Lenity and *Loper Bright*: Narrow Construction of Penal Laws Trumps Administrative Deference in Criminal Contexts to Preserve Liberty and Curb Agency Overreach

STEPHEN R. SADY

Chief Deputy Federal Public Defender, Portland, Oregon (Ret.)

DEVIN D. HUSEBY

Assistant Federal Public Defender, Portland, Oregon

ABSTRACT *With the abrogation of* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. in Loper Bright Enterprises v. Raimondo*, the Supreme Court resolved mixed signals regarding administrative deference in the construction of ambiguous penal laws in favor of lenity. Administrative deference is no longer appropriate in the interpretation of penal statutes, regulations, and guidelines. The rules of construction from the earliest days of the republic require that ambiguities and silence be strictly construed in favor of the individual under the rule of lenity and the doctrine of constitutional avoidance to protect both individual liberty and the separation of powers.*

KEYWORDS *Loper Bright, agency or administrative deference,* Chevron*, construction or interpretation, ambiguity*

In *Loper Bright Enterprises v. Raimondo*, the Supreme Court admitted to having in the past sent "mixed signals" regarding administrative deference in interpreting criminal statutes.[1] In the course of abrogating administrative deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[2] the Court in *Loper Bright* resolved once and for all that, in construing ambiguous criminal statutes, courts should not defer to administrative agencies but, instead, judges should independently apply the "traditional tools of statutory construction."[3] When the linguistic rules fail to resolve ambiguity, traditional rules apply that require the strict construction of penal laws through the rule of lenity and the doctrine of constitutional avoidance.[4] Earlier, the Court in *Kisor v. Wilkie* narrowed the scope of administrative deference even when courts construe an agency's interpretation of its own regulations, requiring courts to apply the "traditional tools of statutory construction" before deciding whether a civil agency's regulation is truly ambiguous.[5]

This article sets out the sea change resulting from *Loper Bright*'s clarification that rules of lenity govern over administrative deference, which affects the interpretation of statutes on the execution of sentences, statutes establishing criminal liability, and rules with criminal applications, including sentencing guidelines. First, *Loper Bright* abrogates cases that applied administrative deference in criminal contexts, resolving mixed signals on the primacy of strict construction of penal laws. Second, *Loper Bright* clarifies that *Kisor*'s construction of regulations leaves no basis for agency deference to expand punishment through interpretation of unclear regulations or sentencing guidelines. Third, the abrogation of *Chevron* in *Loper Bright* returns courts to constitutionally based principles articulated from the earliest days of the republic that protect both individual liberty and the separation of powers.

I.

***Loper Bright* clarified that lenity governs over administrative deference in the construction of criminal statutes.** In abrogating the *Chevron* doctrine, the Supreme Court resolved "mixed signals" regarding administrative deference in the criminal context, rejecting "implicit delegations to agencies."[6] For forty years, courts have deferred to agency interpretations of statutory ambiguity and silence under *Chevron*. After *Loper Bright*, lenity governs over administrative deference in the construction of penal statutes, regulations, and guidelines.

A.

Under *Chevron*, the role of administrative deference in the criminal context was unclear. The *Chevron* doctrine emerged in a civil case involving the Environmental Protection Agency's construction of the Clean Air Act. The Court held that, if a court determines Congress has not directly addressed the precise question at issue, "the court does not simply impose its own construction on the statute," but rather, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[7] In a footnote, the Court recognized that the determination of ambiguity applied only after utilizing "traditional tools of statutory construction."[8]

In the years preceding and following *Chevron*, most courts construing criminal offenses applied the rule of lenity in criminal contexts. In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court by footnote appeared to allow for administrative deference instead of lenity in construing a statute with both criminal and civil applications.[9]

B.

***Loper Bright* clarified that lenity, not administrative deference, governs the construction of criminal statutes.** By abrogating *Chevron* in *Loper Bright*, the Supreme Court returned to the principle from *Marbury v. Madison*

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

DOI: 10.1215/10539867-12110862 · © 2026 The Ohio State University

that it is "the province and duty of the judicial department to say what the law is."[10] *Loper Bright* addressed a Department of Commerce regulation that interpreted a fisheries statute to approve fees from businesses not clearly covered by the underlying law.[11] The Court held that *Chevron* deference was inconsistent with the Administrative Procedure Act's reservation of questions of law to the courts.[12] Citing *Kisor*, the Court also rejected implicit delegations to agencies, recognizing that interpretive issues "may fall more naturally into a judge's bailiwick" than an agency's.[13] By basing its holding on the Administrative Procedure Act, the Chief Justice's majority opinion did not reach Justices Thomas and Gorsuch's assertions in concurrence that, even in the civil context, the administrative deference *Chevron* condoned violated the constitutional separation of powers.[14]

Regarding the application of administrative deference in criminal contexts, the *Loper Bright* majority's reasoning repudiated the misleading "mixed signals" from *Chevron*. The majority relied on rules calling for narrow construction of criminal law to illustrate the problem with *Chevron*'s rule of administrative deference: "Does *Chevron* apply to agency interpretations of statutes imposing criminal penalties? Does *Chevron* displace the rule of lenity?"[15]

Similarly, Justice Gorsuch's concurrence recognized that only criminal law involves lenity, so deferring to agencies to expand punishment in that context "represent[s] nearly the *inverse* of the rules of lenity."[16] Justice Gorsuch elaborated on the rationale for rejecting *Chevron* deference based on lenity's traditional role in protecting individual liberty and the separation of powers:

> Since the founding, American courts have construed ambiguities in penal laws against the government and with lenity toward affected persons. That principle upholds due process by safeguarding individual liberty in the face of ambiguous laws. And it fortifies the separation of powers by keeping the power of punishment firmly in the legislative, not in the judicial department.[17]

Even the *Loper Bright* dissenters recognized the primacy of lenity in the criminal context: Justice Kagan asserted that, even with *Chevron* intact, the "rule of lenity tells us to construe ambiguous statutes in favor of criminal defendants," and "the canon of constitutional avoidance instructs us to construe ambiguous laws to avoid difficult constitutional questions."[18]

Thus, the Court's signals are no longer mixed: the majority, concurrence, and dissenting opinions in *Loper Bright* all agreed that, in the criminal context, lenity controls over deference.

C.

***Loper Bright* abrogated previous cases applying administrative deference in criminal contexts.** The "mixed signals" on administrative deference in criminal cases trace primarily to the footnote in *Babbitt*.[19] In *Babbitt*, the forest products industry brought a facial challenge to the government's interpretation of the definition of "harm" under the Endangered Species Act. Because the definition adopted by the government had potential criminal applications, the Court added a footnote stating the agency gave fair warning of the meaning of "harm," allowing "some degree of deference" to the agency's reasonable interpretation while declining to apply the rule of lenity.[20]

The *Babbitt* footnote did not provide a general analysis of agency deference in the criminal context. As Justices Scalia and Thomas observed two decades later, "*Babbitt*'s drive-by ruling . . . deserves little weight."[21] After *Babbitt*, the Supreme Court stated that it has "never held that the Government's reading of a criminal statute is entitled to any deference."[22] *Loper Bright* put the final stake in the heart of the *Babbitt* footnote by abrogating the precedent upon which the footnote relied.[23] The *Babbitt* footnote now definitively carries no precedential force.[24]

The Court in *Loper Bright* contrasted the *Babbitt* footnote with *Abramski v. United States*.[25] In *Abramski*, the Supreme Court addressed the Bureau of Alcohol, Tobacco, Firearms, and Explosives' broad reading of materiality under the statute on straw purchasers. The Court did not care what the agency's position was on the scope of the statute or that its position had shifted over the years: "We think the ATF's old position no more relevant than its current one—which is to say, not relevant at all."[26] By citing *Abramski* in contrast to *Babbitt*, the Court clarified that the rule of lenity trumps agency deference when a "statute has criminal applications."[27]

D.

The past "mixed signals" have left a misleading legacy of superseded cases holding that administrative deference governs over rules of lenity in construing penal statutes. Based on the *Babbitt* footnote, courts have deferred to harsh agency interpretations of federal sentence reduction statutes, resulting in human and fiscal costs from thousands of years's worth of overincarceration. This line of cases began with the Bureau of Prisons, then spread to expansive readings of statutes with both criminal and civil applications administered by the Board of Immigration Appeals and the Bureau of Alcohol, Tobacco, Firearms, and Explosives. In the future, courts should recognize that *Loper Bright*'s rejection of *Chevron*'s "implicit delegations to agencies"[28] undercuts the precedential value of cases preferring administrative deference over lenity. As stated in *Loper Bright*, "agencies have no special competence in resolving statutory ambiguities. Courts do."[29]

During the *Chevron* years, the trend of routine deferral to administrative agencies in interpreting ambiguous penal statutes began in the context of the Bureau of Prisons' interpretation of the federal good time credit statute. When faced with statutory language that

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

provided credit of either fifty-four days per year against the "sentence imposed" or forty-seven days under the BOP's focus on time actually served, courts followed the *Babbitt* footnote in favor of severity rather than lenity.

In *Pacheco-Camacho v. Hood*, the Ninth Circuit found that, based on *Chevron* deference to the BOP's regulations, "the meaning of the statutory language of the [good time credit statute] is at best ambiguous, and therefore we must defer to the reasonable interpretation adopted by the BOP."[30] Citing the *Babbitt* footnote, the court held, "The rule of lenity . . . does not prevent an agency from resolving statutory ambiguity through a valid regulation."[31] Citing *Pacheco-Camacho*, most of the other circuits found the good time credit statute ambiguous and deferred to the BOP's interpretation.[32]

On review in the Supreme Court, the majority upheld the BOP interpretation by finding the statute unambiguous, leaving no need for deference under *Chevron*, although the dissenting Justices found the less-harsh alternative interpretation "more consistent with the statute's text."[33] The dissent recognized that the harsher interpretation imposed "tens of thousands of years of additional prison time on federal prisoners according to a mathematical formula [individuals in custody] will be unable to understand," "at a cost to the taxpayers of untold millions of dollars."[34] Seventeen years later, Congress "clarified" in the First Step Act that it intended the less-harsh interpretation of the statute and applied it retroactively, but years of added human and fiscal costs had already been incurred.[35]

The lower courts' application of *Chevron* deference to the Bureau of Prisons tainted other areas of law. Courts wrestled with the *Chevron* doctrine when applied to immigration statutes with dual criminal and civil applications, sometimes deferring to harsher administrative interpretations.[36] For example, citing *Babbitt* and *Pacheco-Camacho*, the Ninth Circuit in *Perez-Guzman v. Lynch* deferred to an agency interpretation of an immigration statute with criminal applications, holding that the rule of lenity "does not prevent an agency from resolving statutory ambiguity through a valid regulation."[37]

Similarly, in the context of firearms regulations with criminal applications, judges have debated the strength of administrative deference against the rule of lenity, with some deferring to harsher agency interpretations based on the *Babbitt* footnote.[38] *Babbitt* and *Pacheco-Camacho* have also defeated lenity in the interpretation of statutes with criminal applications administered by the Forest Service and the Drug Enforcement Administration.[39] The end of *Chevron* bars the application of these cases to future statutory interpretation.

E.

Going forward, in the criminal context, courts must go directly to lenity without administrative deference to agency interpretations of statutory silence or ambiguity. Although *Loper Bright* did not invite challenges to established precedent,[40] in future litigation regarding statutes on criminal offenses and punishment, courts cannot simply rely on the same administrative deference reflected in pre–*Loper Bright* precedent. Opinions relying on language from *Pacheco-Camacho* and the *Babbitt* footnote are relics from abrogated authority. Going forward, courts must now resolve statutory ambiguity and silence in the first instance under the rule of lenity and the doctrine of constitutional avoidance.[41] For example, two areas of potential Bureau of Prisons litigation regarding sentencing statutes should now be clearly resolved in favor of prisoners.

First, the First Step Act creates earned time credits for participation in evidence-based rehabilitative programming and productive activities.[42] Although Congress implemented phases of the program in mandatory terms, the reality on the ground has not conformed to the statutory requirements. For example, the BOP has implemented the First Step Act inconsistently with statutory language regarding the commencement of eligibility to participate in programming,[43] the scope of disqualifications based on offense of conviction,[44] and the awarding of credits once they are earned.[45] As these types of issues come before the courts, the interpretation of the FSA's provisions that favor liberty through rehabilitation and community restoration should be enforced through the *Loper Bright* lens favoring strict construction of penal laws.

Second, there has been a long-simmering issue regarding eligibility to participate in the BOP's residential drug abuse program (RDAP). The RDAP-implementing statute sets mandatory standards that the BOP routinely ignores.[46] The statutory phase-in requires that the BOP "*shall*, subject to the availability of appropriations, *provide residential substance abuse treatment*" "*for all eligible prisoners* by the end of fiscal year 1997 and thereafter."[47] Eligibility to participate in the in-prison residential program is simple: the statute expressly defines "eligible prisoner" as a prisoner who is "(i) determined to have a substance abuse problem; and (ii) willing to participate in a residential substance abuse treatment program."[48]

As the Sentencing Commission's study has confirmed, RDAP substantially reduces recidivism[49] and, anecdotally, changes many lives for the better. But after initially complying with the statutory standard for eligibility when the program began in 1995,[50] the BOP unilaterally imposed a community corrections component that implicitly rendered ineligible a cohort of statutory "eligible prisoners" who have state or immigration detainers, pending charges, and nonextraditable warrants.[51] Cut off from participation in RDAP, those individuals can neither benefit from the treatment itself nor receive the sentence reduction incentive. Under *Chevron*, the Ninth Circuit upheld the disqualification for the sentence reduction incentive, which the statue

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

makes discretionary, but did not reach the exclusion from even participating in RDAP.[52]

Today, courts addressing eligibility to participate in RDAP in the first instance post–*Loper Bright* should invalidate the detainer-based disqualification from participation, both because the statute is unambiguous in defining the "eligible prisoners" for whom the BOP is required to provide access to the program, and because, to the extent there is ambiguity, the BOP's interpretation receives no deference under *Loper Bright*.

Paving the pathway to participation is especially important because the sentence reduction precedent remains subject to challenge under administrative law principles: although initially claiming the exclusion of individuals with detainers was based on comment from the American Psychological Association, the BOP has not addressed the Association's renunciation of the BOP's interpretation of its comment.[53] The rejection of administrative deference in the construction of the statute on RDAP eligibility should result in thousands of excluded prisoners participating in this empirically proven rehabilitation program and earning early release.

F.

The narrow construction of criminal statutes requires resolution of statutory ambiguities and silence in favor of the individual. The Court's jurisprudence on lenity governs over administrative deference for purely criminal statutes and those with both criminal and civil applications.[54] If enough ambiguity existed to trigger administrative deference in the *Chevron* era, there is enough uncertainty to require narrow construction in the *Loper Bright* era. The rule of lenity applies in resolving ambiguity because statutes must be narrowly construed to only punish as clearly prescribed by Congress.[55] And under the doctrine of constitutional avoidance, courts narrowly interpret statutes that raise serious constitutional questions: "[The doctrine of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[56]

The potential for additional punishment based on ambiguous statutes or rules implicates the central protection of the Due Process Clause: "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[57] When liberty is at issue, ambiguous statutes and rules must be construed against the government to avoid loss of liberty greater than clearly authorized.[58] While any amount of additional jail time has constitutional significance, the expansive interpretation of statutes and rules by administrative agencies can mean many extra years in prison.[59]

II.

Together, *Loper Bright* and *Kisor* require that courts employ rules of statutory construction—including lenity—rather than agency deference to construe administrative regulations and the Sentencing Guidelines. The reasons articulated in *Loper Bright* for requiring that courts, not agencies, interpret statutes are equally applicable to interpretation of ambiguous agency rules. The Judiciary takes primacy in determining the meaning of federal law. The courts developed deference for agency interpretations of their own regulations in cases such as *Auer v. Robbins* and *Bowles v. Seminole Rock and Sand Co.*, addressing purely civil contexts.[60] In these civil cases, the Court approved deference to the agency's interpretation, instead of independent judicial review, if the agency's construction of its own regulation was not clearly erroneous or inconsistent with the regulation.[61] Just as with *Chevron*, Justices have identified serious separation of powers issues with *Auer* and *Seminole Rock* deference even in the civil context.

A.

Separation-of-powers issues lost within *Seminole Rock* deference even outside the criminal context. In *Perez v. Mortgage Bankers Association*, the Court addressed the Department of Labor's expansion of coverage of the Fair Labor Standard Act's overtime rules through an interpretive rule promulgated with notice-and-comment.[62] In reference to *Auer* and *Seminole Rock*, the majority noted that "it is the court that ultimately decides whether a given regulation means what the agency says."[63] Justice Thomas concurred, finding that, because *Seminole Rock* administrative deference "effects a transfer of the judicial power to an executive agency, it raises constitutional concerns," subjecting regulated parties "to precisely the abuses that the Framers sought to prevent."[64] "It represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches."[65] Justices Scalia and Alito expressed similar concerns regarding expanding rulemaking beyond the Administrative Procedure Act's text.[66]

B.

The Court in *Kisor* narrowed the scope of agency deference by requiring that courts all apply "traditional tools of statutory interpretation" before declaring a regulation ambiguous. In a case involving the Veterans Administration's construction of its own regulation, the Court granted certiorari to determine whether to overrule *Auer* and *Seminole Rock*.[67] In a fractured opinion, the plurality in *Kisor* declined to overrule the decisions but clarified and limited their scope, emphasizing that a regulation must be "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."[68] In the criminal context, traditional rules requiring narrow construction are inseparable from

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

the linguistic canons for determining the meaning of statutory text. The *Kisor* plurality recognized, "Some interpretive issues may fall more naturally into a judge's bailiwick."[69] Criminal punishments are in the heartland of judicial authority.[70]

Justice Gorsuch, joined by Justices Thomas and Kavanaugh, concurred to point out that the plurality "cannot muster even five votes to say that *Auer* is lawful or wise."[71] The *Kisor* concurrence spelled out how, even in a civil case, *Auer* and *Seminole Rock* deference was inconsistent with the Administrative Procedure Act and the Constitution in terms echoed in the later holding of *Loper Bright* and its constitutional concurrences.[72]

C.

The Supreme Court has never held that courts should defer to agency interpretations of ambiguous regulations that enhance rather than ameliorate punishment. The continuing controversy from *Perez* through *Kisor* about the appropriateness of *Auer* and *Seminole Rock* deference occurred in the context of purely civil regulations. The most important application of administrative deference in the criminal context is under the federal Sentencing Guidelines, where from a 1993 case—*Stinson v. United States*, 508 U.S. 36 (1993)—under the then-mandatory Guidelines, courts have felt bound to defer to Sentencing Commission commentary even if it enhances punishment. Those cases misunderstand the limited scope of the *Stinson* decision and the primacy of lenity in construing any ambiguity relating to penal laws.

Courts that insist *Stinson* compels them to defer to commentary that calls for a harsher result than an ambiguous guideline requires overlook a fundamental distinction: the Court in *Stinson* did not address lenity because the deference was provided to *ameliorative* commentary, not to commentary calling for a harsher result. Therefore, the Court had no occasion to consider, let alone set precedent, regarding the application of the rules calling for lenity in construing an ambiguous guideline.

In *Stinson*, the circuits were split on the construction of the then-mandatory career offender guideline.[73] The Sentencing Commission had issued commentary stating that felon-in-possession of a firearm did *not* constitute a "crime of violence" within the meaning of the career offender guideline.[74] Nevertheless, the court of appeals held otherwise, declining to give more than "persuasive" authority to the commentary.[75]

The Supreme Court reversed, holding that commentary 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."[76] But the Court had no need to address, and did not consider, whether similar deference would apply to commentary that, rather than ameliorating punishment, increased the time a person would spend in prison.

Under the Supreme Court's rules on precedent, *Stinson* is not binding on the question of whether commentary expanding punishment from the plain meaning of a guideline must receive deference. As the Court has stated, "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."[77] The Court has recently reaffirmed the party presentation principle that recognizes that it is the parties who "frame the issues for decision," and the courts serve as neutral arbiters.[78] *Stinson* did not present, nor did the parties mention, the application of administrative deference to increase, rather than ameliorate, punishment.

Since 1993, the two major cases reaffirming *Stinson* also did so in the context of ameliorative commentary, finding in both cases that the commentary was trumped by statute.[79] Courts that claim to be bound by *Stinson* to defer to harsher interpretations of guidelines cite the undoubted proposition that only the Supreme Court can overrule its opinions, but that line of precedent is limited to decisions that have "direct application in a case."[80] Because *Stinson* addressed only ameliorative commentary, it does not have "direct application" to commentary that expands punishment.

Applying lenity instead of deference does not call for *Stinson* to be overruled: the holding is valid in calling for deference to ameliorative commentary. But *Stinson* should not be extended to increase punishment because the decision did not involve, and did not resolve, the application of rules of lenity that *Kisor* and *Loper Bright* unequivocally require in the consideration of penal laws.

D.

***Loper Bright* resolves the circuit conflict on whether *Kisor* or *Stinson* guides construction of the Guidelines.** After *Loper Bright*, the Sentencing Commission's commentary expanding the ambiguous language of the guideline must give way to traditional rules calling for narrow construction of ambiguous penal laws. The courts apply "the traditional rules of statutory construction when interpreting the sentencing guidelines."[81] Those traditional rules foreclose expansion of ambiguous or silent guidelines to increase punishment. *Loper Bright* confirms the position of courts holding that ambiguity or silence in guidelines cannot result in the harsher version of the potential readings. Increases in the Guidelines ranges result in increased sentences: "When a Guidelines range moves up or down, offenders' sentences [tend to] move with it."[82] As stated in italics by the Supreme Court in *Peugh v. United States*, "*[T]he Guidelines are in a real sense the basis for the sentence.*"[83]

Commentary, unlike guidelines, are separated from the legislative authorization for their promulgation in accordance with formal notice-and-comment in 28 U.S.C. § 994(x). The Sentencing Commission explicitly

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

reserves to itself the prerogative to issue commentary on its own authority: "The Commission may promulgate commentary and policy statements and amendments thereto, without regard to the provisions of 28 U.S.C. § 994(x)."[84]

Where courts have refused to implement commentary that aggravates sentencing, the Commission has adapted by following the procedures in 28 U.S.C. § 994(x) to amend the guideline.[85] In implementing narrow construction of penal laws, this is as it should be:

> This venerable rule not only vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.[86]

In the Guidelines context, the Commission is the party that can speak more clearly and obtain legislative imprimatur on its interpretation.

The reasoning of *Loper Bright* appears to be directly relevant to an agency's construction of its own rules that have not been formally adopted:

> The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities. That is no less true when the ambiguity is about the scope of an agency's own power—perhaps the occasion on which abdication in favor of the agency is least appropriate.[87]

Given *Kisor*'s narrowing of ambiguity in the context of the construction of rules and regulations, some courts have recognized that *Kisor* supersedes *Stinson*'s version of administrative deference.[88] But other courts, even after *Kisor*, have continued providing administrative deference to Sentencing Commission commentary construing ambiguous guidelines.[89] Those decisions are based on a flawed view of *Stinson* and inadequate consideration of the effect of *Loper Bright* on *Kisor*.

By issuing a rule through approved procedures, the agency is not authorized to later expand punishment by issuing "interpretations" in the absence of the statutorily required procedures. As stated in *Kisor*, deference to expansive agency interpretations of the rules would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."[90]

The absence of legislative authorization leaves only narrow construction and lenity to apply. Even before *Loper Bright*, a number of courts, including the Fourth and Eleventh Circuits, determined that, in the penal context of the guidelines, lenity trumps deference.[91] These pre–*Loper Bright* decisions have only been reinforced by the death of *Chevron*. The holdings of *Kisor* and *Loper Bright* have two basic effects: *Kisor*'s narrowing of ambiguities through "traditional tools of statutory construction" resolves the current circuit split regarding *Kisor* and *Stinson* in favor of lenity; and, if any ambiguity were to remain, *Loper Bright* affirms that lenity must govern. Construction of penal laws such as the Sentencing Commission's guidelines fall clearly in the bailiwick of judges to construe independently.

III.

The end of administrative deference in the construction of penal laws leaves the field to traditional principles that protect individual liberty and the separation of powers. From the time of the founding, the narrow reading of criminal statutes constituted an essential mechanism to enforce the separation of powers and to protect individual liberty. Lenity applies to interpretations of ambiguous criminal prohibitions as well as to the penalties they impose.[92]

The narrow reading of penal laws is among the oldest and most firmly based in constitutional principles protecting liberty and the separation of powers.[93] In Chief Justice Marshall's 1820 decision in *United States v. Wiltberger*,[94] the Court stated that strict construction of penal laws is "founded on 'the tenderness of the law for the rights of individuals' to fair notice of the law 'and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'"[95] As the Court stated in resolving ambiguity in the federal probation revocation statute: "[W]here text, structure, and history fail to establish that the Government's position is unambiguously correct—we apply the rule of lenity and resolve the ambiguity in [the defendant]'s favor."[96]

The doctrine of constitutional avoidance has roots in Chief Justice Marshall's 1804 decision in *Murray v. Schooner Charming Betsy*, assuming that Congress would not legislate in a manner that raises serious constitutional questions.[97] "[The doctrine of constitutional avoidance] is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[98] The narrow construction of penal laws has safeguarded liberty and preserved the separation of powers from the origins of Anglo-American jurisprudence.[99]

IV. Conclusion

Administrative deference has no place in the construction of criminal laws after *Loper Bright*. The traditional rules of statutory interpretation require narrow construction of criminal laws through the rule of lenity and the doctrine of constitutional avoidance. Courts should fully recognize that, to the extent penal laws are ambiguous after narrow construction, lenity must be applied.

The *Chevron* era of administrative deference only began in 1984 and is now over. The disarray among

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

panels and Circuits addressing ambiguous statutes, guidelines, and other penal laws has been resolved by *Loper Bright*'s return to basic principles. It is now time to recognize that shift going forward in the criminal context: if the legislating body—whether Congress or the Sentencing Commission through Congress—has left the basis for punishment or enhancement of punishment ambiguous or silent, the ambiguity or silence must be resolved in favor of the individual, not administrative deference.

Notes

1 Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 405 (2024).
2 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
3 *Loper Bright*, 603 U.S. at 396–97.
4 *See generally* Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing the rule of lenity and doctrine of constitutional avoidance to resolve which plausible interpretations of a statute should apply).
5 Kisor v. Wilkie, 588 U.S. 558 (2019).
6 *Loper Bright*, 603 U.S. at 399, 404.
7 *Chevron*, 467 U.S. at 843.
8 *Id*. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").
9 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704 n.18 (1995).
10 *Loper Bright*, 603 U.S. at 385 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
11 *Loper Bright*, 603 U.S. at 381–82.
12 *Id*. at 392–93.
13 *Id*. at 401 (citing *Kisor*, 588 U.S. at 578).
14 *Loper Bright*, 603 U.S. at 413–14 (Thomas, J., concurring); *id*. at 420–23 (Gorsuch, J., concurring).
15 *Id*. at 409 (citing Cargill v. Garland, 57 F.4th 447, 465–68 (5th Cir. 2023) (en banc) *aff'd*, Garland v. Cargill, 602 U.S. 406 (2024)).
16 *Loper Bright*, 603 U.S. at 435 n.5 (Gorsuch, J., concurring).
17 *Id*. at 435 (citations and quotations omitted).
18 *Id*. at 474 (Kagan, J., dissenting).
19 Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704 n.18 (1995).
20 The footnote states in relevant part: "We have never suggested that the rule of lenity should provide the standard for reviewing facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement. Even if there exist regulations whose interpretations of statutory criminal penalties provide such inadequate notice of potential liability as to offend the rule of lenity, the 'harm' regulation, which has existed for two decades and gives a fair warning of its consequences, cannot be one of them." *Id*.
21 Whitman v. United States, 574 U.S. 1003 (2014) (Scalia, J., joined by Thomas, J., statement respecting the denial of certiorari); *see also* Cargill v. Garland, 57 F.4th 447, 467 (5th Cir. 2023) ("*Babbitt* did not purport to set forth a general rule respecting the interpretation of criminal regulations."). The respondent apparently made the lenity argument for the first time in the Supreme Court. Petitioner's Reply Brief, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995)), 1995 WL 170170, at *11 n.10 (noting lenity was only raised in the respondent's brief).
22 United States v. Apel, 571 U.S. 359, 369 (2014); *accord* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1155 (10th Cir. 2016) (Gorsuch, J., concurring) ("The Supreme Court has expressly instructed us *not* to apply *Chevron* deference when an agency seeks to interpret a criminal statute.").
23 *See Babbitt*, 515 U.S. at 703–4.
24 "It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases." Ramos v. Louisiana, 590 U.S. 83, 104 (2020).
25 Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 409 (citing Abramski v. United States, 573 U.S. 169 (2014)).
26 *Abramski*, 573 U.S. at 191; *see also* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 518 (1992) (holding that, despite Bureau of Alcohol, Tobacco, Firearms, and Explosives advice that a conversion kit constituted a firearm, the ambiguous civil tax statute with criminal applications had to be interpreted under the rule of lenity).
27 *Loper Bright*, 603 U.S. at 405 (citing *Abramski*, 573 U.S. at 191); *see also* Crandon v. United States, 494 U.S. 152, 158 (1990) (in resolving civil application for damages, "because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage.").
28 *Loper Bright*, 603 U.S. at 399.
29 *Id*. at 400–401.
30 Pacheco-Camacho v. Hood, 272 F.3d 1266, 1271 (9th Cir. 2001).
31 *Id*. at 1272.
32 Yi v. Fed. Bureau of Prisons, 412 F.3d 526, 535 (4th Cir. 2005); White v. Scibana, 390 F.3d 997, 1001 (7th Cir.2004); Perez-Olivo v. Chavez, 394 F.3d 45, 51 (1st Cir. 2005); O'Donald v. Johns, 402 F.3d 172, 174 (3d Cir. 2005); *see also* Mujahid v. Daniels, 413 F.3d 991, 999 (9th Cir. 2005) (adhering to *Pacheco-Camacho*).
33 Barber v. Thomas, 560 U.S. 474, 488–89 (2010); *id*. at 494 (Kennedy, J., dissenting); *see generally* Max Hellman, *Barber v. Thomas: The Supreme Court's Interpretation of the Federal "Good Time Credits" Is Undermining Sentencing Reform*, 42 MCGEORGE L. REV. 874, 891–94 (2016).
34 *Barber*, 560 U.S. at 494 (Kennedy, J., dissenting).
35 Pub. L. No. 115–391, § 102(b)(1)(B), 132 Stat. 5194, 5210–13 (Dec. 21, 2018); Staff of S. Comm. on the Judiciary, 115th Cong., S.3649, *The First Step Act Section-by-Section Summary* 3 (Nov. 15, 2018) ("Amends Section 3624 of title 18 of the U.S. Code to clarify congressional intent behind good time credit.").
36 *See* Valenzuela Gallardo v. Barr, 968 F.3d 1053, 1061–62 (9th Cir. 2020).
37 Perez-Guzman v. Lynch, 835 F.3d 1066, 1077 n.5 (9th Cir. 2016).
38 Cargill v. Garland, 57 F.4th 447, 465–68 (5th Cir. 2023) (en banc), *aff'd*, Garland v. Cargill, 602 U.S. 406 (2024) (noting circuit split on rules related to bump stocks that "stems from one paragraph in the decision *Babbitt*.").
39 *See*, *e.g.*, United States v. Kelly, No. 215CR00041GMNNJK, 2016 WL 8732182, at *6 (D. Nev. Apr. 15, 2016), *report and recommendation adopted*, No. 2:15-CR-0041-GMN-NJK, 2016 WL 3769339 (D. Nev. July 14, 2016), *aff'd*, 874 F.3d 1037 (9th Cir. 2017) (Drug Enforcement Agency); Adams v. United States Dep't of Agric., No. CV 08–283-TUC-RCC, 2010 WL 11523866, at *4 n.3 (D. Ariz. Mar. 9, 2010) (Forest Service); *accord* United States v. Wallace, 476 F. Supp. 2d 1129, 1135 (D. Ariz. 2007).
40 Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 412 ("The holdings of those cases [relying on the *Chevron* framework] that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

statutory stare decisis despite our change in interpretive methodology.").

41 *Id*. ("[C]ourts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

42 18 U.S.C. § 3632(d)(4)(B).

43 *Compare id.* ("A prisoner may not earn time credits under this paragraph for an evidence-based recidivism reduction program that the prisoner successfully completed . . . during official detention *prior to the date that the prisoner's sentence commences* under section 3585(a)." (emphasis added)), *with* 18 U.S.C. § 3585(a) ("A sentence to a term of imprisonment *commences on the date the defendant is received in custody awaiting transportation to*, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served." (emphasis added)).

44 *Compare* 18 U.S.C. § 3632(d)(4)(A) ("In general.-A prisoner, except for an ineligible prisoner under subparagraph (D), who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits as follows") *with* 18 U.S.C. § 3632(d)(4)(D) *and* 18 U.S.C. § 3632(d)(4)(C) ("Ineligible prisoners.-A prisoner is ineligible to receive time credits under this paragraph if the prisoner is serving a sentence for a conviction under any of the following provisions of law [listing specific statutes of conviction]").

45 18 U.S.C. § 3632(d)(4)(C) ("Time credits earned under this paragraph by prisoners who successfully participate in recidivism reduction programs or productive activities *shall* be applied toward time in prerelease custody or supervised release. The Director of the Bureau of Prisons *shall* transfer eligible prisoners, as determined under section 3624(g), into prerelease custody or supervised release." (emphases added)).

46 *See* 18 U.S.C. § 3621(e).

47 18 U.S.C. § 3621(e)(1)(C) (emphases added).

48 18 U.S.C. § (e)(5)(B).

49 U.S. SENT'G COMM., RECIDIVISM AND FEDERAL BUREAU OF PRISONS PROGRAMS (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf.

50 See BOP Program Statement 5330.10, Drug Abuse Programs Manual, Ch. 6 at 2 (May 25, 1995) for the standard, i.e., that completion of applicable in-prison transitional services programs is required for sentence reduction.

51 *Drug Abuse Treatment Programs: Early Release Consideration*, 61 Fed. Reg. 25121–01 (May 17, 1996); BOP Program Statement 5330.10, Change Notice, Ch. 6, at 7.3 (May 17, 1996).

52 McLean v. Crabtree, 173 F.3d 1176, 1181–83 (9th Cir. 1999) ("Because the statute implicitly delegates authority to the BOP to design and administer the sentence reduction treatment program, we must defer to the community requirement unless it is unreasonable.").

53 Opening Brief of Appellant at 7–13, Sanderson v. Feather, 14–35483 (9th Cir. June 30, 2014).

54 Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004) ("Although here we deal with [18 U.S.C.] § 16 in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.") (citing United States v. Thompson/Center Arms Co., 504 U.S. 505, 517–18 (1992)).

55 *See* Wooden v. United States, 595 U.S. 360, 388 (2022) (Gorsuch, J., concurring) ("The 'rule of lenity' is a new name for an old idea—the notion that 'penal laws should be construed strictly.'") (quoting The Adventure, 1 F. Cas. 202, 204 (C.C.D. Va. 1812) (Marshall, C. J.)).

56 Clark v. Martinez, 543 U.S. 371, 380 (2005).

57 Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).

58 *See* Rosales-Mireles v. United States, 585 U.S. 129, 141 (2018) (judicial integrity at stake when courts refuse to correct errors that "require individuals to linger longer in federal prison than the law demands"); 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.").

59 *See* Lafler v. Cooper, 566 U.S. 156, 165 (2012) ("[A]ny amount of [additional] jail time has Sixth Amendment significance.") (quoting Glover v. United States, 531 U.S. 198, 203 (2001)).

60 Auer v. Robbins, 519 U.S. 452 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945); *see also* Skidmore v. Swift & Co., 323 U.S. 134 (1944).

61 *Auer*, 519 U.S. at 461; *Seminole Rock*, 325 U.S. at 414.

62 Perez v. Mortgage Bankers Ass'n, 575 U.S. 92 (2015).

63 *Id*. at 104 n.4.

64 *Id*. at 112–13 (Thomas, J., concurring).

65 *Id.* at 118.

66 *Id.* at 107 (Alito, J., concurring); *Id*. at 108 (Scalia, J., concurring).

67 Kisor v. Wilkie, 588 U.S. 558, 563 (2019).

68 *Id.* at 573.

69 *Id.* at 578.

70 Setser v. United States, 566 U.S. 231, 239 (2012).

71 *Kisor*, 588 U.S. at 592 (Gorsuch, J., concurring).

72 *Id*. at 604–16.

73 *Id*. at 40.

74 *Id*. at 39.

75 *Id*.

76 *Id*. at 38.

77 Webster v. Fall, 266 U.S. 507, 511 (1925); *see also* Texas v. Cobb, 532 U.S. 162, 169 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.").

78 United States v. Sineneng-Smith, 590 U.S. 371, 375 (2020) ("[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.") (quoting Greenlaw v. United States, 554 U.S. 237, 243 (2008)).

79 United States v. LaBonte, 520 U.S. 751, 757 (1997) (invalidating commentary limiting the career offender enhancement); Neal v. United States, 516 U.S. 284, 294 (1996) (invalidating commentary limiting LSD enhancements for carrier medium weight). In *Beckles v. United States*, only Justice Ginsberg would have relied on the harsher commentary on whether possession of a sawed-off shotgun avoided any vagueness issues in the Guidelines. Beckles v. United States, 580 U.S. 256, 271 (2017).

80 Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989).

81 United States v. Scheu, 83 F.4th 1124, 1128 (9th Cir. 2023) (quoting United States v. Flores, 729 F.3d 910, 914 n.2 (9th Cir. 2013)); *accord* United States v. Rainford, 110 F.4th 455, 499 n.8 (2nd Cir. 2024) ("Canons of statutory construction also apply to the Sentencing Guidelines."); United States v. Cortez-Gonzalez, 929 F.3d 200, 203 (5th Cir. 2019) ("When interpreting the Sentencing Guidelines, we apply the ordinary rules of statutory construction."); United States v. Hall, 704 F.3d 1317, 1321 (11th Cir. 2013) ("[W]e apply traditional statutory construction rules to interpret" sentencing guidelines.); United States v. Damon, 595 F.3d 395, 400 (1st Cir. 2010) ("We determine the meaning the Sentencing Commission intended to give to Guidelines terms, including whether it intended to adopt a statutory definition, by applying familiar principles of statutory construction."); United States v. Reaves, 253 F.3d 1201, 1203 (10th Cir. 2001) ("We inter-

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026

pret the Sentencing Guidelines according to accepted rules of statutory construction.").

82 Molina-Martinez v. United States, 578 U.S. 189, 199 (2016) (quoting Peugh v. United States, 569 U.S. 530, 544 (2013)); *see also* Rosales-Mireles v. United States, 585 U.S. 129, 133 (2018) ("[E]ven in an advisory capacity the Guidelines serve as 'a meaningful benchmark' in the initial determination of a sentence and 'through the process of appellate review.'") (quoting *Peugh*, 569 U.S. at 541).

83 *Peugh*, 569 U.S. at 542.

84 U.S. Sent'g Comm'n, Rules of Practice & Procedure § 4.3 (2016); *see also id*. § 4.1 ("Amendments to . . . commentary may be promulgated and put into effect at any time.").

85 For example, Amendment 827 to U.S.S.G. § 2B1.1 incorporated commentary on "intended" loss into the guideline. Such amendments would be subject to the Ex Post Facto Clause and the one-book rule under *Peugh* and U.S.S.G. § 1B1.11.

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

87 Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2266 (2024).

88 United States v. Campbell, 22 F.4th 438, 446 (4th Cir. 2022); United States v. Phifer, 909 F.3d 372, 383–85 (11th Cir. 2018); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729–30 (6th Cir. 2013) (Sutton, C.J., concurring).

89 United States v. McIntosh, 124 F.4th 199,206 n.3 (3d Cir. 2024); United States v. Trumbull, 114 F.4th 1114, 1118 (9th Cir. 2024).

90 Kisor v. Wilkie, 588 U.S. 588, 575 (2019) (quoting Christensen v. Harris County, 529 U.S. 576, 588 (2000)).

91 *See infra* note 100.

92 Bifulco v. United States, 447 U.S. 381, 387 (1980); *see also* United States v. R.L.C., 503 U.S. 291, 305 (1992) ("[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing.").

93 Wooden v. United States, 595 U.S. 360, 388–92 (2022) (Gorsuch, J., concurring).

94 United States v. Wiltberger, 18 U.S. 76, 95 (1820).

95 United States v. Davis, 588 U.S. 445, 464–65 (2019) (quoting *Wiltberger*, 18 U.S. at 95); *see also* Harrison v. Vose, 50 U.S. 372, 378 (1850) ("[I]n the construction of a penal statute, it is well settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of the respondent.").

96 United States v. Granderson, 511 U.S. 39, 54 (1994). "As to the *duration* of that punishment, we rest on the principle that 'the Court will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended.'" *Id*. at 42–43 (quoting Bifulco v. United States, 447 U.S. 381, 387 (1980) (quoting Ladner v. United States, 358 U.S. 169, 178 (1958)); *see also* Moskal v. United States, 498 U.S. 103, 108 (1990) ([W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope.").

97 Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

98 Clark v. Martinez, 543 U.S. 371, 381 (2005); *see also* Crowell v. Benson, 285 U.S. 22, 62 (1932) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2286 n.5 (2024) (Lenity embodies a legal doctrine "centuries older than our Republic.") (Gorsuch J., concurring); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 128 (2010) ("The maxim that penal statutes should be narrowly construed is one of the oldest canons of interpretation.").

99 *Wiltberger*, 18 U.S. at 95; W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 88 (1765) ("Penal statutes must be construed strictly"). The rule arguably goes back to biblical times given Paul's account of receiving forty lashes minus one, which avoided the risk of exceeding the maximum allowable number. *Compare* 2 Corinthians 11:24 with Deuteronomy 25:3.

Downloaded from http://read.dukeupress.edu/fsr/article-pdf/38/1/42/2366409/42sady.pdf by berman.43@osu.edu on 27 February 2026