**Gloucester County School Board v. G.G.: Judicial Overdeferece Is Still a Massive Problem**

By Ilya Shapiro and David McDonald

Note from the Editor:

This article discusses *Auer* deference, a central issue in *Gloucester County School Board v. G.G.*, which the Supreme Court recently remanded to the Fourth Circuit in light of new actions by the Trump administration.

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### Introduction

In early March, the Supreme Court punted the transgender bathroom-access case *Gloucester County School Board v. G.G.*, probably the highest-profile case of the term, back down to the U.S. Court of Appeals for the Fourth Circuit. The Trump administration had recently rescinded the Department of Education (DOE) guidance letters at the heart of the lawsuit, so the Court wanted the parties and the lower court to reevaluate the case in light of the new development. But while the future of this particular litigation—and whether it will return to the high court—may now be uncertain, the core legal questions about how much deference courts should give administrative agency determinations remain as live as ever. Notably, Judge Neil Gorsuch, the presumptive next justice, has made a name for himself as a critic of judicial deference to executive agencies. There is also legislation pending in the Senate—commonly known as the REINS Act—that would require congressional approval of any new major regulation. If anything, the debate over judicial deference doctrines is only heating up, and the arguments made in *Gloucester County* will continue to be relevant for some time.

Here’s how the issue was joined here: Title IX, part of the U.S. Education Amendments of 1972, was passed to ensure that schools and universities did not discriminate on the basis of sex. It states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

The statute itself allows for certain exceptions to this prohibition, and its implementing regulations have always allowed schools to provide “separate toilet, locker room, and shower facilities on the basis of sex.” This regulation has been uncontroversial for most of its history, and the traditional reading of the exception—interpreting “sex” to refer to the biological difference (particularly regarding reproductive organs) between males and females—was never challenged before the present litigation.

Gavin Grimm (G.G.), at the time of the events relevant to this litigation, was a student at Gloucester High School in Virginia. Grimm was born biologically female but has identified as a boy from about the age of 12. He remains biologically...
female, though he is on hormone therapy. This case arose from Grimm’s opposition to the school board’s policy of not allowing him to use the boys’ restroom and locker room (although he was given access to private unisex bathrooms open to all students). Upon hearing of the controversy from a transgender-rights activist, a Department of Education Office of Civil Rights (OCR) employee named James A. Ferg-Cadima sent a letter to the activist stating that “Title IX . . . prohibits recipients of Federal financial assistance from discriminating on the basis of sex, including gender identity.”

Grimm then sued the school board, alleging that its policy violated Title IX and the Fourteenth Amendment’s Equal Protection Clause. The Department of Justice (DOJ) filed a “statement of interest,” holding the Ferg-Cadima letter out as the controlling interpretation of Title IX and its implementing regulations. The district court refused to give controlling deference to the letter, and Grimm appealed to the Fourth Circuit. The Fourth Circuit reversed the district court’s dismissal, affording the OCR’s interpretation of the regulation Auer deference (the near-absolute deference courts give to agency interpretations of their own regulations). Indeed, the Fourth Circuit’s deference to the Ferg-Cadima letter was outcome-determinative. Without such deference, the court acknowledged, the interpretation was “perhaps not the intuitive one.”

Following the Fourth Circuit’s ruling, federal officials in the DOE and DOJ issued a “Dear Colleague” letter to every Title IX “recipient[] of Federal financial assistance” in the country, affirming and expanding on the contents of the Ferg-Cadima letter. The school board sought Supreme Court review, which was granted October 28, 2016.

On February 22, 2017, the new Trump administration’s DOE rescinded both the Ferg-Cadima letter and the “Dear Colleague” letter. After considering briefing from the parties on how to proceed, the Supreme Court vacated the Fourth Circuit ruling and remanded the case back to that court for further consideration. The Fourth Circuit hadn’t decided the Title IX statutory-interpretation question, so the Court is allowing it to do so in the first instance.

While advocates on both sides of this contentious cultural issue may have wished to draw the Court into their debates over the nature of sexuality, the more straightforward legal path—before the withdrawal of the OCR guidance—would simply have been to reverse the Fourth Circuit’s deference to the Ferg-Cadima letter and leave the arguments over privacy and nondiscrimination to other forums. Judicial deference to informal agency statements of this sort—statements that have not been tested in notice-and-comment rulemaking—undermines the separation of powers, defeats the purposes of notice-and-comment as set forth in the Administrative Procedure Act, thwarts the protections of judicial review of agency rulemaking, and encourages regulatory brinkmanship without full consideration of congressional will or practical consequences. Notice-and-comment rulemaking has a purpose.

8 Prof. Blumstein has separately argued that the enforcement guidance is inconsistent with the sex-segregation regime that characterizes Title IX. See James F. Blumstein, New Wine in Old Bottles: Title IX and Transgender Identity Issues, Vanderbilt Pub. L. Research Paper No. 16-51, http://bit.ly/2hBEKL.


of whether *Auer* deference should apply to informal agency pronouncements.\(^{11}\)

In *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, the Court held that courts must give “effect to an agency’s regulation containing a reasonable interpretation of an ambiguous statute.”\(^{12}\) In a series of cases almost 20 years old, the Court then limited *Chevron* deference to ensure that agencies would not circumvent notice-and-comment rulemaking when they interpreted Congress’s statutes. *Christensen v. Harris County* held that “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”\(^{13}\) A year later, in *Mead*, the Court reaffirmed that only interpretations carrying the force of law warrant *Chevron* deference.\(^{14}\)

Since agency discretion to interpret broad statutory directives is derived only from Congress’s delegation of such authority, there must be an indication that Congress intended directives is derived only from Congress’s delegation of such authority, there must be an indication that Congress intended such statutory interpretations not promulgated through notice-and-comment, formal adjudication, or some other method that legally binds the agency to its decision are entitled to limited deference only as far as their reasoning is persuasive, under *Skidmore v. Swift & Co.*.\(^{15}\)

The Court has not had occasion to extend these *Chevron* principles to *Auer*. Under *Auer*, an agency pronouncement interpreting one of its own regulations, regardless of whether it has the force of law—or whether anyone outside the agency is even aware of the interpretation before enforcement—is treated as entitled to controlling deference. This incongruence between the two deference doctrines creates unnecessary confusion and uncertainty, and muddles the justifications for providing deference.

Precisely the same reasons that lead the Court to insist that *Chevron* deference attaches only to agency action with the effect of law apply to *Auer* deference. Indeed, the failure to harmonize these two types of deference has created an absurd situation in which an informal letter from a low-level bureaucrat redefining a word in a regulation may be afforded more deference than the regulation itself, which actually went through public notice-and-comment rulemaking. This bizarre circumstance provides agencies—already loath to undertake the expensive and time-consuming notice-and-comment process—an additional incentive not to engage the public when making policy decisions. And that goes double for cases like *Gloucester County*, where the agency was attempting to promulgate a controversial policy that is likely to provoke legal challenges. Why go through all that trouble if it’s just going to put you in a less advantageous litigating position anyway?

This case illustrates a further aspect of the *Chevron-Auer* divergence. If deference regarding *statutory* interpretation requires certain safeguards and procedures but deference regarding *regulatory* interpretation does not, agencies have the incentive to manipulate the legal form—statute or regulation—they purport to interpret. *Gloucester County* is a classic example. Title IX itself contains the operative language of the question at issue: whether an institution’s statutory right to maintain “separate living facilities for the different sexes” refers to biological sex.\(^{16}\) Yet because the immediate factual context involves bathrooms rather than living facilities, the parties have looked further to OCR regulation 34 C.F.R. § 106.33, which provides that institutions may also provide separate “toilet, locker room, and shower facilities on the basis of sex.” Is the operative language of the separate-facilities exception statutory or regulatory? The answer could be either or both. The Fourth Circuit treated it as regulatory and thus applied *Auer* deference. Had the court treated it as statutory, *Chevron* would have applied—along with the limitations on its application—and the case would have come out the opposite way. Because in many cases statutes and regulations cover (much of) the same ground, the choice between *Auer* and *Chevron* will often be arbitrary. All the more reason to bring the prerequisites for applying the two kinds of deference into harmony.

II. Current *Auer* Doctrine Undermines Due Process, the Rule of Law, and Separation of Powers

A. Auer Undermines Due Process and the Rule of Law

It is a fundamental maxim of American law that, in order to be legitimate, the law must be reasonably knowable to an ordinary person. A properly formulated law must provide fair warning of the conduct proscribed and be publicly promulgated. These are not merely guidelines for good public administration; they are bedrock characteristics of law qua law.\(^{17}\) *Auer* deference, at least as formulated in the current doctrine, violates this maxim by making it possible for administrative agencies to make changes to their regulations that have significant impacts on regulated persons without ever even publishing the changes to the public, let alone allowing the public to participate through notice-and-comment rulemaking. It allows “[a]ny government

\(^{11}\) Compare United States v. Lachman, 387 F.3d 42, 54 (1st Cir. 2004) (holding that *Auer* deference is inappropriate for interpretations contained in informal pronouncements); Keys v. Barnhart, 347 F.3d 990, 993–95 (7th Cir. 2003) (same); Arriaga v. Fla. Pac. Farms, L.L.C., 305 F.3d 1228, 1238 (11th Cir. 2002) (same); with Cordiano v. Metacon Gun Club, Inc., 575 F.3d 199, 207–08 (2d Cir. 2009) (holding that *Auer* deference is warranted even in informal contexts); Bassiri v. Xerox Corp., 463 F.3d 927, 930 (9th Cir. 2006) (same); Smith v. Nicholson, 451 F.3d 1344, 1349–50 (Fed. Cir. 2006) (same).


\(^{13}\) 529 U.S. 576, 587 (2000).

\(^{14}\) Id. at 221.

\(^{15}\) Id. at 227–31.

\(^{16}\) 323 U.S. 134 (1944).

\(^{17}\) 20 U.S.C. §1681(a).

\(^{18}\) See Lon L. Fuller, *The Morality of Law* 33–38 (1964) (arguing that lack of public promulgation and reasonable intelligibility are two of the “eight ways to fail to make law”).
lawyer with a laptop [to] create a new federal crime by adding a footnote to a friend-of-the-court brief.20

When surveyed, two in five agency officials whose job duties include rule-drafting confirmed that “Auer deference plays a role in drafting” their regulations.21 Allowing agencies to reinterpret their ambiguous rules at will, with no need for formal processes, incentivizes them to write vague regulations to ensure the widest range of plausible potential meanings. In the words of Justice Scalia, “giving [informal agency interpretations] deference allows the agency to control the extent of its notice-and-comment-free domain. To expand this domain, the agency need only write substantive rules more broadly and vaguely, leaving plenty of gaps to be filled in later, using interpretive rules unchecked by notice and comment.”

Auer’s fair-notice-related defects are not endemic to the rest of the Court’s administrative deference jurisprudence, and limiting Auer need not also doom Chevron. The difference is that, unlike Auer, Chevron is limited by Mead and, as discussed above, Mead’s reasoning should extend to limit agency interpretations of their own regulations, bringing the two doctrines into closer alignment. Maintaining a distinction between published rules and nonbinding interpretations found in letters or circulars—heretofore unrecognized in regulatory interpretation jurisprudence—would ensure that only interpretations that have been given public scrutiny receive controlling deference. Agencies would be free to issue informal interpretations to quickly and efficiently provide guidance to employees and regulated parties, but those interpretations would lack the force of law and would not be given deference by the courts. Major policy changes, however, would require notice-and-comment rulemaking. This system ensures that someone, whether the courts through careful review or the public through the notice-and-comment process, is able to keep watch over what the agency is doing. Mead forced agency interpretations of statutes into the light, while agency interpretations of their own regulations remain in the shadows.

B. Auer Undermines Separation of Powers

Auer deference for informal interpre tive letters “contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation.”22 Affording controlling deference to agencies’ interpretations of their own regulations gives executive agencies the power both to write the regulations they are charged with enforcing and later to declare just what the ambiguous words of those regulations mean—a task traditionally left to courts. Even Congress is not permitted this power. If Congress wants to change the meaning of one of its statutes, it has to pass a new law, and then courts engage in their own independent review of what the statute actually means. Regardless of the persuasiveness of evidence regarding legislative intent, courts never simply accept Congress’s interpretation sight unseen.

Auer thus produces the absurd result that, when Congress delegates rulemaking authority to an agency, it effectively delegates greater authority than Congress itself possesses. Equally absurd is the fact that—at least since Christensen and Mead forced agency interpretations of statutes into the light—an agency receives greater deference when it changes policy by interpreting a footnote in an amicus brief or via an informal guidance letter than when it engages in formal reinterpretation of a statute.24 The collection, in effect, of legislative and judicial authority into the hands of relatively unaccountable administrative agencies that Auer deference allows undermines the separation of powers at the center of the country’s constitutional structure.

C. This Case Shows Auer At Its Worst

Gloucester County presented an egregious, yet typical, example of the absurd results Auer deference can lead to when a federal agency decides to act aggressively. The Ferg-Cadima letter asserting OCR’s new interpretation of the bathroom exception to Title IX in 3 C.F.R. § 106.33 represented an abrupt change in longstanding agency and public understanding of the regulation—one that stood in direct conflict with Congress’s repeatedly expressed policy choices. The interpretation contained in the letter did not go through notice-and-comment rulemaking. Indeed, it was not published to the general public at all. It was an informal letter written by a relatively low-level employee and was not even considered binding on the agency itself. Applying Auer, the Fourth Circuit gave this unpublished, non-binding letter from a minor bureaucrat the full force of a federal statute.

Nor did the “Dear Colleague” letter that followed the Ferg-Cadima letter go through any sort of rulemaking process when it was written in response to the current litigation. The lack of public comment is abundantly clear in that it shows no regard for any of the various legitimate concerns individuals have raised about transgender restroom and locker room access. The letter shows an OCR that has let its own policy preferences take it above and beyond its delegated authority, concerning itself with neither the express will of Congress nor the good faith opinions of regulated parties, let alone the procedures required by constitutional structure and the Administrative Procedure Act. The APAs notice-and-comment procedures exist specifically to counter aggressive agency behavior of this sort. But the Supreme Court’s Auer jurisprudence, as currently applied, allows (if not encourages) agencies to do an end-run around the statutory requirements simply by promulgating
vague rules and cloaking sweeping policy pronouncements as merely informal interpretations.

III. Auer Deference Should, at the Very Least, Be Limited to Interpretations that Have Gone Through Notice-and-Comment

An adjustment to the Auer doctrine to reconcile it with modern Chevron jurisprudence would mitigate most of Auer's largest defects. As noted above in Part I, Chevron held that courts must give "effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute." Then Christensen explained that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference." Then Mead reaffirmed Christensen's central holding that informal interpretative statements lacking the force of law should be afforded only the lesser Skidmore deference.

In Auer, the Court held that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation." The Court should follow Christensen and Mead's limitation on Chevron by placing a similar restriction on Auer, especially when an agency's interpretative actions are nonbinding on the agency itself. If agencies want their interpretations to have the force of law—and to have courts defer to them—they should have to go through the trouble of notice-and-comment rulemaking. If they instead want flexibility and efficiency, they shouldn't enjoy judicial deference. There's a tradeoff—such that agencies remain accountable to either the public or the courts—but if decisions like that made by the Fourth Circuit in Gloucester County carry the day, agencies will get the best of both worlds while regulated people and institutions will get neither an opportunity to participate in rulemaking nor a proper day in court with real judicial review.

IV. Conclusion

Despite the fact that the specific circumstances surrounding Gloucester County v. G.G. may prevent the Supreme Court from ever reaching the merits in the case, this issue of administrative deference remains extremely relevant. Sooner rather than later, the Court will have to reckon with the Auer doctrine it created. It should consider our concerns about Auer's undermining of due process and separation of powers when that time comes.

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25 467 U.S. at 842–44.
26 529 U.S. at 587.
27 533 U.S. at 229–34.