Uncommon Allies: Bridging the Gap Between *Auer* Deference and the Rule of Lenity in Criminal Cases

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I. INTRODUCTION

Judicial deference to administrative agencies remains a highly contentious issue in administrative law.[1] Recently, the Supreme Court granted certiorari in *Kisor v. Wilkie*[2] to address whether it should abandon the long-standing judicial deference doctrine according to which courts must defer to an agency's interpretation of the agency's own ambiguous regulation unless the interpretation is "plainly erroneous or inconsistent with the regulation"[3]—referred to as *Seminole Rock* or *Auer* deference.[4] While the Court declined to overrule the doctrine, what emerged from *Kisor* is a deference rule far more limited in scope.[5] And while the Court made clear that *Auer* deference is not going away anytime soon,[6] it did not address whether *Auer* deference applies to the same extent and force—or at all—in criminal cases, or to civil regulations that carry potential criminal penalties. Justice Thomas and the late Justice Scalia suggested that they would take up this issue in the proper case,[7] but confusion remains among the circuit courts

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1. *See, e.g.*, Jonathan H. Adler, Auer *Evasions*, 16 GEO. J.L. & PUB. POL'Y 1, 14 (2018) (arguing deferring to agency interpretations of regulations violates separation-of-power principles); Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects*, 87 FORDHAM L. REV. 531, 535 (2018) (arguing deferring to agency interpretations of regulations allows agencies to expand authority by promulgating ambiguous regulations); Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 HARV. J.L. & PUB. POL'Y 625, 629-30 (2019) (noting "considerable pushback" against administrative state and delegation of "law-interpreting power" to administrative agencies); Jeffrey A. Pojanowski, *Revisiting* Seminole Rock, 16 GEO. J.L. & PUB. POL'Y 87, 90-91 (2018) (noting various criticisms of judicial deference to administrative interpretations of regulations).

2. 139 S. Ct. 2400 (2019).

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

4. *See Kisor*, 139 S. Ct. at 2408 (confronting explicitly whether to overrule deference doctrine).

5. *See id.* (acknowledging *Auer* deference's important role in construing regulations but restricting its scope).

6. *See id.* at 2418 (explaining Court not persuaded *Auer* wrongfully decided, seeing no special justification for abandoning doctrine).

7. *See* Whitman v. United States, 574 U.S. 1003, 1005 (2014) (Scalia, J., joined by Thomas, J., statement respecting denial of certiorari) (stating he remains "receptive" to granting review of issue when raised in proper setting); *see also* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) (declining to decide whether rule of lenity supplants *Chevron* deference because statute not ambiguous).

as to whether *Auer* deference is appropriate, or even constitutional, in the criminal context.[8]

With the Court never squarely addressing this issue, circuit courts are left to rely on dicta in several Supreme Court decisions that lead to no clear answer. For example, in *Ehlert v. United States*,[9] the Court deferred to the Government's interpretation of a Selective Service regulation, affirming the defendant's criminal conviction for failing to submit to induction into the armed forces.[10] The Court explained, "since the meaning of the language is not free from doubt, we are obligated to regard as controlling a reasonable, consistently applied administrative interpretation if the Government's be such."[11] And in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[12] the Court deferred to the Secretary of the Interior's interpretation of an ambiguous statute under *Auer*'s counterpart doctrine, *Chevron* deference,[13] even though the statute carried criminal penalties.[14] The Court rejected the rule of the lenity—according to which courts must resolve ambiguous criminal laws in favor of defendants—in favor of deferring to the Secretary's interpretation, noting that "[w]e have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute

8. *See, e.g.*, United States v. Phifer, 909 F.3d 372, 385 (11th Cir. 2018) (holding *Auer* does not apply in criminal cases); Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1024 (6th Cir. 2016) (applying *Chevron* deference to interpreting statutes with criminal implications in absence of Supreme Court guidance), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1572 (2017) (declining to address whether *Chevron* deference should apply over rule of lenity); NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1287 (10th Cir. 2003) (stating deference appropriate if not conflicting with "interpretive norms regarding criminal statutes").

9. 402 U.S. 99 (1971).

10. *See id.* at 100, 104-05 (presenting facts and accepting Government's interpretation of regulation); *id.* at 108 (affirming lower court's judgment).

11. *Id.* at 105.

12. 515 U.S. 687 (1995).

13. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-44 (1984). In *Chevron*, the Court held that agency interpretations of the statute the agency is charged with administering receive "considerable weight" if Congress has not addressed the precise question at issue and the agency's interpretation is a permissible construction of the statute. *Id.* at 844. *Chevron* deference, however, applies only where the agency has acted with the force of law. *See* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001). While Scalia has described *Auer* deference as *Chevron* deference applied to regulations, others suggest that the two rules are distinct doctrines occupying separate domains. *See* Adler, *supra* note 1, at 3-4. As such, whether courts should apply *Chevron* deference in criminal cases may not have the same answer as whether courts should apply *Auer* deference in criminal cases and is outside the scope of this Article. *See generally* William T. Gillis, Note, *An Unstable Equilibrium: Evaluating the "Third Way" Between* Chevron *Deference and the Rule of Lenity*, 12 N.Y.U. J.L. & LIBERTY 352 (2019) (evaluating strengths and weaknesses of reconciling *Chevron* deference and rule of lenity); David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 504 (2007) (arguing rule of lenity applies in immigration cases after determining agency's interpretation not permissible construction).

14. *See Sweet Home*, 515 U.S. at 708 (concluding Secretary's "harm" definition justified). In his dissent, Justice Scalia points out that the statute at issue carries criminal penalties. *Id.* at 721 (Scalia, J., dissenting) (describing penalty provisions of Endangered Species Act); *see also* 16 U.S.C. § 1540(b)(1) (1973) (amended 2002) (outlining criminal penalties associated with violations).

authorizes criminal enforcement."[15] In 1946, however, shortly after deciding *Bowles v. Seminole Rock & Sand Co.*, the Court suggested that a strict rule of construction should apply in criminal cases.[16] In a number of subsequent cases, the Court further suggested that the rule of lenity should apply to statutes and regulations that carry both civil and criminal penalties.[17] And, perhaps most notably, the late Justice Scalia, joined by Justice Thomas, insisted that judicial deference to administrative agencies must give way to the rule of lenity because "[c]riminal statutes 'are for the courts, not for the Government, to construe.'"[18] Scalia further insisted that the Court's "drive-by ruling" in *Sweet Home* "deserves little weight."[19]

The circuit courts have reached no consensus. The Eleventh Circuit held in *United States v. Phifer* that *Auer* does not apply in criminal cases and that the court should instead apply the rule of lenity.[20] The court declined to defer to the Drug Enforcement Administration's (DEA) interpretation of a regulation defining "positional isomer," a term with multiple and varying scientific definitions, and which was relevant to determining whether the defendant was guilty of possessing a controlled substance.[21] Similarly, in *United States v. Moss*,[22] the Fifth Circuit interpreted regulations authorized under the Outer Continental Shelf Lands Act (OCSLA) in favor of the defendants because the proposed interpretation of the regulations at issue was contradictory to the agency's earlier interpretation and carried criminal penalties.[23] The Fifth Circuit remarked, "[w]here, as here, a regulatory violation carries criminal penalties, the regulation must be strictly construed and cannot be enlarged by analogy or expanded beyond the plain meaning of the words used."[24] In *NLRB v. Oklahoma Fixture Co.*, however, the Tenth Circuit found a statute that imposed criminal penalties for payments between employers and unions to be ambiguous and ultimately deferred

15. *Sweet Home*, 515 U.S. at 704 n.18.

16. *See* M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946) (arguing explicit and unambiguous provisions needed to adequately inform those subject to them).

17. *See* Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (applying rule of lenity to interpret statute with criminal and noncriminal applications); Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 16 (2011) (acknowledging rule of lenity can apply when interpreting criminal statutes in noncriminal contexts); Maracich v. Spears, 570 U.S. 48, 76 (2013) (considering applying rule of lenity to interpret civil remedies provision of statute).

18. *See* Whitman v. United States, 574 U.S. 1003, 1003-04 (2014) (Scalia, J., joined by Thomas, J., statement respecting the denial of certiorari) (quoting Abramski v. United States, 573 U.S. 169, 191 (2014)).

19. *Id.* at 1005 (noting rule of lenity encroaches on legislature's sole power to define crimes and fix punishments).

20. *See* United States v. Phifer, 909 F.3d 372, 383, 385 (11th Cir. 2018) (explaining court's holding).

21. *See id.* at 375, 379-80 (presenting competing definitions of "positional isomer").

22. 872 F.3d 304 (5th Cir. 2017).

23. *See id.* at 314-15 (reasoning agency's interpretation contradicts agency's earlier interpretation of regulation).

24. *Id.* at 308 (quoting United States v. CITGO Petroleum Corp., 801 F.3d 477, 482 (5th Cir. 2015)).

to the National Labor Relations Board's interpretation.[25] The court reasoned that deference to the agency would be appropriate as long as deference was "not in conflict with interpretive norms regarding criminal statutes."[26] And in *Esquivel-Quintana v. Lynch*, the Sixth Circuit rejected the rule of lenity in favor of deferring to the Board of Immigration Appeals' interpretation of an ambiguous statute that carried both civil and criminal penalties.[27] While noting "compelling reasons" to apply the rule of lenity, the Sixth Circuit chose to follow Supreme Court precedent in applying *Chevron* deference to immigration laws in the absence of controlling authority to the contrary.[28] While the Supreme Court ultimately reversed this decision, it did so on the basis that the statutory language was not ambiguous.[29] The Court, therefore, did not reach the issue of whether *Chevron* deference or the rule of lenity should apply.[30]

With federal regulations encompassing an extraordinary range of conduct, whether courts should defer to agencies in criminal cases carries critical implications. Indeed, no one really knows how many federal regulations impose criminal penalties,[31] and regulations—even in the civil context—often have a more direct role in defining our legal rights than statutes passed by Congress.[32] Compounding this uncertainty is the fear that agencies can stretch the already expansive federal criminal landscape beyond the plain language of regulations by advancing new interpretations without engaging in rulemaking procedures.[33] Another concern is that deferring to agencies in the criminal context violates separation-of-powers principles, permitting agencies, rather than Congress, to define criminal conduct.[34] Eliminating deference to administrative agencies in criminal cases may seem to be an obvious solution, especially when the rule of lenity instructs courts to construe ambiguous criminal laws narrowly. But an all-or-nothing approach fails to accommodate the complex reality of the modern

25. *See* NLRB v. Okla. Fixture Co., 332 F.3d 1284, 1285, 1291 (10th Cir. 2003) (setting forth facts and holding inclusion of permit fees reasonable due to ambiguous statutory language).

26. *Id.* at 1287.

27. Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1024 (6th Cir. 2016) (stating court must adhere to precedent requiring *Chevron* deference to agency's interpretation), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

28. *See id.* at 1023-24 (discussing decision rejecting rule of lenity).

29. *See Esquivel-Quintana*, 137 S. Ct. at 1572-73 (stating no deference necessary because statutory language reads unambiguously in context).

30. *See id.* at 1572.

31. *See* Gamble v. United States, 139 S. Ct. 1960, 2008 n.98 (2019) (Gorsuch, J., dissenting) (asserting "There are so many federal criminal laws that no one . . . knows the actual number").

32. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614-15 (1996) (noting agencies' major influence on public's legal rights).

33. *See, e.g.*, Matthew C. Stephenson & Miri Polgoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1464 (2011) (suggesting deference allows "agencies to issue binding legal norms while escaping . . . constraints"); Cass, *supra* note 1, at 535 (highlighting concern agencies rely on deference to subsequent rule interpretations to expand their authority).

34. *See, e.g.*, United States v. Phifer, 909 F.3d 372, 383-84 (11th Cir. 2018) (refusing deference to agency interpretation in criminal case due to separation-of-powers concerns).

administrative state and the necessary role that agencies play in implementing statutory schemes when authorized by Congress.[35] This approach also fails to acknowledge that, while only Congress has the constitutional authority to define new crimes, language has its limits, and even courts engage in delegated law-making when interpreting criminal statutes and regulations.[36]

This Article argues that *Auer* deference, as limited in *Kisor v. Wilkie*, has a necessary and important place in federal criminal jurisprudence under certain limited circumstances. Specifically, courts should utilize the three-step framework set forth in *Kisor* to determine whether *Auer* deference or the rule of lenity is most appropriate based on the circumstances of a specific case, rather than rejecting agency deference altogether at the outset. The "character and context" inquiry under the final phase of the *Kisor* framework balances the normative values justifying *Auer* deference against the values justifying the rule of lenity.[37] In this way, courts can choose between *Auer* deference and the rule of lenity based on what makes more sense on a case-by-case basis.

This Article proceeds as follows: Part II provides a brief overview of the evolution of *Auer* deference and the rule of lenity.[38] Part III compares these rules, revealing similarities that may allow both rules to work together.[39] Part IV explains how *Kisor*'s three-step framework allows courts to balance the justifications underpinning each rule to determine which rule is more appropriate given the specific circumstances at issue.[40] Part IV also provides an example of a case in which *Auer* deference would be more appropriate and a case in which the rule of lenity would be more appropriate.[41] And finally, Part V briefly addresses other normative canons of construction that may not work as well in conjunction with *Auer* deference.[42]

35. *See* Daniel E. Walters, *The Self-Delegation False Alarm: Analyzing* Auer *Deference's Effects on Agency Rules*, 119 COLUM. L. REV. 85, 107-09 (2019) (explaining *Auer* deference promotes increased flexibility in administration of regulations while "guarding against . . . 'administrative authoritarianism'").

36. *See, e.g.*, Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 472-75 (1996) (arguing "federal criminal law should be viewed as a system of delegated common law-making"). Kahan posits that Congress "transfers lawmaking responsibility to courts" by resorting "to general statutory language." *Id.*

37. *See infra* notes 62-67 and accompanying text (explaining factors bearing upon whether agency interpretation entitled to controlling weight); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (describing considerations at final phase of inquiry).

38. *See infra* Part II.

39. *See infra* Part III.

40. *See infra* Part IV.

41. *See infra* Sections IV.B-C.

42. *See infra* Part V.

II. BACKGROUND

A. Auer *Deference*

Judicial deference to agencies first took hold in the early twentieth century,[43] and by 1945, it was a "'common sense' idea" that agencies occupied a superior position as compared to courts when it came to determining what an agency meant when it promulgated a rule, and how an agency could best effectuate its purposes under a given rule.[44] This view was expressed in *Bowles v. Seminole Rock & Sand Co*.[45] and then affirmed fifty years later in *Auer v. Robbins*.[46]

In *Seminole Rock*, a crushed-stone manufacturer challenged a regulation promulgated by the Administrator of the Office of Price Administration under the Emergency Price Control Act of 1942.[47] 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."[48] The Court noted that, while congressional intent or constitutional principles may be relevant when choosing between different interpretations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[49] As a result, a court's "only tools" when interpreting a regulation "are the plain words of the regulation and any relevant interpretations of the [agency]."[50] After consulting an agency bulletin, the Court interpreted the regulation so as to be consistent with the agency's guidance.[51]

Half a century later, Justice Scalia wrote the unanimous opinion of the Supreme Court reaffirming the rule of *Seminole Rock* in *Auer v. Robbins*.[52] The *Auer* Court deferred to the Secretary of Labor's interpretation of his own regulations regarding employee entitlement to overtime pay under the Fair Labor Standards Act of 1938.[53] Because the Secretary was interpreting his own regulations, the Court focused on whether the interpretation was "plainly erroneous or inconsistent with the regulation."[54] After finding that the regulation did not compel the employees' interpretation, the Court deferred to the Secretary's

43. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 965 (2011) (explaining agency deference concept emerged from appellate review model).

44. *See* Manning, *supra* note 32, at 614 (quoting 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.10 (3d ed. 1994)) (describing emerging twentieth century deference granted to federal agencies).

45. 325 U.S. 410, 414 (1945).

46. 519 U.S. 452, 461 (1997).

47. *Seminole Rock*, 325 U.S. at 411-12.

48. *Id.* at 413-14.

49. *Id.* at 414.

50. *Id.*

51. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 417-18 (1945).

52. Auer v. Robbins, 519 U.S. 452, 453 (1997).

53. *See id.* at 461.

54. *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

interpretation because it was "a creature of the Secretary's own regulations," and the regulation comfortably bore the meaning the Secretary assigned to it.[55] When the employees argued that the Court should construe the regulation narrowly against the employer, the Court explained that that rule of construction governed only judicial interpretations of statutes and regulations, and should not be applied as a "limitation on the Secretary's power to resolve ambiguities in his own regulations."[56] Because the Secretary was subject to only the limits imposed by statute, he could write regulations "as broadly as he wishes," and "[a] rule requiring the Secretary to construe his own regulations narrowly would make little sense."[57]

After delivering the unanimous *Auer* opinion, however, Scalia himself sought to limit the breadth of discretion this rule conferred upon agencies.[58] Legislators, commentators, and Supreme Court Justices have mounted a number of challenges to the doctrine.[59] The Supreme Court resolved the contentious debate—at least for now—in *Kisor v. Wilkie*, reaffirming *Auer* while purporting to limit its scope.[60] Prior to *Kisor*, an agency's interpretation of an ambiguous regulation was binding as long as it was a reasonable interpretation, even if it was not the best or most natural interpretation.[61] The *Kisor* Court cut against this expansive characterization and set forth a three-step inquiry for determining whether deference to an agency's interpretation of its own regulation is appropriate.[62] First, the court must determine whether the regulation is "genuinely ambiguous" by "exhaust[ing] all the 'traditional tools' of construction."[63] Second, if the regulation is genuinely ambiguous, the court must then determine whether the agency's interpretation falls within "the zone of ambiguity the court has identified after employing all its interpretive tools."[64] And lastly, the "court must make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight."[65] Declining to set forth an exhaustive test, the Court identified three markers that may indicate whether the agency

55. *Id.* at 457-58, 461-62.

56. *Auer*, 519 U.S. at 462-63 (explaining application of rule of construction).

57. *Id.* at 463.

58. *See* Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 69 (2011) (Scalia, J., concurring) (expressing interest in revisiting *Auer*).

59. *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 108 (2015) (Alito, J., concurring) (inviting opportunity to reconsider *Auer*'s underlying precedent); Decker v. Nw. Env't Def. Ctr., 568 U.S. 597, 615-16 (2013) (Roberts, C.J., concurring) (noting interest in reconsidering *Auer* and *Seminole Rock* deference in future case); *Talk Am., Inc.*, 564 U.S. at 69 (Scalia, J., concurring); Adler, *supra* note 1, at 14 (arguing *Auer* violates separation-of-power principles); Cass, *supra* note 1, at 535 (arguing *Auer* deference allows agencies to expand authority by promulgating ambiguous regulations).

60. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2422-24 (2019) (remanding to determine if *Auer* deference should apply when ambiguity present).

61. Manning, *supra* note 32, at 627-28 (describing deference prior to *Kisor*).

62. *See Kisor*, 139 S. Ct. at 2414-16 (detailing three-step analysis).

63. *Id.* at 2415 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

64. *Id.* at 2415-16.

65. *Id.* at 2416.

interpretation is entitled to deference.[66] First, the interpretation must represent the agency's authoritative or official position rather than an "ad hoc statement not reflecting the agency's views."[67] Second, the interpretation must implicate the agency's expertise.[68] And third, the agency's interpretation must reflect its "fair and considered judgment."[69] Only after the interpretation passes these three steps may the court defer to the agency.[70]

B. The Rule of Lenity

The rule of lenity's roots trace further back in American and English jurisprudence. English common law courts began construing criminal statutes narrowly when death was the punishment for most felonies.[71] The rule is thought to have originated in American jurisprudence in the early seventeenth century in *United States v. Wiltberger*.[72] In *Wiltberger*, the Court was tasked with determining whether U.S. courts had jurisdiction over manslaughter committed on a United States vessel located in a river in China.[73] The main issue was whether the river was part of the "high seas" within the meaning of the Judiciary Act of 1789, which would have conferred jurisdiction on U.S. courts.[74] Chief Justice Marshall described the rule that criminal laws are to be construed strictly, invoking its well-established history in American and English jurisprudence:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[75]

The Court ultimately declined to "enlarge the statute" beyond the crimes Congress already made punishable, holding that the river was not part of the "high seas."[76]

Put simply, "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."[77] Despite having stood the test of time, the rule has not remained entirely unchanged over the years, and

66. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (claiming inquiry does not reduce to exhaustive test, laying out markers instead).

67. *See id.* (describing first marker).

68. *See id.* at 2417.

69. *See id.* (quoting Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2159 (2012)).

70. *See Kisor*, 139 S. Ct. at 2418 (summarizing Court's limitations of *Auer*'s scope).

71. *See* Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 897 (2004) (discussing rule of lenity's early origins in English criminal law).

72. 18 U.S. (5 Wheat.) 76 (1820).

73. *See id.* at 77.

74. *See id.* at 84 (describing issue in case).

75. *Id.* at 95.

76. *Wiltberger*, 18 U.S. (5 Wheat.) at 105 (articulating holding in case).

77. United States v. Santos, 553 U.S. 507, 514 (2008).

some suggest that courts fail to apply it as consistently as one may expect.[78] Because the rule of lenity applies only to ambiguous laws, the sources a judge is willing to consult in interpreting a statute or regulation bear on the frequency with which a judge will find the statute or regulation ambiguous and apply the rule of lenity.[79] Initially, courts generally found a statute ambiguous without consulting legislative intent and construed the law in favor of the criminal defendant.[80] But after the appointment of Justice Frankfurter in 1939, the Court began considering legislative history and other materials beyond the text of the statute before resorting to the rule of lenity.[81] The Court emphasized "common sense" and legislative purpose, treating the rule of lenity as a last resort among interpretive canons.[82] Under this approach, the rule of lenity operates as a tie-breaker when courts fail to reach a "best reading" of the language at issue.[83] The appointment of Justice Scalia and the return of textualism, however, fostered a divide on the bench, with some justices prioritizing the rule of lenity over other interpretive canons or sources of legislative purpose.[84] While the issue remains unresolved, it brings us back to the subject of this Article: Whether the rule of lenity should preclude the application of *Auer* deference in criminal cases.

III. SIMILARITIES BETWEEN *AUER* AND THE RULE OF LENITY

The assumption that the rule of lenity and *Auer* deference advance conflicting policies furthers the idea that these doctrines are irreconcilable. But these doctrines are not so different after all, and both can play a part in resolving ambiguous regulations that carry criminal implications. This Article addresses two main similarities: both are normative canons of construction and both involve an ambiguity threshold.

78. *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 346 (1994); Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity, and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 102 (2016); Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 58 (1998) (noting inconsistent application of rule and recognizing some state legislatures eliminated rule entirely). "Although widely accepted, the rule is by no means adhered to universally." Solan, *supra*, at 58.

79. *See* Ortner, *supra* note 78, at 102-05 (recognizing varying standards of ambiguity employed in Supreme Court jurisprudence); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2118 (2016) (book review) (explaining judges cannot initially determine whether statute ambiguous "in a settled, principled, or evenhanded way").

80. *See* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1204 (2013) (outlining traditional use of rule of lenity).

81. *See id.* (discussing Court's new interpretation of rule of lenity).

82. *See id.* at 1205-06 (quoting United States v. Brown, 333 U.S. 18, 25 (1948)) (analyzing general decline of rule of lenity).

83. *See* Price, *supra* note 71, at 891 (describing common judicial approach which has gained favor in state and federal courts).

84. *See* Kahan, *supra* note 78, at 393-95 (contrasting judicial philosophies of pro-lenity and anti-lenity Court factions).

A. As Normative Canons of Construction

Both *Auer* deference and the rule of lenity fall under a category of interpretive rules known as normative canons of construction. Normative canons of construction "direct courts to construe any ambiguity in a particular way in order to further some policy objective,"[85] and they embody judicial policy concerns that reflect contemporary public values.[86] The public values underlying normative canons "appeal to conceptions of justice and the common good, not to the desires of just one person or group."[87] For example, one of the underpinnings of the rule of lenity is "the due process value that government should not punish people who have no reasonable notice that their activities are criminally culpable."[88] Likewise, deference doctrines "reflect[] deeper judicial commitments,"[89] and deferring to agencies promotes judicial economy and accommodates the structure of the modern administrative state.[90] Taking a closer look at the values underlying the rule of lenity and judicial deference reveals meaningful overlap. This Article focuses on three normative values that justify both rules: uniformity, notice and due process, and separation-of-powers principles.

First, courts justify both doctrines on the grounds that they promote uniformity in the application of an overall regulatory or statutory scheme. When courts construe statutory or regulatory language that carries both criminal and civil penalties, the rule of lenity ensures that the language does not carry a different meaning in different cases.[91] When a law or regulation is susceptible to different interpretations depending on whether it is applied in the criminal or civil context, some argue that courts should apply the "least liberty-infringing interpretation" in both contexts.[92] And in general, the rule of lenity "ensures that the same 'rules of interpretation bind all interpreters, administrative agencies

85. *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (defining normative canons). Normative canons are distinguished from descriptive canons, which are based on "predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language." *Id.*

86. *See id.* at 564 (examining theoretical justifications of normative canons by leading scholars).

87. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1008 (1989) (defining public values).

88. *See id.* at 1029 (defining rule of lenity).

89. Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1727 (2010) (describing deference regimes); *see* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 618 (1992) (asserting Court inspired by constitutional considerations).

90. *See* Eskridge & Frickey, *supra* note 89, at 645 (summarizing Court's preference for executive rulemaking over congressional lawmaking).

91. *See* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1023 (6th Cir. 2019) (recognizing rule of lenity should apply in civil cases involving statutes with civil and criminal applications), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

92. *Id.* at 1028 (Sutton, J., concurring in part and dissenting in part).

included.'"[93] Deferring to agencies under *Auer*, however, also promotes uniformity by "resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation."[94] Allowing agencies to interpret their own regulations avoids circuit splits on interpretive issues,[95] which could be of particular importance in criminal law. Further, judges who lack the specialized expertise of administrative agencies are more likely to reach divergent interpretations of complex or technical regulatory regimes.[96]

Closely related to uniformity, both rules promote the values of notice and due process. One of the main justifications for the rule of lenity is to ensure that criminal defendants have fair notice of what conduct is unlawful.[97] The rationale is that if a law or regulation is ambiguous, the criminal defendant lacks sufficient notice that the conduct of which he was accused could subject him to criminal punishment.[98] Similarly, *Auer* promotes notice by ensuring uniform interpretations among the courts[99] and within an overall regulatory framework.

Courts also justify both rules based on separation-of-powers principles. When Congress's intention is unclear, courts apply the rule of lenity to avoid speculating about congressional intent.[100] In this way, the rule of lenity preserves the balance of powers by ensuring that the executive and judicial branches do not roam outside the bounds of their constitutional limits. The rule prevents the executive branch from supplanting the role of the courts by interpreting the law. Likewise, courts are blocked from creating new crimes, a role reserved exclusively for Congress.[101] Each branch is confined to its constitutionally prescribed space, with the executive enforcing, the judicial interpreting, and the legislative writing the law.

While delegation to administrative agencies blurs the line between the branches in general,[102] *Auer* deference is also premised on the principle that

93. *Id.* at 1030 (quoting Carter v. Wells-Bowen Realty, Inc., 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring)).

94. Kisor v. Wilkie, 139 S. Ct. 2400, 2413 (2019) (quoting Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 568 (1980)).

95. *See id.* at 2414 (arguing deference rule would have prevented circuit split in *Auer*).

96. *See id.* at 2413-14 (explaining benefits of uniformity).

97. *See* United States v. Santos, 553 U.S. 507, 514 (2008) (emphasizing citizens not accountable for statute with uncertain commands or unclear punishments).

98. *See id.* (explaining rule of lenity requires ambiguous statutes interpreted in favor of defendants subject to statute).

99. *See Kisor*, 139 S. Ct. at 2413-14.

100. *See Santos*, 553 U.S. at 515. "When interpreting a criminal statute, we do not play the part of a mindreader." *Id*.

101. *See* Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1027 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (explaining role of Congress to create criminal laws), *rev'd sub nom.* Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017).

102. Whether *Auer* deference is unconstitutional on the basis that it violates separation-of-power principles is outside the scope of this Article. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., dissenting). "When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the

Congress, not the courts, should write the law. As the *Kisor* plurality explained, *Auer* deference is "rooted in a presumption about congressional intent—a presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities."[103] Because Congress delegated to an agency the power to issue rules implementing a particular statutory scheme, Congress must have also implicitly delegated power to the agency to interpret its own rules.[104] When a court is faced with speculating as to what Congress intended, courts should defer to the agency based on the rebuttable presumption that the power to interpret its own rules is part of the agency's delegated law-making powers.[105] *Auer* deference further prevents courts from making policy judgments about which interpretation should prevail.[106] And finally, it is also widely recognized that Congress may delegate authority to agencies to prescribe the limits of criminal conduct.[107] The only requirements are that Congress itself makes violations of the regulations a criminal offense and sets the punishment, and that the agency does not exceed its delegated authority.[108]

B. Breaching the Ambiguity Threshold

Both the rule of lenity and *Auer* deference require courts to determine whether a regulation is ambiguous before resorting to either rule. Under both doctrines, courts must determine how much ambiguity is necessary to breach this ambiguity threshold and depart from the plain language of the regulation. While this threshold determination depends in large part on interpretive ideology, courts generally employ a similar ambiguity standard under both rules.

With the rule of lenity, one side of the bench engages in a more searching inquiry into the meaning of the text, looking to the "statutory context, 'structure, history, and purpose.'"[109] While the plain language of the regulation or statute may seem ambiguous at first, context, structure, history, or legislative purpose

law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them." *Id.*

103. *See id.* at 2412 (majority opinion) (explaining roots of *Auer* deference).

104. *See id.* (discussing scope of power Congress delegated to agencies).

105. *See id.* (discussing agencies' delegated law-making powers).

106. *See Kisor*, 139 S. Ct. at 2413 (emphasizing *Auer*'s decision regarding policy judgments).

107. *See generally* TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES (2018), https://fas.org/sgp/crs/misc/R45442.pdf [https://perma.cc/5FZK-GVGN] (explaining Congress delegating powers to agencies).

108. *See* Loving v. United States, 517 U.S. 748, 768 (1996). "We have upheld delegations whereby the Executive of an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confine themselves within the field covered by the statute.'" *Id.* (quoting United States v. Grimaud, 220 U.S. 506, 518 (1911)).

109. *See* Abramski v. United States, 573 U.S. 169, 179 (2014) (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013)).

may resolve the ambiguity.[110] The other side looks only to the ordinary usage of the words, applying the rule of lenity when the language does not "unambiguously command[] the Government's current reading" and refusing to expand the reach of criminal penalties beyond the plain text.[111] Generally, however, courts defer under the rule of lenity "after all legitimate tools of interpretation have been exhausted" and "'a reasonable doubt persists' regarding whether Congress has made the defendant's conduct a federal crime."[112]

Courts face the same conundrum when deciding whether to defer under *Auer*. In *Kisor v. Wilkie*, the Court sought to clarify the requisite level of ambiguity for *Auer* to apply.[113] Now, courts are to afford *Auer* deference only when the regulation is "genuinely ambiguous."[114] To determine whether a regulation is *genuinely* ambiguous, courts "must exhaust all the 'traditional tools' of construction."[115] They must empty the "legal toolkit," deferring only when "the interpretive question still has no single right answer."[116] To this end, courts should "'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."[117] Therefore, under both rules, courts are encouraged to consult sources beyond the plain text of a regulation before concluding that it is ambiguous.

IV. HOW *AUER* SHOULD APPLY IN CRIMINAL CASES

Auer deference, as reformulated in *Kisor*, can coexist with the rule of lenity in criminal cases. Framing the issue as how these rules can work together, rather than pitting the rules against each other, reveals that courts can ensure due process, maintain separation of powers, and respect agency expertise by adhering to the three-step framework set forth in *Kisor* to first determine whether *Auer* deference is appropriate, and then applying the rule of lenity when it is not. This part first explains how courts could apply *Auer* as articulated in *Kisor* to analyze whether *Auer* deference or the rule of lenity is more appropriate. Then, this part illustrates how *Kisor* allows courts to reach different conclusions based on the specific circumstances of a particular case by analyzing a criminal case in which *Auer* deference was more appropriate and a case in which the rule of lenity was more appropriate.

110. *See id.* at 188 n.10 (explaining process courts use when resolving ambiguity in statutes).

111. *See id.* at 203 (Scalia, J., dissenting).

112. *See id.* at 204 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).

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

114. *See id.* at 2415.

115. *See id.* (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984)).

116. *See id.* (recognizing ambiguous statutes need legislative answers when legal tools of construction become exhausted).

117. *See Kisor*, 139 S. Ct. at 2415 (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)).

A. Combining Kisor v. Wilkie *and the Rule of Lenity*

Because both rules require a certain level of ambiguity, the decision of which rule to apply should not occur until after the court determines that the regulation is sufficiently ambiguous. Indeed, neither rule would apply if a regulation is clear. As discussed further below, *Kisor*'s second and third steps—whether the interpretation is reasonable and whether the character and context of the interpretation warrant deference[118]—accommodate the due process and separation-of-power concerns underlying the rule of lenity. In some circumstances, the character and context could be such that the agency interpretation does not offend notions of due process and maintains a balance of powers—to the extent practicable in a modern administrative state. As such, the decision whether to apply *Auer* or the rule of lenity should occur at the last step, with the court analyzing the character and context of the agency interpretation.

1. Is the Regulation Genuinely Ambiguous?

As discussed above, both the rule of lenity and *Auer* deference apply only after the court determines that the regulatory language at issue is ambiguous. *Kisor*'s "genuine ambiguity" inquiry is consistent with the inquiry which courts generally engage in under the rule of lenity.

Just as *Kisor* encourages courts to exhaust the "traditional tools" of construction and empty their interpretive toolboxes by considering a regulation's "text, structure, history, and purpose,"[119] courts apply the rule of lenity only after looking to those same interpretive tools, the "context, 'structure, history, and purpose.'"[120]

Some may argue that the "genuine ambiguity" standard would limit the circumstances under which courts find in favor of criminal defendants under the rule of lenity. Indeed, Justice Scalia advocated for a more lenient standard, rejecting legislative purpose as a legitimate interpretive tool.[121] Because legislative purpose may resolve many seeming ambiguities, refusing to consider legislative purpose leads courts to find statutes and regulations ambiguous more often,

118. *See id.* (holding reasonable interpretation occurs when only one reasonable construction of ambiguous regulation); *see also id.* at 2416 (emphasizing interpretation must actually come from agency and embody agency's authoritative or official position).

119. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9); *see also id.* (acknowledging courts should consider various components of regulation as if no agency to rely on).

120. Ambramski v. United States, 573 U.S. 169, 179 (2014) (quoting Maracich v. Spears, 570 U.S. 48, 76 (2013)); *see* Moskal v. United States, 498 U.S. 103, 108 (1990) (reserving rule of lenity unless statute's intended scope in doubt even after exhausting interpretive tools). The rule of lenity applies in "those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *See Moskal*, 498 U.S. at 108 (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980)).

121. *See* Ortner, *supra* note 78, at 108-10. Justice Scalia's ambiguity standard for the rule of lenity is described as one of "reasonable doubt" that rejects extra-textual factors as tools of interpretation and results in more frequent deference to criminal defendants. *See id*.

resulting in more frequent applications of the rule of lenity.[122] In his concurrence in *Kisor*, Justice Kavanaugh recognized this implication regarding *Kisor*'s "genuine ambiguity" inquiry, predicting that fewer agency interpretations will receive deference because courts will find regulations to be ambiguous less often when resorting to more interpretive tools.[123] While judges certainly disagree as to what sources beyond the plain text courts should consider, that disagreement speaks more to the overarching dispute over the best methods of statutory interpretation and less to the merits of either *Auer* deference or the rule of lenity.[124]

Nevertheless, *Kisor*'s "genuine ambiguity" inquiry imposes no higher a standard than that invoked with the rule of lenity.[125] For example, Justice Kavanaugh invoked *Kisor*'s "genuine ambiguity" standard to explain why the rule of lenity did not apply to a criminal statute.[126] Just as with *Auer* deference, Kavanaugh emphasized that "a court may invoke the rule of lenity only 'after consulting traditional canons of statutory construction.'"[127] He further reiterated that "when 'a reviewing court employs all the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation.'"[128] Kavanaugh went on to describe the ambiguity standard for the rule of lenity as one requiring "grievous ambiguity . . . meaning that the court can make no more than a guess as to what the statute means."[129] Because *Kisor*'s "genuine ambiguity" inquiry naturally accommodates both rules, the court need not make a decision about which rule to apply at this stage of the analysis. If the regulation is not genuinely ambiguous, neither the rule of lenity nor *Auer* deference would apply.

2. Is the Agency's Interpretation Reasonable?

Under the rule of lenity, courts automatically construe a statute or regulation narrowly upon finding it ambiguous. Under the newly reformulated *Auer*, however, the next step is to determine whether the agency's interpretation is

122. *See id.* at 110.

123. *See Kisor*, 139 S. Ct. at 2448 (Kavanaugh, J., concurring) (stating overturning *Auer* more direct path to similar result).

124. *See, e.g.*, Kavanaugh, *supra* note 79, at 2118-20 (noting challenge of objective interpretation in face of ideological and partisan perspectives); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1091 (2017) (theorizing disagreement centers on whether reader or author's perspective should control).

125. *See* Ortner, *supra* note 78, at 103-04 (discussing four standards of ambiguity Supreme Court applied in lenity cases). Ortner notes that "the two more stringent standards for lenity . . . are far less likely to result in the application of lenity." *Id.* at 104.

126. *See* Shular v. United States, 140 S. Ct. 779, 788 (2020) (Kavanaugh, J., concurring) (noting rule of lenity rarely applies due to traditional tools of construction).

127. *Id.* at 787 (quoting United States v. Shabani, 513 U.S. 10, 13 (1994)).

128. *Id.* at 788 (quoting Kisor v. Wilkie, 139 S. Ct. 2400, 2448 (2019) (Kavanaugh, J., concurring)).

129. *Id.* at 788-89 (quoting Ocasio v. United States, 136 S. Ct. 1423, 1434 n.8 (2016) (Kavanaugh, J., concurring)).

"reasonable."[130] Should a court find that the agency's interpretation falls outside the "zone of ambiguity," the court could then apply the rule of lenity. This way, the court chooses the narrower interpretation rather than continuing to interpret the regulation without relying on the agency. This furthers the separation-of-powers principles underpinning the rule of lenity by preventing the court from engaging in lawmaking. If the agency's interpretation is reasonable, however, the court should continue to *Kisor*'s third step, respecting Congressional delegation to the agency.

3. Does the Character and Context of the Interpretation Entitle It to Controlling Weight?

Lastly, the court analyzes whether the character and context of the agency's interpretation requires deference, "for not every reasonable agency reading of a genuinely ambiguous rule should receive *Auer* deference."[131] Under this third step, the court can determine whether *Auer* deference or the rule of lenity is more appropriate. Based on the circumstances at hand, the court can evaluate which rule more effectively furthers the normative values underpinning both rules. Indeed, many of the reasons identified by the *Kisor* Court for not deferring under *Auer* justify applying the rule of lenity.

Auer's third step requires courts to analyze whether Congress would have intended courts to defer to the agency under the specific circumstances at issue.[132] As discussed above, the *Kisor* Court identified three "markers" to guide courts in determining when *Auer* deference is appropriate. First, the interpretation must be the agency's authoritative or official position as opposed to an "ad hoc statement not reflecting the agency's views." Second, the interpretation must implicate the agency's substantive expertise. And third, the interpretation must reflect the agency's fair and considered judgment.[133]

In addition to these three markers, courts can incorporate the normative values underpinning both rules into the analysis. For example, courts can evaluate whether deferring to the agency would truly offend the notions of due process and notice underpinning the rule of lenity, or whether these normative values may be better served by deferring to the agency. As the *Kisor* Court emphasized, *Auer* deference is often inapplicable,[134] and lack of fair notice to a criminal defendant justifies applying the rule of lenity rather than *Auer* deference. But just as *Auer* deference does not apply to every reasonable interpretation of an ambiguous regulation, the rule of lenity may not be appropriate in every criminal case

130. *See Kisor*, 139 S. Ct. at 2416 (quoting City of Arlington v. FCC, 569 U.S. 290, 296 (2013)) (clarifying *Auer* deference).

131. *Id.* (outlining application of *Auer* deference).

132. *See id.* "[W]e give *Auer* deference because we presume, for a set of reasons relating to the comparative attributes of courts and agencies, that Congress would have wanted us to." *Id.*

133. *See id*. at 2416-17 (outlining markers for *Auer* deference).

134. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019) (summarizing upshot of *Auer* analysis).

involving an ambiguous regulation—specifically when the agency's interpretation provides fair notice to the defendant. If an agency's official or authoritative interpretation provides constructive notice to the defendant, then the other normative values underpinning *Auer* deference—such as agency expertise or regulatory uniformity—may justify deferring to the agency's interpretation. Under this last step, courts can evaluate the normative values underpinning each canon in light of the specific circumstances of the case to determine which rule should prevail.

B. United States v. Phifer*: A Case in Which the Court Should Have Deferred Under* Auer

In *United States v. Phifer*, the Eleventh Circuit rejected *Auer* deference and applied the rule of lenity even though the case involved circumstances under which it made more sense to defer to the agency's interpretation of the ambiguous regulation.[135] *Phifer* predates *Kisor*, and the Eleventh Circuit operated under the understanding that *Auer* deference indiscriminately demanded deference unless the agency's construction was "plainly erroneous or inconsistent with the regulation," "even if the agency's interpretation appears for the first time in a legal brief in the very litigation at issue."[136] Under the newly reformulated *Auer*, however, the court should have found that *Auer* deference was appropriate, and the normative values underpinning the rule of lenity did not outweigh those justifying *Auer* deference based on the particular circumstances of the case.

John Alexander Phifer was convicted of possession with intent to distribute a controlled substance in violation of the Controlled Substances Act (CSA).[137] Because the government accused Phifer of possessing ethylone, ethylone must have qualified as a controlled substance under the DEA's regulations for Phifer's conviction to stand.[138] The CSA grants authority to the Attorney General to identify substances as "controlled substances" under the Act.[139] To do so, the Attorney General must engage in notice-and-comment rulemaking, which can take six to twelve months to complete.[140] Due to the rapid expansion of illicit substances in the illegal drug market, Congress amended the CSA to permit the Attorney

135. *See* United States v. Phifer, 909 F.3d. 372, 385 (11th Cir. 2018) (holding *Auer* deference does not apply in criminal cases).

136. *See id.* at 383 (explaining *Auer* analysis).

137. *See id.* at 375; 21 U.S.C. § 841(a)(1); *id.* § 841(b)(1)(C).

138. *See Phifer*, 909 F.3d at 375.

139. 21 U.S.C. § 811(a)(1)-(2).

140. *See Phifer*, 909 F.3d at 375 (noting process and typical timeline for rulemaking procedure); *see also* Touby v. United States, 500 U.S. 160, 162-63 (1991) (describing process Attorney General must comply with to add controlled substance to schedule).

General to identify controlled substances on a temporary basis.[141] The Attorney General delegated this power to the DEA.[142]

In March of 2014, the DEA Administrator designated a substance called butylone as a temporary controlled substance under the CSA.[143] A newly promulgated regulation then listed butylone as a temporarily controlled substance.[144] Also considered a controlled substance under this regulation were butylone's "optical, positional, and geometric isomers."[145] At the time of Phifer's arrest, ethylone was not yet identified as a controlled substance on a permanent or temporary basis.[146] But if ethylone constituted a "positional isomer" of butylone, it would constitute a controlled substance under the regulation at issue.[147] While Phifer did not dispute he possessed ethylone at the time of his arrest, he argued that ethylone did not constitute a positional isomer of butylone as defined in the DEA's regulations.[148] As such, the *Phifer* court was tasked with interpreting the DEA's definition of "positional isomer."[149]

The DEA established its own definition for "positional isomer" because the term "is not universally defined, and, therefore, is subject to scientific interpretation."[150] The DEA defined "positional isomer" as "any substance possessing the same molecular formula and core structure and having the same functional group(s) and/or substituent(s) as those found in the respective schedule I hallucinogen, attached at any position(s) on the core structure."[151] While Phifer conceded that ethylone was a positional isomer of butylone under this definition, he argued that this definition did not apply to the term "positional isomer" as used in the temporary controlled substance regulation on the grounds that the regulation defining "positional isomer" applied only to permanently identified controlled substances.[152] Phifer further argued that the DEA's regulations provided no definition for "positional isomer" so the "scientific . . . meaning that is known commonly in the science world" should apply.[153] Further complicating the

141. *See* Food and Drug Administration Safety and Innovation Act, Pub. L. No. 112-144, sec. 1153, 126 Stat. 993, 1132 (2012) (codified as amended at 21 U.S.C. § 811(h)) (authorizing temporary scheduling of dangerous substances).

142. *See* 28 C.F.R. § 0.100 (2021).

143. *See* United States v. Phifer, 909 F.3d 372, 375 (11th Cir. 2018) (explaining classification of butylone).

144. *See* Schedules of Controlled Substances: Temporary Placement of 10 Synthetic Cathinones Into Schedule I, 79 Fed. Reg. 12,938, 12,938 (Mar. 7, 2014).

145. *See Phifer*, 909 F.3d at 376 (quoting 21 C.F.R. § 1308.11(h) (2018)) (specifying which aspects of butylone considered controlled substances).

146. *See id.* at 383 (explaining ethylone classification).

147. *See id.* at 375 (explaining how regulation of ethylone possible under CSA).

148. *See id.* at 379 (presenting Phifer's argument).

149. *See* United States v. Phifer, 909 F.3d 372, 381 (11th Cir. 2018).

150. Definition of "Positional Isomer" as It Pertains to the Control of Schedule I Controlled Substances, 72 Fed. Reg. 67,850, 67,850 (Dec. 3, 2007).

151. *Id.* at 67,851.

152. *See Phifer*, 909 F.3d at 379 (explaining Phifer's argument).

153. *See id.* (recounting Phifer's explanation of "literal definition" of positional isomer).

matter, however, was the fact that there are at least two dominant—but different—definitions for positional isomer in the scientific community.[154]

Upon finding the DEA's regulations ambiguous, the court considered whether it should defer to the DEA's definition under *Auer*.[155] The Eleventh Circuit initially concluded the DEA's definition was entitled to *Auer* deference if *Auer* applied.[156] At the time of Phifer's arrest, the DEA website identified both butylone and ethylone as controlled substances, specifically identifying ethylone as a positional isomer of butylone.[157] The court recognized the DEA's interpretation was not "plainly erroneous or inconsistent with the regulation," and that it had "no 'reason to suspect that the DEA's interpretation does not reflect the agency's fair and considered judgment.'"[158] The DEA's interpretation was consistent with prior interpretations and was not a post hoc rationalization.[159]

Nonetheless, the Eleventh Circuit held that the rule of lenity, not *Auer* deference, applies in criminal cases involving ambiguous regulations.[160] The court explained that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear."[161] The court also cited separation-of-powers concerns, explaining that "legislatures, not courts . . . define crimes."[162] The Eleventh Circuit ultimately concluded that it was bound by circuit precedent in *Diamond Roofing Co. v. Occupational Safety & Health Review Commission*,[163] in which the court explained, "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."[164]

154. *See id.* at 376-77 (noting "positional isomer" not universally defined). The DEA established its own definition of "positional isomer" for purposes of the CSA. *See id.*

155. *See* United States v. Phifer, 909 F.3d 372, 382 (11th Cir. 2018) (describing *Auer* deference).

156. *See id.* at 383 (acknowledging potential application of *Auer* deference).

157. *See id.* (noting both butylone and ethylone considered controlled substances according to DEA).

158. *See id.* at 383 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)) (explaining reasoning of court).

159. *See Phifer*, 909 F.3d at 383.

160. *See id.* at 383, 385 (holding Fifth Circuit decisions binding on Eleventh Circuit, therefore rule of lenity applies).

161. *See* United States v. Phifer, 909 F.3d 372, 383 (11th Cir. 2018) (quoting United States v. Bass, 404 U.S. 336, 347 (1971)).

162. *See id.* (differentiating roles of legislatures and courts).

163. 528 F.2d 645 (5th Cir. 1976). The Fifth Circuit originally encompassed the states within the current Eleventh Circuit before the Fifth Circuit Court of Appeals Reorganization Act divided the Fifth Circuit into two circuits, creating the Eleventh Circuit. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41); *see also Phifer*, 909 F.3d at 385 (citing Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) (considering Fifth Circuit decisions before close of business September 30, 1981 binding precedent in Eleventh Circuit)).

164. *See Diamond Roofing Co.*, 528 F.2d at 649 (concluding cannot construe regulations to mean what agency intended but did not adequately express).

The Eleventh Circuit essentially performed the first two steps of *Kisor*, finding the regulation ambiguous and the agency's interpretation reasonable.[165] The court also considered a number of factors similar to the "markers" under *Kisor*'s third step.[166] The interpretation represented the DEA's authoritative or official position because it was publicized on the DEA's website prior to Phifer's arrest, it involved the DEA's subjective expertise in a rapidly evolving and unsettled scientific field, it represented "the agency's fair and considered judgment," and it was not a post hoc rationalization nor was it advanced for the first time in the instant litigation.[167]

These circumstances cut strongly against the notice concerns justifying the rule of lenity. While the regulatory language itself may have been ambiguous, the DEA's application of the regulation was not. The DEA clearly identified ethylone as a controlled substance and positional isomer of butylone on its website.[168] In fact, in a different case, the Ninth Circuit analyzed the same regulatory provision and found that a criminal defendant had sufficient notice that ethylone was a controlled substance solely because the DEA filed the Notice and Order in the Federal Register designating butylone and its positional isomers as temporary controlled substances.[169]

Further, the DEA's "positional isomer" definition reconciled several varying definitions, ensuring uniformity in the application of an overall regulatory framework. Certainly, allowing a jury to reconcile conflicting expert opinions and scientific definitions would provide less notice than applying a single definition in every administration of the same regulation.[170] As discussed above, courts

165. *See Phifer*, 909 F.3d at 382-83. Whether the Eleventh Circuit applied the "genuine ambiguity" standard is certainly open to dispute, as the court concluded that the regulation was ambiguous after finding that the regulation was susceptible to more than one interpretation and did not go so far as to exhaust all the traditional tools of construction. While the court may have found the regulation clear under the more rigorous "genuine ambiguity" standard, it would not have deferred under either *Auer* or the rule of lenity because the meaning of the regulation would not be ambiguous. As such, an analysis of *Kisor*'s first step in this context is not relevant to whether the circumstances of the case command *Auer* deference or lenity under *Kisor*'s third step.

166. *Compare* Kisor v. Wilkie, 139 S. Ct. 2400, 2416-17 (2019) (requiring interpretation of official position relevant to agency's expertise and reflecting fair judgment), *with Phifer*, 909 F.3d at 383 (deferring to agency interpretation of promulgated regulation consistent with agency's judgment).

167. *See* United States v. Phifer, 909 F.3d 372, 383 (11th Cir. 2018) (reasoning DEA's interpretation entitled to deference).

168. *See supra* note 157 and accompanying text (identifying controlled substance status of ethylone and butylone).

169. *See* United States v. Kelly, 874 F.3d 1037, 1045-49 (9th Cir. 2017).

170. As the Eleventh Circuit explained:

> If there are a handful of generally accepted definitions of "positional isomer" in the scientific community, there might be an as-applied vagueness problem. In that scenario it would be difficult to see how a reasonable person could have known in 2015 whether ethylone was a "positional isomer" of butylone. That reasonable person would have had to survey the scientific community, figure out which definitions of "positional isomer" were generally accepted, and then try to apply each of those definitions to ethylone.

have invoked the normative value of uniformity to justify the rule of lenity, and yet this value is best served under these circumstances by deferring to the DEA.

The Eleventh Circuit's holding also undermined the DEA's role in administering the CSA. While noting that the legislature, not the courts, defines crimes, the Eleventh Circuit failed to address congressional delegation to the DEA to administer the CSA. While defining crimes is the legislature's prerogative, delegating to the DEA allows Congress to effectively combat drug trafficking. As much as courts refrain from creating crimes themselves, maintaining separation of powers necessarily requires courts to respect congressionally delegated authority allowing agencies to carry out legislative intent in prescribing criminal conduct.[171] Congress amended the CSA specifically to allow the Attorney General greater flexibility in responding to the abuse of new and changing illicit substances,[172] and *Phifer* was not a case where an agency overstepped the bounds of its delegated authority. As such, separation-of-powers concerns alone are insufficient to justify applying the rule of lenity over *Auer* deference in this context.

C. United States v. Moss*: A Case in Which the Rule of Lenity Was More Appropriate*

United States v. Moss presents a case in which the normative values underpinning the rule of lenity outweigh the values justifying *Auer* deference. In this case, the government indicted several oil platform contractors, along with the platform owner and operator, for criminal violations of the OCSLA after a fatal welding accident that occurred on an offshore oil platform.[173] At issue was whether contractors—as opposed to owners or operators—could be subject to criminal liability under the OCSLA.[174]

The Bureau of Safety and Environmental Enforcement (BSEE) was charged with administering the provisions of the OCSLA at issue.[175] Whether a contractor could be subject to criminal liability under the OCSLA depended on whether contractors fell within the definition of "You" as defined in the OCSLA regulations.[176] The regulations defined "You" as "a lessee, the owner or holder of operating rights, a designated operator or agent of the lessee(s), a pipeline right-of-way holder, or a State lessee granted a right-of-use and easement."[177]

Phifer, 909 F.3d at 388 (Jordan, J., concurring).

171. *See* Loving v. United States, 517 U.S. 748, 758 (1996) (explaining delegation doctrine). "To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government." *Id.*

172. *See Phifer*, 909 F.3d at 375 (describing authority to temporarily schedule certain substances).

173. *See* United States v. Moss, 872 F.3d 304, 305 (5th Cir. 2017).

174. *Id.* at 305-06.

175. *See id.* at 306.

176. *Id.* at 307.

177. *See Moss*, 872 F.3d. at 308 (quoting 30 C.F.R. § 250.105 (2021)).

In this case, the BSEE had never before sought criminal penalties against a contractor during the entire sixty-plus year history of the OCSLA.[178] Even more, in promulgating the regulation defining "You," the BSEE rejected a more expansive definition that would have encompassed contractors.[179] The agency even represented in public statements that contractors were not subject to criminal liability, explicitly stating in an advertisement for a public workshop that "You" does not include contractors and that the BSEE regulates operators, not contractors.[180] While the BSEE argued that the regulatory language was always broad enough to include contractors, the court noted that when the BSEE promulgated a more recent regulation regarding renewable energy, it specifically included contractors and subcontractors within the definition of "You" as it pertained to this new regulation.[181]

The BSEE advanced this interpretation for the first time in the *Moss* litigation when seeking to impose criminal penalties on the contractors.[182] The fact that the BSEE represented to the public that contractors were not subject to criminal liability indicates that the interpretation was not the authoritative or official position of the agency.[183] Neither could the interpretation be the result of the agency's fair and considered judgment when it contradicted an extensive and consistent history of enforcing criminal penalties against owners and operators, but not contractors.[184] The Fifth Circuit did note that even if the case involved only civil penalties and *Auer* deference applied, the BSEE's interpretation would not warrant deference because it "flatly contradict[ed]" the agency's earlier, contemporaneous interpretation.[185] And nothing indicates that the BSEE had greater expertise than the court in interpreting this particular provision.

Assuming the interpretation would have passed both the first and second steps under *Kisor v. Wilkie*,[186] not one of the identified markers under the third step weighs in favor of deferring to the agency. Here, due process and separation-of-powers principles certainly warrant applying the rule of lenity. Given the sudden and contradictory change in the agency's position, the contractors lacked even constructive notice that they could be subject to criminal penalties under the OCSLA. And unlike in *Phifer*, there was no clear indication that Congress

178. *Id.* at 309.

179. United States v. Moss, 872 F.3d 304, 311-12 (5th Cir. 2017).

180. *Id.* at 312.

181. *Id.* at 314 (citing 30 C.F.R. § 585.112 (2021)).

182. *See id.* at 311-312 (noting interpretation "recently coined").

183. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) (distinguishing ad hoc statements from official positions).

184. *See id.* at 2417 (noting courts should not defer to agency's merely "convenient litigation position").

185. *See* United States v. Moss, 872 F.3d 304, 315 (5th Cir. 2017).

186. *See* 139 S. Ct. at 2416-17. While the Fifth Circuit did not systematically analyze whether the regulation was truly ambiguous or whether the agency's interpretation was reasonable, it essentially concluded that the language of the regulation and the agency's enforcement history precluded the agency's interpretation. *See id.* at 2416.

intended for the BSEE to impose criminal penalties on contractors.[187] In fact, the contractors in *Moss* also argued that the BSEE exceeded Congress's explicit grant of statutory authority in imposing criminal penalties on contractors.[188] The Fifth Circuit did not resolve this argument, however, after finding that the definition of "You" did not include contractors.[189]

V. *AUER*'S RELATIONSHIP TO OTHER NORMATIVE CANONS OF CONSTRUCTION

While this Article does not seek to address all normative canons of construction, briefly addressing how *Auer* may—or may not—work in conjunction with other normative canons of construction is necessary. *Auer* deference and the rule of lenity are uniquely situated in that they are based on similar normative values and involve a similar ambiguity threshold. As demonstrated above, *Auer* deference has the capacity to further the very same values underpinning the rule of lenity under the appropriate circumstances. But *Auer* deference may not adequately accommodate other normative values, and the "genuine ambiguity" standard may not apply to all other canons of construction. In such a situation, it may be more appropriate for courts to decide at the outset which normative canon to apply to resolve an ambiguous regulation, and some canons may more appropriately come into play when deciding whether a regulation is ambiguous at all under *Auer*'s new "genuine ambiguity" inquiry.

For example, according to the pro-veteran canon, provisions providing benefits to veterans are to be construed liberally in the veterans' favor.[190] The rule is based on a presumption that Congress created the benefits system intending for ambiguities to be resolved in veterans' favor[191] and furthers the policy goal of "protect[ing] those who have been obliged to drop their own affairs to take up the burdens of the nation."[192] Veterans law is also distinct from other areas of administrative law. All parties involved generally support a "veteran-friendly system," and the government's goal is not necessarily to deny benefits to veterans, "but to preserve the Secretary's view of how best to operate the system in the interest of all veterans."[193] Similarly, the "pro-Indian" canon instructs that "statutes are to be construed liberally in favor of the Indians, with ambiguous

187. *See Moss*, 872 F.3d at 311-12 (explaining legislative history specifically not extending liability to contractors).

188. *Id.* at 309.

189. *See id.* at 308-10 (defining "You" in terms of whether it includes contractors).

190. *See* Procopio v. Wilkie, 913 F.3d 1371, 1383 (Fed. Cir. 2019) (O'Malley, J., concurring); *see also* Brown v. Gardner, 513 U.S. 115, 118 (1994) (explaining courts favor veterans when ambiguous terms cause any interpretive doubt of regulation).

191. James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. MASS. L. REV. 388, 408 (2014).

192. Boone v. Lightner, 319 U.S. 561, 575 (1943); *Procopio*, 913 F.3d at 1383 (O'Malley, J., concurring) (citing *Boone* to distinguish *Chevron*).

193. Ridgway, *supra* note 191, at 420.

provisions interpreted to their benefit."[194] This canon is "rooted in the unique trust relationship between the United States and the Indians,"[195] and courts have held that this more specific canon should prevail over more general canons such as *Chevron* deference.[196] While the test set forth in *Kisor* accommodates the normative values justifying the rule of lenity, such as notice, uniformity, and separation-of-powers principles, it does not necessarily reflect normative values such as those of gratitude and trust underpinning the pro-veteran and pro-Indian canons. While courts are free to expand the "character and context" inquiry beyond the three "markers" identified in *Kisor*,[197] these equitable principles may also justify rejecting *Auer* deference at the outset.

Further, whether the pro-veteran canon is subject to the same "genuine ambiguity" inquiry as *Auer* deference remains unresolved. Recently, in considering *Kisor* on remand, the Federal Circuit held the pro-veteran canon to the same "genuine ambiguity" standard established for *Auer* deference in the Supreme Court's recent decision.[198] While the Federal Circuit initially found the regulation ambiguous before Kisor's appeal to the Supreme Court, on remand the Federal Circuit held that *Auer* deference did not apply because the regulation was not *genuinely* ambiguous.[199] Kisor argued that while the regulation may not be *genuinely* ambiguous, it may still be sufficiently ambiguous to trigger the pro-veteran canon, requiring the court to construe the regulation in Kisor's favor.[200] The dissent agreed with Kisor, arguing that the pro-veteran canon could be one of the many tools of construction at the court's disposal that the court may use to resolve an apparent ambiguity under the new first step established in *Kisor*.[201] The dissent aptly pointed out that not all canons of construction should be held to the same "tiebreaker" status as *Auer* deference.[202] Kisor raised a similar issue in his petition for a writ of certiorari, asking whether *Auer* deference should yield to a substantive canon of construction.[203] The Court, however, declined to grant certiorari as to this issue.[204] This dispute illuminates that while the Court has

194. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (explaining "standard principles of statutory construction do not have their usual force in Indian law").

195. Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (describing origins of Indian Law canon of statutory construction).

196. *See, e.g.*, Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (determining Indian law canon governed rather than *Chevron* deference); Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1462 (10th Cir. 1997) (noting "it would be entirely inconsistent" with federal Indian law policy to do otherwise).

197. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2416-17 (2019) (setting forth markers for courts to use in inquiry of agency interpretation's controlling weight).

198. Kisor v. Wilkie, 969 F.3d 1333, 1342-43 (Fed. Cir. 2020) (outlining court's analysis).

199. *Id.* (concluding term "relevant" not "genuinely ambiguous").

200. *Id.* at 1342 (outlining Kisor's final argument).

201. *See id.* at 1344 (Reyna, J., dissenting) (arguing for weighing of pro-veteran canon along with other traditional tools).

202. *See Kisor*, 969 F.3d at 1344 (rejecting majority's assumption canon treated like *Auer* deference).

203. Petition for a Writ of Certiorari at i, Kisor v. Wilkie, 139 S. Ct. 2400 (2019) (No. 18-15).

204. *See id.* (setting forth issues presented); Kisor v. Wilkie, 139 S. Ct. 657 (2018) (mem.) (granting certiorari on only one issue).

required a similar ambiguity threshold for both the rule of lenity and *Auer* deference, the same may not be said for all canons of construction. In such a case, it may be more appropriate to consider other canons as part of *Kisor*'s first step.

VI. CONCLUSION

With the Supreme Court recently affirming *Auer* deference in *Kisor v. Wilkie*, the Court should soon resolve whether *Auer* deference applies to regulations with criminal penalties, and if so, how. Settling this dispute will result in more uniform decisions and would promote a "neutral and impartial rule of law" as well as a "principled, nonpartisan judiciary."[205] Even without direct controlling authority on the matter, circuit courts can faithfully follow *Kisor* in the criminal context while still promoting the due process and separation-of-powers values that have justified rejecting *Auer* deference in favor of the rule of lenity in the past. While the rule of lenity protects these values, *Auer* deference "gives agencies their due, while also allowing—indeed, obligating—courts to perform their reviewing and restraining functions."[206] Requiring courts to engage the three-step framework set forth in *Kisor* facilitates a balancing of the values at stake so that courts can determine which rule is more appropriate for the specific case at issue. Not only does the framework further the normative values underpinning each canon, it prevents courts from rejecting deference to agencies at the outset based on policy preference alone. Only a context-specific inquiry such as that set forth in *Kisor* can "give[] agencies their due"[207] while still protecting the rights of criminal defendants.

205. *See* Kavanaugh, *supra* note 79, at 2121 (arguing settling "interpretive rules of the road" in advance would make rules more predictable).

206. *See Kisor*, 139 S. Ct. at 2415 (rejecting claim *Auer* gives agencies significant and "unreviewable" authority).

207. *Id.* (recognizing *Auer* gives agencies sufficient authority).