenched the term "substantial deference" in characterizing the weight the Supreme Court came to give agency regulatory interpretations. *E.g.*, Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144 (1991); *see also* Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 4–5 (1996) (dubbing the deference that emerged from invocations of *Seminole Rock* "an indulgent if not downright abject standard" and contending that even the "reasonableness" component of the Court's deference analyses only vaguely stems from the original case's language).

62. *See, e.g.*, Stinson v. United States, 508 U.S. 36, 46–47 (1993) (applying *Seminole Rock* deference to a commentary on federal Sentencing Guidelines and finding it the "binding interpretation"). Of course, *Stinson* also represents the convergence of the two threads that animate this Note: regulatory deference and federal sentencing.

63. 519 U.S. 452, 454 (1997).

64. *Id.* at 460–62.

65. *Id.* at 463.

66. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 108, 112 (2015) (Scalia, J., concurring) ("The agency is free to interpret its own regulations with or without notice and comment; but courts [should] decide—with no deference to the agency—whether that interpretation is correct.").

67. *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2417 (2019) (reaffirming *Auer* while clarifying the steps involved in deference analysis, including a now-explicit requirement that an agency's interpretation represents its "fair and considered judgment"); *see also Auer*, 519 U.S. at 462 ("There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.").

68. *Auer*, 519 U.S. at 459–61.

Although the court of appeals appeared to analyze the regulation and conclude that the Secretary's view was correct, the Supreme Court declined to analyze it independently.[69] Instead, the Court illustrated the parties' disagreement over the proper meaning and dubbed the Secretary's view controlling because the regulation "comfortably b[ore]" it.[70] Thus, despite ample opportunity to independently scrutinize the regulation and reach the same conclusion, the *Auer* Court—led by the normally punctilious interpreter, Justice Scalia—allowed a legal brief to answer the interpretive question for it,[71] signaling the full extent of its willingness to defer to agencies.

2. Regulatory Interpretation and Deference in Scholarship

In recent years, scholars have begun to more squarely study interpretive methodology in the regulatory domain, seeking to clarify the features of regulation that distinguish it from other objects of legal interpretation—namely constitutions and statutes—and derive a more effective approach to parsing regulatory meaning from those distinctive qualities. To date, two major strands of this discourse have come from Professors Kevin Stack and Jennifer Nou, who propose forms of regulatory purposivism and textualism, respectively.[72] Although related to eponymous statutory interpretation theories, the approaches elaborated by Stack and Nou bear qualities specific to regulation and, by the scholars' own admission, are not mutually exclusive.[73] It is therefore useful to lay out each approach, assess their sticking points and commonalities, and make note of how they might prove useful in reading the Sentencing Guidelines, applying deference, and, specifically, applying deference to the Guidelines commentary.

Stack emphasizes how a dearth of scrutiny on how best to interpret regulations is not only "a shortcoming in interpretive theory" but also "a practical problem for administrative law and lawyers who

69. *See id.* at 460 (laying out the independent analysis and conclusion of the court below).

70. *Id.* at 461. Justice Scalia elaborated on this seemingly comfortable fit between the regulation and the Secretary's interpretation only by noting compatible dictionary definitions. *Id.*

71. *See id.* (noting how the Secretary's brief came at the request of the Court).

72. *See* Stack, *supra* note 42 (arguing for what he calls "regulatory purposivism"); Nou, *supra* note 42 (calling for "regulatory textualism").

73. *Compare* Stack, *supra* note 42, at 361 (contending that regulatory text and preambles "stand in a unique relationship" insofar as "they constitute the act of regulation," which in turn suggests "it does not make sense to interpret the text of a regulation independently from its [preamble]"), *with* Nou, *supra* note 42, at 84 (expressly distinguishing regulatory textualism from statutory textualism by noting that courts should interpret regulations "armed not with dictionaries or other general linguistic aids, but rather by structured reference to select materials generated by the regulatory drafting process," such as preambles). Thus, there is methodological, if not theoretical, overlap.

grapple with regulations."[74] Characterizing the impact of an underdeveloped understanding of regulatory interpretation, Stack puts it plainly: "How a court interprets the regulation at issue can decide the outcome . . . ."[75] He explains the intuitive yet inconsistent manner in which courts often determine the meaning of regulations—by relying variably on text, canons of construction, and both legislative and procedural history.[76] Stack's response, in turn, is that a peculiar but essential feature of regulation is the statement of basis and purpose, or preamble, which necessarily lays out the impetus for the agency's decision to promulgate the rule in question and the aim the rule furthers.[77] Whereas there is much disagreement in the statutory-interpretation domain about the legal function and importance of purposive language, preambulatory language in executive-branch regulations is a procedural requirement and a measure by which one can evaluate regulations' substantive efficacy.[78] In Stack's view, these sources are therefore uniquely useful in elucidating the best meaning of a given regulatory provision as well as in excluding those which are incompatible with the provision's stated goals.[79] Ultimately, Stack contends that because the stated purpose of a regulation is essential to both its procedural validity and substantive effectiveness, the search for a regulation's meaning should be purpose-driven.

Stack also explains how his approach functions within various legal doctrines, including the deference regime that has emerged from *Seminole Rock*. In such analyses, one should ask whether a proposed construction is "(1) permitted by the regulation's text and (2) consistent with the regulation's purposes."[80] As Stack notes, this inquiry seeks to arrive at an "appealing balance" between providing fair notice of the permissible range of interpretation—confined by the text of the provision and the stated purposes accompanying it—and accepting the choice of meaning that the agency has made within those bounds.[81] He also emphasizes that constraining the inquiry in terms of only what is

74. Stack, *supra* note 42, at 358.

75. *Id.* at 359.

76. *Id.* at 359–60.

77. *Id.* at 361.

78. *See id.* at 360–61 (noting how Congress may define its own statutory aims but that "administrative agencies' aims are prescribed by statute," suggesting therefore that because "regulations must be purposive in this sense of carrying into effect the agency's statutory aims, it makes sense to read them in light of their purposes").

79. *Id.* at 361–62.

80. Kevin M. Stack, *First Principles for Interpreting Regulation*, REGUL. REV. (Feb. 11, 2013), https://www.theregreview.org/2013/02/11/11-stack-regulation-interpretation/ [https://perma.cc/B55F-H8DP].

81. Stack, *supra* note 42, at 363.

textually permissible would likely go too far toward unqualified deference and permit interpretive alterations unmoored from purpose.[82] In sum, one sees the decisive role of preambles in Stack's theory but also how his approach leaves room for clarification of the textual permissibility step and how to deal with regulation-like sources, such as the Sentencing Guidelines, that lack explicit purposive guideposts.

Nou likewise places preambulatory language at the center of her proposed method of regulatory interpretation but does so in service of positive political theory principles[83] and in search of meaning according to how a so-called "reasonable reader" would construe a term.[84] The theoretical core of Nou's approach is that a reasonable reading is one which privileges "those statements in the rulemaking record that are most likely to be credible reflections of the public meaning to which regulatory actors agreed"[85] or "materials that are likely to be sincere, as opposed to strategic attempts to misstate the terms of the agreement."[86] Thus, although the same preambulatory material that Stack emphasizes sits high atop Nou's interpretive hierarchy, the basis for her emphasis is different—a regulatory textualist prefers sources because of their likelihood of reflecting the input of rulemaking stakeholders.[87] Perhaps then the distinction is nebulous, and what matters is that preambles are valuable interpretive sources, no matter the theory. Yet by imbuing her methodological approach with positive political theory, and thereby emphasizing the link between the stakeholder bargaining behind regulation and its public meaning, Nou suggests intentionalism or policy-based purposivism may obscure the

82. *Id.* Without step two (the purposive prong), permissibility merely involves acknowledging that a proposed construction is acceptable in light of ambiguous text. This suggests both that Stack's primary focus is effectively deploying step two and that, even in this inquiry, there remains much room for debate as to how one should determine what is textually ambiguous and/or permissible (i.e., in step one).

83. First popularized generally by WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962), this theory of government action is often applied to the law, including in deriving the meaning of legal sources. *See, e.g.*, David S. Law, *Introduction: Positive Political Theory and the Law*, 15 J. CONTEMP. LEGAL ISSUES 1, 1 (2006). This mode of legal analysis, rooted in a conception of lawmaking actors as rational participants in a game, "is built upon the insight that law is simply a form of policy" and "makes heavy use of sequential game theory to derive predictions about the outcome of the lawmaking game from information about the preferences of the players." *Id.*

84. Nou, *supra* note 42, at 85.

85. *Id.* at 86.

86. *Id.*

87. *See id.* at 84 (characterizing rulemaking as a series of "review processes" that produces various interpretive sources, the meaning of which can be assessed "based on their public accessibility, reliability, and relevance to the interpretive question"); *see also id.* at 84–85 ("Different forms of regulatory history can be ranked according to the source's likelihood to shed credible light on the public meaning of a text with the appropriate level of generality.").

fact that the reader's view of a regulation matters most.[88] In other words, the reasonable reader's construction of a provision is the construction supported by the most legitimate sources of meaning accompanying a rule.[89] Nou's prioritization of source-stakeholder legitimacy is clearly distinct from (but not necessarily inconsistent with) Stack's focus on purpose as the driver of meaning. Still, to fully understand Nou's method , it is helpful to consider its mechanics.

Nou proposes judges first consider regulatory preambles, specifically inclusions that analyze specific provisions of the regulation.[90] As described above, the purposive language takes priority in terms of clarifying textual meaning because it is most often the result of "the agency's back-and-forth with external commenters and political monitors."[91] This notion reflects both the regulatory mandate an agency usually receives in its authorizing statute and the rigorous notice-and-comment procedures called for by the Administrative Procedure Act ("APA"), while also seeking to decrease interpretive decision costs and discretion by restricting the range of valid sources.[92] If this initial clarifier does not resolve the interpretive snag, Nou then advises consideration of the "regulatory analyses," the fact-specific examples that often accompany regulations and explain how regulations will apply in practice.[93] Although it will not often be the case that an individual factual scenario is directly on point, the combination of all scenarios provided may clarify the specific concerns that government actors and public commenters voiced.[94] As a result, the fact-specific

88. *See id.* at 85–86 (explaining how a so-called reasonable reader is more likely to believe a source if the stakeholders who shaped it "would incur some cost if [they] misrepresented the bargain"). This "public meaning" or "reasonable reader" paradigm, of course, counters the "reasonable lawmaker" premise which informs statutory purposivism. *See* Stack, *supra* note 42, at 362–63; *see also* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1995) (rooting statutory purposivism in a presumption that Congress is comprised of "reasonable persons pursuing reasonable purposes reasonably").

89. *See* Nou, *supra* note 42, at 85 ("[The] hierarchy of interpretive sources tracks . . . how a reasonable reader of the regulation would have understood the meaning of the regulation as negotiated by the President, Congress, and other authoritative regulatory actors."); *id.* at 86 ("[A] court's task is to privilege those statements in the rulemaking record that are most likely to be credible reflections of the public meaning to which the regulatory actors agreed.").

90. *Id.* at 85.

91. *Id.*

92. *See id.* at 86, 98 (pointing out the ostensible efficiency and error-reduction benefits of a hierarchy of sources and comparing them to purposivism); *see also* 5 U.S.C. § 553(c) (requiring formal notice-and-comment procedures, including the inclusion of a "statement of their basis and purpose," the analytical starting point for both Stack and Nou).

93. Nou, *supra* note 42, at 85.

94. *See id.* ("Congressional and presidential reviewers, as well as the public more generally, rely on these analyses when engaging in the regulatory process."); *see also id.* at 121 ("These analyses contain the agency's description of the rule's anticipated costs and benefits, net benefits,

applications can help triangulate assumed meanings that cut across the examples or suggest reliance interests latent within a provision.[95] If these two layers of elaborative source material do not resolve the ambiguity in question or if they conflict with each other, Nou suggests deference to the agency, "provided that the agency offers a reasoned explanation."[96] Thus, like Stack's approach, one can incorporate Nou's method into deference analysis as a means of determining whether a regulation is ambiguous—essentially, as an interpretive tiebreaker. But how might these methods inform interpretation of the Guidelines?

C. Stinson *and the Collision of Sentencing and Deference*

In 1993, the Supreme Court took up the question of whether the Commission's commentary was binding on federal courts in sentencing determinations.[97] Ultimately, it concluded 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."[98] The Court perceived this holding as a simple application of *Seminole Rock* deference, albeit one transposed to the federal sentencing context by analogy.[99] Nevertheless, probing the Court's analysis in the case is critical to assessing the current legal debate over deference to the commentary and over regulatory deference more broadly.

The *Stinson* Court began by describing the content and purpose of the Guidelines Manual—the would-be Rosetta Stone of federal sentencing promulgated by the Commission. The Guidelines, arranged in numbered sections and consisting of operative provisions as well as authoritative definitions,[100] "provide direction as to the appropriate type of punishment . . . and the extent of the punishment imposed."[101]

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and the potential alternatives considered. As such, the documents often communicate the various regulatory options considered and rejected by the agency." (footnote omitted)).

95. *See id.* at 121–22 (explaining how a Department of Agriculture rule and the regulatory analysis accompanying it demonstrated how factual applications and alternatives considered can elucidate—and in this instance constrain—the meaning of a term that might otherwise lend itself to multiple constructions or a single, inaccurately broad one).

96. *Id.* at 86.

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

98. *Id.* at 38 (emphasis added); *cf.* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) (The agency view of a regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

99. *See Stinson*, 502 U.S. at 44 ("Although the analogy is not precise because Congress has a role in promulgating the guidelines, . . . the commentary [should] be treated as an agency's interpretation of its own legislative rule.").

100. *See, e.g.*, U.S. SENT'G GUIDELINES MANUAL § 4B1.1–2 (U.S. SENT'G COMM'N 2021) (laying out an operative provision with accompanying definitions).

101. *Stinson*, 508 U.S. at 41.

The Court emphasized, as was formally still the case at the time,[102] that the Guidelines also "bind judges and courts in the exercise of their uncontested responsibility to pass sentence in criminal cases."[103] That is to say, under the Act (as originally construed), a sentencing judge could only depart from the dictates of a relevant guideline if he or she finds an aggravating or mitigating factor "not given adequate consideration by the Commission."[104] That the Act meant for the Guidelines to be binding on sentencing judges was thus one of the key premises on which the Court's deference conclusion in *Stinson* rested.[105]

Crucially for purposes of this Note, the Guidelines Manual also features "commentary,"[106] a form of text "not in express terms authorize[d]" by the Act nor defined therein[107] but rather a kind of supplementary material authorized and developed by the Commission itself in a Guideline.[108] Commentary, according to the Commission, serves key purposes, such as suggesting circumstances warranting departure from the Guidelines and providing relevant background information regarding the promulgation of the Guidelines.[109] Most impactfully, commentary serves to "interpret" the Guidelines and "explain how [they are] to be applied."[110] This description indicates how the Commission views commentary in relation to Guidelines—the commentary represents the Commission's attempt(s) to clarify the meaning and application of the Guidelines, so as to dictate the

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102. As discussed below, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court later concluded that construing the Guidelines as formally binding on sentencing judges would unconstitutionally infringe defendants' Sixth Amendment jury trial right. As such, the Court elected to sever the offending provision. *Id.* at 259.

103. *Stinson*, 508 U.S. at 42; *see also* 18 U.S.C. § 3553(b) (stating courts "shall impose a sentence of the kind, and within the range" set forth by the Guidelines, subject to variances).

104. *Stinson*, 508 U.S. at 42 (quoting and discussing the language from § 3553(b)).

105. It is telling that as it moves to discuss commentary's relationship to the Guidelines, the Court analyzes these documents chiefly by analogy to examples of informal interpretations of binding promulgations. *See, e.g.*, *id.* at 44 (considering whether the Guidelines are sufficiently analogous to statutes to merit *Chevron* analysis). In this way, it becomes clear that the analogical hooks on which affording deference hung in *Stinson* are rooted in the implied premise that the object of interpretation must itself be binding in order for a court to afford "controlling" deference to a supplemental, and otherwise nonbinding, construction thereof. *Cf. id.* at 43 (noting the commentary may not be binding "in all instances" because where it is "inconsistent" with the provision it interprets, the Act "commands compliance" with the Guidelines, not the commentary).

106. U.S. SENT'G GUIDELINES MANUAL § 1B1.7 (U.S. SENT'G COMM'N 2021) includes the title "Significance of Commentary" and describes its purposes. Saliently, the Manual does not purport to formally designate the legal force or binding effect of commentary. Fittingly, however, it does include its own commentary, which quotes *Stinson*'s holding regarding the authoritativeness. *Id.*

107. *Stinson*, 508 U.S. at 41.

108. § 1B1.7.

109. *Id.*

110. *Id.*; *see Stinson*, 508 U.S. at 45 ("The functional purpose of commentary . . . is to assist in the interpretation and application of [the Guidelines].").

sentencing decisions of judges.[111] What is less evident from the character and function of commentary, however, is the interpretive weight it deserved; for that, the *Stinson* Court had to look elsewhere.

Because the Commission's promulgation of the Guidelines and inclusion of commentary were not the same as the contexts in which the Court had previously theorized and applied deference, the Court sought a suitable analogy to justify deference in this judicial-branch rulemaking setting. In doing so, the Court focused on the appropriate analogy for the commentary itself—the interpretive source to which it might ultimately defer—rather than the Commission's institutional role or the functioning of the Guidelines more broadly.[112] The Court therefore rejected the suggestion that commentary ought to be viewed like legislative history—i.e., as a "contemporaneous statement of intent by the drafters or issuers."[113] It also concluded that analogizing to *Chevron* deference was "inapposite," again focusing on the nature of commentary rather than any analytical fit between the Guidelines and ambiguous statutes.[114] Critically but curiously, the Court emphasized that a key difference between the interoperation of statutes and regulations amenable to *Chevron* analysis and the Guidelines and commentary is that "commentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied."[115] In other words, the Court posited that commentary is different because it need not yield to clear Guidelines.[116] This description is peculiar given the Court's view on the suitability of *Seminole Rock* deference to commentary,[117] but it is also crucial to the interpretive dilemma that now divides courts—commentary language clashing with the so-called plain text of the Guidelines.

Ultimately, the Supreme Court concluded the best, albeit admittedly not "precise," analogy for the weight to afford the Commission's commentary was the regulatory deference doctrine set

111. *See Stinson*, 508 U.S. at 40 (explaining how the Act tasked the Commission with establishing sentencing "policies and practices"); *see also id.* at 44 (contending that commentary "provides concrete guidance as to how even unambiguous guidelines are to be applied in practice").

112. *See id.* at 42–44 (analogizing based on the function of the commentary).

113. *Id.* at 43.

114. *Id.* at 44.

115. *Id.*

116. By contrast, in describing the *Chevron* analysis, the Court said, "if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity left a gap for the agency to fill, courts must defer to the agency's interpretation so long as it is a permissible construction of the statute." *Id.* at 44 (internal quotations marks omitted).

117. *See id.* at 47 (finding a commentary interpretation lawful and not plainly erroneous or inconsistent with its Guidelines provision, U.S. SENT'G GUIDELINES MANUAL § 4B1.2 (U.S. SENT'G COMM'N 2021), and deeming it controlling).

forth in *Seminole Rock*.[118] Specifically, its comparison rested on the view that the Commission's promulgation of the Guidelines is quite similar to an executive agency promulgating a legislative rule, which would in turn mean the commentary functions essentially as an agency interpretation of its own rule[119]—precisely the purview of *Seminole Rock* deference.[120] With this paradigm in mind, the Court stated and applied the test from *Seminole Rock*: "[P]rovided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' "[121] In mapping this principle onto commentary, and despite its earlier skepticism about the analogy to legislative history and the usefulness of searching for drafters' intent,[122] the Court reasoned that because the Commission drafts both the Guidelines and the commentary, one could presume the interpretations in the commentary "represent the most accurate indications of how the Commission deems that the guidelines should be applied."[123] Previously, the Court had dismissed the legislative history example by focusing on how contemporaneousness was not an essential feature of commentary, rather than focusing on how it might represent indicia of drafters' intent.[124] Yet here, the Court staked the commentary's presumption of accuracy on the fact that it had come from the same source as the Guidelines: the Commission.[125]

This paradoxical distinction is important when one considers that the legislative history analogy would not have triggered deference doctrine[126] but rather would have merely suggested judges who find such sources probative of meaning should consult commentary. Instead,

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118. *Id.* at 44.

119. *Id.* at 44–45.

120. *See, e.g.*, Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 150 (1991) (explaining how the doctrine of "substantial deference" to agency interpretations of their own regulations stems from *Seminole Rock* and its progeny); *see also* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945) ("Since this [question] involves an interpretation of an administrative regulation, a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt.").

121. *Stinson*, 508 U.S. at 45 (quoting *Seminole Rock*, 325 U.S. at 414); *see id.* at 47 ("We now apply these principles . . . [and find] the commentary is a binding interpretation . . . .").

122. *See id.* at 43 (dismissing the comparison between commentary and legislative history and expressing doubts regarding the possibility of accurately ascertaining congressional intent).

123. *Id.* at 45.

124. *Compare id.* at 43 (overlooking the intentionalism analogy between statutory legislative history and the Commission's use of the commentary), *with id.* at 45 (seemingly emphasizing commentary as indicia of intent).

125. *Id.* at 45.

126. At most, relying on this analogy suggests treating commentary, like legislative history, as one of the "traditional tools" of construction. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843, n.9 (1984).

the Court substituted the authorial intent concept that informs reliance upon legislative history for the fact of common authorship—that the Commission wrote the Guidelines and the commentary.[127] In other words, the Court concluded that it matters not what the Commission *intends* but rather what it *deems* in explicating the Guidelines through the commentary.[128] This rhetorical creativity, in turn, enabled the Court to give the commentary controlling deference and elevate it from persuasive authority, to which courts might give different weight in different situations, to binding authority that can—in the Court's view—supervene even textually clear Guidelines.[129] Therein lies the interpretive impact of *Stinson* on the commentary and sentencing.

II. HOW DEFERENCE AND THE COMMENTARY INTERACT TODAY

With the origins and convergence of federal sentencing and regulatory interpretation in mind, this Part turns to the Supreme Court's latest clarification of regulatory deference and assesses the Guidelines provision that has divided circuit courts in the wake of that decision. Through close consideration of *Kisor*'s interpretive guidance and section 4B1.2(b)'s language and penological consequences, one begins to understand the current divide and sense why deference to the commentary is troublesome in light of the Supreme Court's insights.

A. Kisor v. Wilkie*: Its Interpretive Impact, in Its Own Words*

In 2019, the Supreme Court heard *Kisor v. Wilkie* solely to clarify its position on and the current contours of *Seminole Rock–Auer* deference. Although five justices agreed not to discard the deference doctrine, the Court sought to "reinforce its limits."[130] This Section provides a close reading of the *Kisor* opinions, with a particular focus on how the current justices understand the task of interpreting regulation. It also introduces the key takeaways of the case in terms of the interpretive methodology and policy rationales that guide regulatory deference in order to contextualize and inform the application of deference to the commentary.

The facts of *Kisor* were essentially irrelevant to the discussion and disposition of the Court's majority and concurring opinions, each of which discussed *Seminole Rock* deference generally. Saliently, however,

127. *Stinson*, 508 U.S. at 45 (describing the Court's idiosyncratic treatment of authorial intent vis-à-vis the commentary).

128. *Id.* at 43–47.

129. *See id.*

130. Kisor v. Wilkie, 139 S. Ct. 2400, 2408 (2019).

the Federal Circuit below found the Veterans Administration regulation at issue ambiguous;[131] therefore, determining the degree of deference to the Veteran Administration's proposed construction was in order.[132] In setting forth its conception of the proper analysis under *Seminole Rock*, the Supreme Court ultimately remanded the case to give the Federal Circuit an opportunity to follow the Court's step-by-step approach directly.[133] As a result, the justices who sharply opposed deference still concurred, contending instead that the Federal Circuit was wrong to defer at all.[134] Because Chief Justice Roberts joined only part of Justice Kagan's plurality opinion for the Court and because Justices Ginsburg and Breyer voted with the majority, it is particularly important to parse the analysis of each opinion with an eye toward the interpretive guidance provided and the impact each perspective could have on how a realigned Court might interpret the Guidelines.

The upshot of *Kisor v. Wilkie* is the part of Justice Kagan's opinion in which Chief Justice Roberts joined, wherein the Court laid out the specific questions courts must ask and answer in determining whether to apply deference to a given regulatory interpretation.[135] Each ensuing analytical step—for example, the requirement that the proffered interpretation represent the agency's "fair and considered judgment"[136]—now may serve as a hurdle for the deference-minded and an escape hatch for the deference-averse.[137] This is why Chief Justice Roberts and Justice Kavanaugh downplayed the "distance" between the doctrinally divergent opinions of Justice Kagan and Justice

131. *See* Kisor v. Shulkin, 869 F.3d 1360, 1367 (Fed. Cir. 2017):

> Significantly, [the regulation] does not specify whether "relevant" records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard. This uncertainty in application suggests [it] is ambiguous. . . . The varying, alternative definitions of the word "relevant" offered by the parties further underscore [that] ambiguity.

132. *See id.* at 1368 (finding the Veterans Administration Board's proffered interpretation neither plainly erroneous nor inconsistent).

133. *Kisor*, 139 S. Ct. at 2424; *see* Kisor v. Wilkie, 969 F.3d 1333 (Fed. Cir. 2020).

134. *E.g.*, *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring).

135. *See Kisor*, 139 S. Ct. at 2414–17 (formalizing the genuine ambiguity of a regulation and the reasonableness, character, and context of its interpretations as prerequisites to deference).

136. *See id.* at 2417 ("[A] court should decline to defer to a merely convenient litigating position or *post hoc* rationalization advanced to defend past agency action against attack." (internal quotation marks omitted)).

137. The various *Kisor* opinions hint at the subjective, ink-blot quality of this test. *Compare id.* at 2418 ("[T]his Court has cabined *Auer*'s scope in varied and critical ways—and in exactly that measure, has maintained a strong judicial role in interpreting rules. What emerges is a deference doctrine not quite so tame as some might hope, but not nearly so menacing as they might fear."), *with id.* at 2425 (Gorsuch, J., concurring) (describing the majority's decision as "more of a stay of execution than a pardon" and contending that "retaining even this debilitated version of *Auer* threatens to force litigants and lower courts to jump through needless and perplexing new hoops and in the process deny the people the independent judicial decisions they deserve").

Gorsuch[138]—the practical consequences might be a wash.[139] It is also why Justice Gorsuch characterized this more rigorous, restrictive approach to deference as "zombified" and "a paper tiger."[140] Yet looming behind this supposed doctrinal zombie-tiger is the problem of how to properly interpret regulations under either regime. With four justices supporting a form of deference that turns on thorough determinations of ambiguity and reasonableness and four justices supporting scrapping deference altogether and requiring interpretation by the courts themselves, interpretive methodology is now more pivotal than ever. Whether a future Court keeps *Kisor* and regulatory deference on life support or pulls the plug, one must consider how judges view the task of regulatory interpretation and how *Kisor*'s interpretive guidance impacts whether courts should defer to Guidelines commentary, like Application Note 1 of section 4B1.2(b).

From an interpretive perspective, the most important takeaway from *Kisor* is its command that in determining whether a regulation is "genuinely ambiguous," reviewing courts "must exhaust all the 'traditional tools' of construction."[141] Justice Kagan elaborated somewhat, noting that one could proceed to evaluating an agency's interpretation for reasonableness "only when that legal toolkit is empty and the interpretive question still has no single right answer."[142] And, importantly, she explained that a court must carefully consider "the text, structure, history, and purpose of a regulation in all the ways it would if it had no agency to fall back on."[143]

Justice Kagan's plurality opinion represents perhaps the Court's clearest statement on the "toolkit" of regulatory interpretation since *Seminole Rock*.[144] But methodological wrinkles remain. Most critically, while *Kisor* suggests judges may not take interpretive shortcuts to reach conclusions of ambiguity,[145] must judges utilize each tool in

138. *Id.* at 2424 (Roberts, C.J., concurring); *id.* at 2448 (Kavanaugh, J., concurring).

139. *See id.* at 2448 (Kavanaugh, J., concurring) ("If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation.").

140. *Id.* at 2425–26 (Gorsuch, J., concurring).

141. *Id.* at 2415 (quoting and transposing the approach suggested by *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 843, n.9 (1984)).

142. *Id.* By contrast, "if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading." *Id.*

143. *Id.*

144. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413 (1945) (declaring the Court's "only tools [were] the plain words of the regulation and any relevant interpretations of the [agency]").

145. *See* 139 S. Ct. at 2415 (emphasizing that "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read" and "hard interpretive

finding clear meaning? Requiring methodological thoroughness in order to find ambiguity is sensible,[146] but is the Court demanding the same exhaustive approach to all interpretive questions? Given its transposition of the "toolkit" from statutory interpretation and the fact that judicial review in that domain features longstanding methodological disagreement,[147] surely the Court did not mean to impose any kind of interpretive stare decisis.[148] So, although the *Kisor* majority's formulation adds interpretive thoroughness to the deference analysis, must one look elsewhere for guidance on the best way to find the so-called plain meaning of regulations?

The concurring opinions in *Kisor* provide important insights into how the Supreme Court—beyond the plurality led by Justice Kagan—currently views the task of regulatory interpretation and the appropriateness of retaining regulatory deference, as a policy matter. Gleaning such insights is valuable for the purpose of evaluatingdeference in the sentencing context for two reasons: First, because Chief Justice Roberts provided the decisive vote in narrowing and preserving *Seminole Rock* deference, his characterizations of the doctrine and of the opinions of his fellow Justices are arguably most salient—at least precedentially.[149] Second, the views offered by Justices Kavanaugh and Gorsuch—on how judges should interpret regulations, why judges are best suited to that task, and when the risks posed by deference are especially acute[150]—provide indications as to how the newly constituted Court might conceptualize its next deference case, such as one dealing with *Stinson* and whether to defer to commentary.

The vote of Chief Justice Roberts in *Kisor* is as telling—in terms of what he joined and what he did not—as his brief concurring opinion. He pivotally joined Parts I, II-B, III-B, and IV of Justice Kagan's

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conundrums . . . can often be solved"); *id.* at 2416 ("[Reasonableness] is a requirement an agency can fail.").

146. *See, e.g.*, Stack, *supra* note 42, at 358 (highlighting the relative lack of, but also the need for, interpretive methodology in the specific context of regulations).

147. The traditional fault lines in statutory interpretation have been between purposivism and textualism. *Compare* HART & SACKS, *supra* note 88 (articulating the purposivist theory), *with* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (articulating the textualist theory). *See also* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (noting "textualism and purposivism do in fact share more conceptual common ground" than is assumed).

148. This concept, also known as "methodological stare decisis," has not taken root among the federal courts, but it has been the subject of scholarly debate. *See, e.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863 (2008) (advocating in favor of this practice).

149. *See Kisor*, 139 S. Ct. at 2400, 2408, 2424 (indicating which parts of the plurality opinion Roberts joined). *See generally* Marks v. United States, 430 U.S. 188 (1977) (stating the narrow holding principle).

150. *E.g. Kisor*, 139 S. Ct. at 2448–49 (Kavanaugh, J., concurring).

opinion, rendering those parts the majority opinion.[151] In those sections, Kagan articulated the "cabined" scope of regulatory deference and then emphasized how stare decisis cut against the arguments for overruling deference, arguments proffered by Justice Gorsuch.[152] Meanwhile, Roberts declined to join Parts II-A and III-A, in which Justice Kagan described the doctrinal heritage and policy rationales of deference and then responded to the constitutional and statutory critiques levied against it.[153] By simply noting those points to which Roberts ascribed and those to which he did not, then, one sees that the majority in *Kisor* turns pivotally on his view that deference in the regulatory context requires a rigorous multi-step analysis,[154] which in turn rests primarily on precedent rather than Roberts' independent belief that the doctrine is prudent in and of itself.[155] His concurrence drives the point home: Roberts reiterated that he joined only portions of Justice Kagan's opinion and emphasized his view that "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."[156] In other words, whereas the majority "catalogs the prerequisites for, and limitations on," regulatory deference, Justice Gorsuch "lists the reasons that a court might be persuaded to adopt an agency's interpretation of its own regulation."[157] Finally, attempting to harmonize the two opinions, Roberts alluded to the analytical overlap between the newly articulated *Kisor* deference doctrine and the *Skidmore* persuasiveness standard—the synergy being that interpretations warranting deference should also persuade courts.[158]

Justice Kavanaugh's concurrence is noteworthy in that it both agrees substantively with Justice Gorsuch's holistic critique of regulatory deference and echoes the Chief Justice's contention that the disagreeing Justices are not that far apart as a practical matter.[159] As

151. *Id.* at 2408, 2424 (majority opinion).

152. *Id.* at 2414–18, 2422–23.

153. *See id.* at 2408, 2410–13, 2418–21, 2424 (explaining the origins of and rationales behind the regulatory deference doctrine that has emerged since *Seminole Rock* and rebutting the attacks on it put forward by petitioner and by Justice Gorsuch's concurrence).

154. *See id.* at 2424 (Roberts, C.J., concurring) (evaluating the plurality's deference test).

155. *See id.* ("For the reasons the Court discusses in Part III-B, I agree that overruling [*Seminole Rock* and *Auer*] is not warranted. I also agree with the Court's treatment in Part II-B of the bounds of *Auer* deference."); *see also id.* at 2425 (Gorsuch, J., concurring) ("The Court cannot muster even five votes to say that *Auer* is lawful or wise. Instead, a majority retains [it] only because of stare decisis.").

156. *Id.* at 2424 (Roberts, C.J., concurring).

157. *Id.*

158. *See id.* at 2424–25) ("[T]he cases in which *Auer* deference is warranted largely overlap with the cases in which it would be unreasonable for a court not to be persuaded by an agency's interpretation of its own regulation."); *see also supra* notes 56–58 and accompanying text (discussing the doctrine laid out in *Skidmore*).

159. *Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring).

to the methodological implications, Kavanaugh evaluated how regulatory interpretation should play out under the majority's approach: "If a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt an agency's contrary interpretation."[160]

Under this view, then, a rigorous interpretive exercise at the "genuinely ambiguous" phase of *Kisor* analysis "should lead in most cases to the same general destination" as the formal rejection of deference demanded by four members of the Court.[161] Kavanaugh also observed, however, that the majority's test acceptably allows for deference where regulations feature "broad and open-ended terms" that require "policy choices," such as "reasonable," "feasible," or "practicable."[162] Although interpretations of these terms, in Justice Kavanaugh's view, more directly implicate arbitrariness review, there is an extent to which the majority's "rigorous" multistep deference heuristic appropriately balances the need for thorough judicial interpretation and the value of deferring to reasonable agency "policy" views.[163] In light of this discussion, it is perhaps curious that Kavanaugh declined to join even the stare decisis portion of Justice Kagan's opinion—his concurrence makes clear his preference for rejecting deference but also recognizes that sufficiently thorough interpretation can take place within the majority's framework, alongside some acceptable instances of deference.[164] What prevails here, it seems, and what pervades the separate concurrence from Justice Gorsuch, is a hostility to regulatory deference in broad terms. But there is also common ground across the Court as to the merits of interpretive rigor and the notion of deference as contextually grounded, particularly given the overtures from several Justices that *Kisor* in no way threatens the *Chevron* framework.[165]

In his opinion, Justice Gorsuch forcefully called for the Court to "stop this business of making up excuses for judges to abdicate their job of interpreting the law" and demanded instead that a court must

160. *Id.*

161. *Id.*

162. *Id.* at 2448–49.

163. *Id.* at 2449.

164. *Compare id.* at 2422–23 (plurality opinion) and *id.* at 2424 (Roberts, C.J., concurring) (relying on stare decisis to oppose the anti-deference position and emphasizing the "long line of precedents" going back "75 years or more"), *with id.* at 2448 (Kavanaugh, J., concurring) (stating there are "serious questions" as to whether stare decisis should apply and arguing a heightened standard of stare decisis should not apply here).

165. *Id.* at 2425 (Roberts, C.J., concurring); *id.* at 2449 (Kavanaugh, J., concurring).

provide "its best independent judgment of the law's meaning."[166] He then critiqued regulatory deference, as previously constituted and now reformulated by the majority, on several grounds, including that it is (1) incompatible with §§ 553 and 706 of the APA[167] and (2) in tension with constitutional separation-of-powers principles.[168] To be certain, if either argument becomes the prevailing view, the decision in *Kisor* and those that came before it would have to be overruled. As discussed above, there are persuasive reasons for the APA-based critiques.[169] Separation of powers challenges, meanwhile, seemingly have gained frequency and currency on the Roberts Court.[170] Still, the majority's disagreement on these grounds and the Chief Justice's emphasis on stare decisis limit the impact of these critiques here.

Most salient for purposes of determining the appropriateness of regulatory deference after *Kisor* is Justice Gorsuch's prudential critique, which responds directly to Justice Kagan's policy discussion. Gorsuch first took issue with the plurality's characterization of the interpretive goal of deference—to determine what meaning the agency intended.[171] In his view, whatever the interpretive value of pre-enactment legislative history, the kind of post-enactment clarification typically referenced in the regulatory deference context is no more informative of a regulation's meaning than a lawmaker's statements about a statute that has already been enacted.[172] Given changes in agency personnel and policymaking priorities, Gorsuch contends, there is no reason a construction ascribed to a regulation after its promulgation should be afforded any special interpretive authority.[173]

Gorsuch's point is important, and it is one that drives at the heart of many disputes over the correct way to interpret legal sources. The post hoc concern is also equally valid in the executive agency

166. *Id.* at 2426 (Gorsuch, J., concurring).

167. *Id.* at 2432–34. Recall that § 553 of the APA draws a meaningful distinction between those rules subject to defined procedural requirements and those, such as "interpretative rules," which are not. *See* 5 U.S.C. § 553(b). In addition, § 706 pertinently requires courts to "decide all relevant questions of law" and "determine the meaning or applicability of the terms of an agency action." *See* 5 U.S.C. § 706. This language informs Justice Gorsuch's view.

168. *Kisor*, 139 S. Ct. at 2437.

169. *See supra* notes 54–55 and accompanying text.

170. *See, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (successful challenge based on executive removal authority); Gundy v. United States, 139 S. Ct. 2116 (2019) (narrowly unsuccessful nondelegation challenge).

171. *See Kisor*, 139 S. Ct. at 2441 (Gorsuch, J., concurring) ("If the best reading of the regulation turns out to be something other than what the agency claims to have intended, the agency is free to rewrite the regulation; but its secret intentions are not the law.").

172. *Id.*

173. *See id.* (analogizing this approach to "seeking guidance about [an] email's meaning, years or decades later, from the latest user of the computer from which the e-mail was sent").

context.[174] As discussed, however, the case for deference in the criminal sentencing domain should hinge less on drafters' intent-related arguments and more on the circumstances and consequences surrounding the application of deference.[175] In this regard, a few of Justice Gorsuch's responses to Justice Kagan on policy grounds are crucial. First, the majority argues that deference as a means of resolving ambiguity is particularly worthwhile where the question at issue "sounds more in policy than in law," but this view runs headlong into the notice and accountability principles that underpin the APA—that is, despite potential inconsistencies between regulatory deference and the statute's provisions, the broader rationales for enacting laws (and the policies embodied therein) via rigorous and open procedures also cut against deference.[176] Even where policy preference pervades a proffered meaning, Justice Gorsuch suggested that "the real cure doesn't lie in turning judges into rubber stamps for politicians."[177]

The final two policy grounds on which Justice Gorsuch challenges the majority concern how deference can give due respect to the technical expertise of agencies and how it can foster consistency and uniformity in regulatory meaning. He first notes the "traditional approach" embodied in *Skidmore*: that agency expertise, insofar as it might justify a certain regulatory construction, must be demonstrated—it must persuade in the face of competing views.[178] Gorsuch then challenged the consistency argument by asserting that the decision itself on whether to apply deference often divides courts, undercutting the notion that reliance upon a regime of deference would increase uniformity in regulatory meaning.[179] Together, these critiques and the majority's defenses help elaborate the contexts in which deference is most suitable and the bases on which one might conclude

174. *See, e.g.*, *id.* at 2421 (majority opinion) (explaining how declining deference to "ad hoc statements or post hoc rationalizations" stems from a concern about "unfair surprise" arising from an agency's changed view). *But see, e.g.*, Chase Bank USA v. McCoy, 562 U.S. 195, 209 (2011) (concluding that deference to an amicus brief was appropriate and that the post hoc character of the agency's offered interpretation did not undermine its weight).

175. The relationship between and origins of the Guidelines and commentary suggest that the arguments for and against deference have more to do with their legal character and the impact of deference on criminal defendants, rather than on the appropriateness of deferring to a particular bit of commentary for its particular qualities. In other words, the meritoriousness of deference in this context turns on its appropriateness in general terms. *See supra* Part I.A (calling into question congressional approval of the commentary as interpretively decisive); *see also supra* Part I.C (discussing the Supreme Court's peculiar justifications for deferring to the commentary).

176. *See Kisor*, 139 S. Ct. at 2442 (2019) (Gorsuch, J., concurring) (Without APA procedure, "an agency has no warrant to compel judges to change the law to conform with the agency's current policy preferences.").

177. *Id.*

178. *Id.* at 2443.

179. *Id.*

it is inappropriate.[180] In sum, Justices Kagan and Gorsuch agree that interpretive rules do not carry the force of law unless a court agrees with their construction of a procedurally valid rule and also that more informal statements are not worthy of deference.[181] The issue, then, is whether the commentary can satisfy the Justices.

B. Section 4B1.2: Career Offender Status and Inchoate Offenses

Chapter Four of the Guidelines Manual, "Criminal History and Criminal Livelihood," provides a scheme for enhancing sentences according to defendants' past criminal convictions and sentences.[182] The character of past sentences, such as their length and the terms of release still facing the defendant at the time of the instant offense, determine an allotment of points, which in turn correspond to a sentencing level and range provided in Chapter Five.[183] Put simply, consideration of a defendant's criminal history can produce enhanced punishment for the instant offense. For purposes of this Note, one specific type of criminal history enhancement is pertinent (and illustrative of how the Guidelines function): career offender status.[184]

Section 4B1, the Guidelines language considered in *Stinson* and recently in several circuit court cases on the question of deference to commentary, lays out sentencing enhancements for so-called career offenders.[185] Section 4B1.1(a) defines a career offender as a defendant who, after turning eighteen, committed either a "crime of violence" or a "controlled substance offense" and has two or more prior felony convictions of either type.[186] Controlled substance offenses are the focus here—not only because such offenses have become the specific battleground of the current deference disagreement but also because they far more frequently trigger career offender status.[187] As noted in *Stinson*, section 4B1.2(b) provides the relevant definition: in pertinent part, a "controlled substance offense" includes making, importing,

180. *See id.* at 2421 (Kagan, J.) (plurality opinion) (responding to criticisms of deference).

181. *See id.* at 2421, 2442–43; *supra* notes 171–180 and accompanying text.

182. U.S. SENT'G GUIDELINES MANUAL § 4A (U.S. SENT'G COMM'N 2018).

183. *Id.* at § 4A1.1; *see id.* at § 5A (providing a detailed table that allows for computation of sentences).

184. *See id.* § 4B1 (describing how a defendant qualifies as a career offender, laying out associated sentencing enhancements, and providing relevant definitions of key terms).

185. *Id.*

186. § 4B1.1(a).

187. Of the 1,737 career offender cases filed in FY 2019, 1,305 of them involved "drug trafficking." *Quick Facts: Career Offenders*, U.S. SENT'G COMM'N https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY19.pdf (last visited Mar. 30, 2022) [perma.cc/H7LT-6KVZ] [hereinafter "*Quick Facts: Career Offenders*"].

exporting, distributing, and dispensing a qualifying substance, as well as the possession thereof with intent to engage in one of those activities.[188] Despite the fact that the corresponding "crime of violence" definition enumerates the "attempted use" of force,[189] section 4B1.2(b) does not include a reference to so-called "inchoate" offenses—or rather, the inchoate versions of the aforementioned acts.[190] Instead, this broadened definition—which includes "aiding and abetting, conspiring, and attempting"—comes only from the commentary appending the provision, Application Note 1.[191] From this distinction, there is a tension between the main text of section 4B1 and the substantially broader coverage provided by the accompanying commentary.[192] To understand the stakes of the fight over deference in this context, however, one must consider the consequences of grafting inchoate offenses onto section 4B1.2(b). In other words, how much punishment does the commentary add?

The short answer: a lot. At a basic level, the inclusion of inchoate offenses significantly widens the array of offenses (and therefore the number of defendants) that count toward career offender status. Representative examples include attempts to distribute or manufacture a controlled substance—in lay terms, trying (but failing) to sell or make drugs.[193] With the types of conduct swept into career offender status in mind, it then becomes even more critical to understand the consequences of acquiring that status during sentencing. In 2019, 91.7 percent of cases involving career offenders saw an increase in the relevant Guideline range as a result of section 4B1 being triggered.[194] Seventy-five percent of those cases involved controlled-substance offenses and more than sixty-sex percent of career offender sentences exceeded ten years in prison, with the average sentence for career offenders exceeding twelve years.[195] As a basic matter, these figures establish the significance of career offender status and the prominence of controlled substance offenses in classifying defendants as career offenders. Other data from the Commission further drives the point

188. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(b) (U.S. SENT'G COMM'N 2018).

189. *Id.* at § 4B1.2(a).

190. *Id.* at § 4B1.2(b).

191. *Id.* at § 4B1.2(b) cmt. n.1.

192. *See id.* (stating that inchoate offenses not expressly named in § 4B1.2(b) should be interpreted as if they were included); *see also, e.g.*, United States v. Winstead, 890 F.3d 1082, 1089–91 (D.C. Cir. 2018) (finding it "apparent" that section 4B1.2(b) "clearly excludes inchoate offenses").

193. *See, e.g.*, *Winstead*, 890 F.3d at 1090–91 (considering the application of career offender status where attempted distribution was at issue).

194. *Quick Facts: Career Offenders*, *supra* note 187.

195. *Id.*

home: more than eighty-one percent of career offenders saw an increase in their Final Offense Level ("FOL"), with the average point totals increasing from twenty-three to thirty-one.[196] For Category VI offenders, of which qualifying section 4B1.2(b) defendants are one example, such an FOL upgrade increases the mandatory minimum sentence from 92 to 188 months and the maximum sentence from 115 to 235 months.[197] In sum, by engrafting inchoate offenses onto section 4B1.2(b), Application Note 1 does more than classify certain defendants as career offenders: it generates an offense level that ratchets up the recommended sentence from a range of roughly eight to nine years to one between sixteen and nineteen years.[198] It bears noting that while judges are no longer bound by the Guidelines in a literally mandatory sense,[199] the offense level and corresponding range still form judges' principal benchmark during sentencing.[200] With all this in mind, two dilemmas remain: Does the punishment fit the crime, and is the commentary a valid means by which to dole the punishment out?

C. The Circuits on Whether to Defer in Construing Section 4B1.2(b)

Alas, the circuit split. This Section assesses the approaches courts have taken in reviewing section 4B1.2(b) and Application Note 1 since the *Kisor* decision. One approach concludes that deference to the commentary was inappropriate even before the Supreme Court's clarification of regulatory deference. Another sees *Kisor* as an opportunity for meaningful reinterpretation of section 4B1.2(b). And the last approach relies on pre-*Kisor* circuit caselaw to find that deference to the commentary is still required. Examining each view illuminates why skepticism about deference makes sense in the sentencing context, notwithstanding its potential value elsewhere.

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196. *Id.*

197. *See* U.S. SENT'G GUIDELINES MANUAL § 5A (U.S. SENT'G COMM'N 2018) (sentencing table).

198. *Id.*

199. *See* United States v. Booker, 543 U.S. 220, 258–59 (2005) (holding that the Guidelines have the force and effect of law but are still subject to Sixth Amendment requirements).

200. *Compare* U.S. SENT'G COMM'N, THE INFLUENCE OF THE GUIDELINES ON FEDERAL SENTENCING 22–24 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20201214_Guidelines-Influence-Report.pdf [perma.cc/7NUB-DW9Y] (finding that actual sentences track closely with the relevant Guidelines-specified minimum), *with id.* at 56–58 (documenting a wider downward disparity between section 4B1.1's minimums and the actual sentences doled out). While the disparity may suggest a decline in section 4B1.1's influence on judges, which may in turn reflect an intuition on the part of judges that the commentary's modification is often unduly punitive, the report reinforces the truism that the Guidelines continue to anchor the process. *See id.*

1. Even Before *Kisor*, Deference Was Inappropriate

Prior to the Supreme Court's clarification of regulatory deference in *Kisor*, two courts of appeals questioned the appropriateness of deferring to commentary accompanying section 4B1.2(b): The D.C. Circuit, in *United States v. Winstead*, [201] and the Sixth Circuit, in *United States v. Havis*, [202] reviewed whether career offender status could turn on the inclusion of attempted controlled substance offenses. Both concluded that no deference should be given to Application Note 1's addition of inchoate crimes, but it is useful to examine the analytical steps each took in reaching that conclusion.

In *Winstead*, the D.C. Circuit closely followed the argument raised on appeal by the defendant, whose career offender status hinged on a conviction for attempted distribution of a controlled substance.[203] Recognizing that *Stinson* commanded deference to commentary unless the proposed construction was unlawful or "inconsistent with, or a plainly erroneous reading of" the Guideline in question, the Court (and the defendant) indeed emphasized inconsistency.[204] Under this view, the two crucial considerations were that (1) the "very detailed" definition of "controlled substance offense" provided in section 4B1.2(b) plainly does not include inchoate offenses and that (2) the corresponding definition of "crime of violence" in section 4B1.2(a) specifically does include reference to an inchoate offense—i.e., the "attempted use . . . of physical force."[205] The plain text of the Guidelines and the relevant canon of construction, *expressio unius est exclusio alterius* ("the expression of one is the exclusion of the other"), thus revealed that inchoate offenses were excluded from section 4B1.2(b) and irrelevant to career offender status.[206]

The D.C. Circuit's discussion included two other salient points. First, the defendant's arguments and the court's ultimate analysis suggest a relative dearth of D.C. Circuit precedent endorsing the application of *Stinson* to section 4B1.2(b) and inchoate offenses counting toward career offender status.[207] By contrast, other circuits appear to heavily rely on such precedents as a justification for not

201. 890 F.3d 1082, 1089–91 (D.C. Cir. 2018).

202. 927 F.3d 382, 386–87 (6th Cir. 2019) (en banc).

203. 890 F.3d at 1090–92.

204. *See id.* at 1091 (quoting Stinson v. United States, 508 U.S. 36, 38 (1993)).

205. *See id.* (referring to and quoting Guidelines section 4B1.2(a)-(b) and accompanying text).

206. *Id.*

207. *See id.* (laying out past D.C. Circuit cases dealing with inchoate offenses and sentencing).

changing course on this question.[208] Second, the court emphasized how the Commission wields significant authority in promulgating the Guidelines, which govern the use of "the ultimate government power, short of capital punishment."[209] Instead of doling out additional punishment via commentary, the court concluded that the Commission should "seek to amend the language . . . by submitting the change for congressional review."[210] The parallels to the problems of foregone procedure and deficient notice in executive-branch regulatory deference are apparent—indeed, the *Stinson* Court invoked this analogy to justify its decision to defer to commentary.[211] Thus, it is not only textual interpretation that cuts against broadening section 4B1.2(b); the process-based policy concerns raised in *Kisor* also resonate here.

The Sixth Circuit followed a similar line of analysis in *Havis*, even citing *Winstead* directly on the aforementioned points about sentencing power and notice.[212] Its decision to conclude similarly on the inappropriateness of deference to commentary is separately notable, however, for a few reasons. First, the Sixth Circuit issued its decision en banc in a per curiam opinion, indicating that the Court considered the question thoroughly and resolved it unanimously.[213] This opinion lent credence to the D.C. Circuit's view and offered greater support for overriding stare decisis.[214] Second, the Court emphasized how *Mistretta v. United States* originally ratified the constitutionality of the Commission's role in large part because the Commission would remain "fully accountable to Congress" in its promulgation of the Guidelines and subject to APA notice-and-comment procedures.[215] Commentary, meanwhile, passes through no such "gauntlets."[216] As the Sixth Circuit emphasized, it is not simply that Application Note 1 explains the

208. *See, e.g.*, United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (agreeing with the analysis of section 4B1.2(b) in *Winstead* but concluding that deference to Application Note 1 was compelled by Ninth Circuit precedent).

209. *Winstead*, 890 F.3d at 1092 (quoting Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting)).

210. *Id.*

211. *See supra* notes 121–128 and accompanying text (describing the *Stinson* Court's search for an appropriate analogy for applying a form of deference to interpretations provided by the Commission in commentary); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2432–34, 2442 (2019) (Gorsuch, J., concurring) (raising APA-based challenges to regulatory deference and suggesting procedural validity is critical to establishing an agency's interpretive authority).

212. United States v. Havis, 927 F.3d 382, 385–87 (6th Cir. 2019) (en banc) (per curiam).

213. *Id.*

214. *See generally* Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–800 (2012) (discussing how law-of-the-circuit precedent functions in the courts of appeals and how each circuit recognizes a variety of exceptions or means by which past horizontal precedent can be overcome).

215. *Havis*, 927 F.3d at 385 (quoting Mistretta v. United States, 488 U.S. 361, 393–94 (1989)).

216. *Id.* at 386.

meaning of terms within section 4B1.2(b); rather, Application Note 1 expands that meaning, both lexically and substantively.[217] In sum, the Sixth Circuit both emphasized that deference to the commentary enables the Commission to add to the offenses that trigger career offender status without congressional approval and endorsed the D.C. Circuit's textual and policy-based analysis of section 4B1.2(b).

2. *Kisor* Now Instructs Against Deference

In a pivotal twist for the development of this Note, an en banc panel of the Third Circuit recently reviewed the very same section 4B1.2(b) deference question, post-*Kisor*, in *United States v. Nasir*.[218] Unsurprisingly, the Court perceived *Kisor* to represent a marked shift from a relatively "uncritical" policy of deference to one that is more limited and "context dependent."[219] Yet, aside from emphasizing *Kisor*'s command that courts "exhaust all the 'traditional tools' of construction" prior to finding "genuine ambiguity,"[220] much of the Third Circuit's approach to the issue resembles how the D.C. and Sixth Circuits tackled the problem in *Winstead* and *Havis*—i.e., before *Kisor*.[221] For example, the en banc opinion tracks and cites *Winstead*'s invocation of the *expressio unius* canon, and it echoes the policy arguments endorsed in *Havis* regarding how the Commission's legitimacy flows from procedure.[222] Thus, one might view the Third Circuit's decision, in part, as a third voice in favor of abandoning deference in this context.

Yet *Nasir* also raised another viable argument to that end—the rule of lenity. In his concurrence, Judge Bibas joined the entire circuit en banc on the aforementioned points; like the Sixth Circuit, the Third Circuit found these arguments sufficient to overrule law-of-the-circuit precedent and an en banc hearing the appropriate setting for declaring

217. *See id.* at 386 (concluding that if commentary could permissibly add terms otherwise absent from the text of the Guidelines and earn deference in doing so, "the institutional constraints that make the Guidelines constitutional in the first place—congressional review and notice and comment—would lose their meaning").

218. 982 F.3d 144 (3d Cir. 2020) (en banc). The pertinent part of the majority opinion, including the portions cited below, was unanimously agreed upon by the circuit. *See id.* at 156 (analyzing relevant Guidelines enhancement in Part II-D of the court's opinion). The Supreme Court vacated the judgment on different grounds in *United States v. Nasir*, 142 S. Ct. 56 (2021).

219. *Id.* at 158.

220. Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019).

221. *See Nasir*, 982 F.3d at 158–59.

222. *Id.* at 159.

such a departure.[223] But Judge Bibas added a compelling point in support of this decision: the rule of lenity should be emphasized as a traditional tool of construction, and, as applied in this context, it would counsel against reading the broader and more punitive construction provided by Application Note 1 into section 4B1.2(b).[224] Put another way, even if one were to contend that it is "genuinely ambiguous" whether a provision and its commentary are compatible, lenity would require the less punitive construction.[225] This point is not only valuable as an alternative to the more traditionally linguistic analysis of section 4B1.2(b) described above; it also reflects pertinent policy considerations. As Judge Bibas explained, the rule of lenity is "entwined" with notice, due process, the separation of powers, and the U.S. system's "strong preference for liberty."[226] In other words, the rule of lenity reflects principles, including due process and separation of powers, that caution against deference and resonate more powerfully in criminal sentencing than in other administrative law arenas.[227]

3. *Kisor* Leaves Deference Undisturbed

At least six of the remaining courts of appeals have concluded differently than the three circuits mentioned above, even after *Kisor*. Their view is that *Stinson* and circuit precedent dictate that deference to commentary remains appropriate both as a general matter and in the specific case of section 4B1.2(b).[228] On some level, the stare decisis rationale speaks for itself—the courts that recently examined the issue leaned on law-of-the-circuit precedent instead of tackling the interpretive merits arguments directly.[229] For example, the First

223. *See id.* at 144 n.** (laying out which judges joined which portions of the opinion of the court, with all endorsing Section II-D, the portion analyzing the question of whether to defer to Application Note 1 concerning section 4B1.2(b)).

224. *Id.* at 177 (Bibas, J., concurring in part).

225. *See id.* ("Under the rule of lenity, courts must construe penal laws strictly and resolve ambiguities in favor of the defendant."). Note that this argument would only be necessary if a court were unpersuaded that section 4B1.2(b) is clear.

226. *Id.* at 177–78.

227. *Id.* at 178–79. Although the notice principle permeates administrative law, its importance is amplified in the criminal law context in part because of the relationship between notice and the heightened due process and liberty interests at stake in criminal cases.

228. United States v. Lewis, 963 F.3d 16, 22 (1st Cir. 2020); United States v. Tabb, 949 F.3d 81, 87 (2d Cir. 2020); United States v. Davis, 801 F. App'x 457, 458 (8th Cir. 2020); United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2020); United States v. Lovelace, 794 F. App'x 793, 795 (10th Cir. 2020); United States v. Bass, 838 F. App'x 477, 480–81 (11th Cir. 2020). The Seventh Circuit also has suggested since *Kisor* that it views the inchoate offense interpretation provided in Application Note 1 as a permissible reading of section 4B1.2(b). *See* United States v. Stewart, 813 F. App'x 241, 241–42 (7th Cir. 2020). However, they provided little elaboration. *Id.*

229. *E.g.*, *Lewis*, 963 F.3d at 22.

Circuit in *United States v. Lewis* thoroughly discussed relevant prior cases and the operative language of both section 4B1.2(b) and Application Note 1.[230] Yet it ultimately concluded that prior cases giving deference to that particular commentary foreclosed the argument that the commentary was inconsistent with the corresponding provision.[231] More pointedly, the Court grounded its decision in the doctrine that it could not overrule prior decisions except via en banc review and dismissed the argument that *Kisor* constituted subsequently announced controlling authority.[232] Despite this unexplained dodge, the court conceded that "the circuit[ ] split suggests that the underlying question is close."[233] Thus, it alluded to the merits but did not scrutinize them in earnest. [234] Other courts have been no more analytically enticed when it comes to deference and section 4B1.2(b).

The Second, Tenth, and Eleventh Circuits have taken principally the same exact stance—summarizing on-point case law applying deference to Application Note 1 and conceding the possibility (though not the substantive merit) of an en banc review of the question.[235] By contrast, the Ninth Circuit arrived at the same conclusion regarding its own precedent but expressed more openness to a substantive discussion of the arguments against deferring to a broadened construction of section 4B1.2(b).[236] In *United States v. Crum*, the Ninth Circuit declared that if it "were free to do so," it would "follow the Sixth and D.C. Circuits' lead."[237] More substantively, it explained its view that "the commentary improperly expands the definition" in section 4B1.2(b) and echoed the other courts' emphasis of textual inconsistency and procedural laxity, finding the latter "especially concerning given that the Commission's interpretation will likely increase the sentencing ranges for numerous defendants whose prior convictions qualify as controlled substance offenses due solely to Application Note 1."[238] In short, the Ninth Circuit endorsed the anti-deference view on the merits and implied a lack of counterarguments.[239]

230. *Id.* at 21–24.

231. *Id.* at 22.

232. *Id.*

233. *Id.* at 25.

234. *Id.*

235. *Tabb*, 949 F.3d at 87; *Lovelace*, 794 F. App'x at 795; *Bass*, 838 F. App'x at 480–81.

236. United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2020).

237. *Id.*

238. *Id.*

239. It should be noted that both defendant Crum's petition for rehearing en banc and for certiorari at the Supreme Court were denied. United States v. Crum, 2019 U.S. App. LEXIS 32409

III. WHAT TO DO ABOUT DEFERENCE TO THE COMMENTARY

For *Stinson* to remain good law, its conclusion regarding deference to the commentary accompanying the U.S. Sentencing Guidelines cannot be viewed as a categorical rule. Indeed, to the extent it remains even the default or presumptive rule, individual Guidelines provisions and the commentary accompanying them should be analyzed on a case-by-case basis under *Kisor*. This means, above all, bringing to bear rigorous interpretive methods on the relevant text. The work of Professors Stack and Nou invites judges to place the Commission's impetus front and center: promoting consistency and fairness in sentencing policy.[240] Judge Bibas's invocation of the rule of lenity in *Nasir* echoes this principle—at the interpretive analysis and ambiguity phase of interpretation, one should consider whether a construction provided by the commentary is the more punitive proposed meaning.[241] With this in mind, only when "traditional tools of construction" and this adapted fairness-lenity principle are exhausted should judges properly find the Guideline "genuinely ambiguous" and consider deference.

A straightforward application of this framework, perhaps unsurprisingly, leads to the conclusion reached by the D.C., Sixth, and Third Circuits with respect to section 4B1.2(b). The standalone text of the Guidelines provision makes clear that it not only purports to define "controlled substance offense" but also that the available language does not mention the so-called inchoate or incomplete versions of the crimes described.[242] Of course, linguistic canons emphasize the problematic implications of the Commission's choice to reference inchoate language elsewhere—including in the other qualifying section 4B1.2 offense, "crime of violence."[243] Thus, even an initial blush of textual analysis suggests there is inconsistency between the Guideline and its commentary, which lexically and substantively add to the qualifying offenses. And yet, even if one were to accept the view that the norm in criminal law of punishing inchoate offenses breathes ambiguity into the definition in section 4B1.2(b), the rule of lenity cautions strongly against this construction. If the Commission wishes to effectively double the sentences of offenders by including inchoate offenses in the career offender tabulation, it should have to do so in close consultation

(9th Cir. Oct. 29, 2019); Crum v. United States, 140 S. Ct. 2629 (2020). This implies an uncertain future for section 4B1.2(b).

240. *See supra* Part I.B.2 (analyzing and comparing these interpretive methodologies).

241. *See supra* notes 223–227 and accompanying text (discussing the application of the rule of lenity to the interpretation of the Guidelines).

242. *See supra* notes 188–192 and accompanying text (analyzing Guidelines section 4B1.2(b)).

243. *See supra* notes 204–206 and accompanying text (applying the *expressio unius* canon).

with Congress—that is how the Act and original Commission envisioned the promulgation process, despite the apparent preference of Congress in the 1980s for strong medicine in sentencing.[244]

It is simple enough to suggest circuits dispense with prior decisions interpreting section 4B1.2(b) because they strain under the plain meaning of the Guidelines, contravene the notice and fairness principles that should guide regulatory interpretation when a provision is ambiguous, and involve the extremely high stakes of criminal sentencing. But while these panels instead leaned on their past conclusions about the meaning of section 4B1.2(b), the approaches of the D.C. and Sixth Circuits could be seen as heeding the command of *Stinson* not to defer where a supplied meaning is "inconsistent with, or a plainly erroneous reading of" the underlying provision. In addition, as the Third Circuit's decision implies, *Kisor* may represent new authority justifying reconsideration of circuit precedent. Of course, the Supreme Court also has the power to address the issue and the differing circuit approaches to it, an opportunity it recently declined.[245] This decision to deny certiorari, though unexplained, could be read as suggesting the Court is comfortable with the deferential approach to interpreting punitive Guidelines commentary. Nevertheless, this Note has sought to explicate both why that approach is inappropriate and how its defects represent precisely the kind of interpretive problem Congress, the Commission, the Supreme Court, and scholars have worked to avoid.

CONCLUSION

Fortunately, the problem can be solved. Congress can instruct the Commission to more explicitly exclude inchoate offenses in section 4B1.2(b) and similar provisions. The Commission can clarify the appropriate impact inchoate offenses should have on how parties and judges determine offense levels and sentencing ranges. And, in light of shifting societal attitudes regarding the punishment of nonviolent drug offenses, individual judges can discount enhancements based on inchoate drug offenses in their sentencing decisions. All would be welcome steps toward addressing the specific problem of how to interpret section 4B1.2(b) and clarifying how punishment of inchoate offenses should fit within our penological system more generally. But no matter whether lawmakers and trial judges seize the opportunity to weigh in, the federal appellate courts have their own job to do. When

244. *See generally supra* Part I.A (discussing the origins and role of the Guidelines).

245. *See* United States v. Crum, 2019 U.S. App. LEXIS 32409 (9th Cir. Oct. 29, 2019), *cert. denied*, 140 S. Ct. 2629 (2020) (no opinions accompanying denial).

they view the commentary through the lenses of *Kisor*'s interpretive rigor, the aims of the Commission, and the rule of lenity, appellate judges should find that deference that doles out additional punishment is wrong, both as a matter of law and as a matter of penological policy.

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