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

By Ilya Shapiro & 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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• Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 Ohio St. L.J. 813 (2015), *available at* http://moritzlaw.osu.edu/students/groups/oslj/files/2015/11/Vol.-76-813-845-Barmore-Article.pdf.

• Cass R. Sunstein & Adrian Vermeule, Auer*, Now and Forever*, Notice & Comment (Sept. 19, 2016), *available at* http://yalejreg.com/nc/auer-now-and-forever-by-cass-r-sunstein-adrian-vermeule/.

• Bill Funk, *Why SOPRA Is Not the Answer*, CPRBlog (Oct. 3, 2016), *available at* http://www.progressivereform.org/CPRBlog.cfm?keyword=SOPRA.

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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of the term, back down to the U.S. Court of Appeals for the Fourth Circuit.[1] The Trump administration had recently rescinded the Department of Education (DOE) guidance letters at the heart of the lawsuit,[2] so the Court wanted the parties and the lower court to reevaluate the case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.[3] There is also legislation pending in the Senate—commonly known as the REINS Act—that would require congressional approval of any new major regulation.[4] 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."[5] 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."[6] 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

1 Gloucester County Sch. Bd. v. G.G., No. 16-273, 2017 U.S. LEXIS 1626 (Mar. 6, 2017) (vacating the judgment and remanding to the Fourth Circuit "for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017").

2 U.S. Dep't. Educ. & U.S. Dep't. Just., "Dear Colleague" Letter Withdrawing Previous Title IX Guidance Regarding Transgender Bathrooms (Jan. 22, 2017), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.docx.

3 *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring).

4 Regulations From the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017).

5 20 U.S.C. § 1681.

6 34 C.F.R. § 106.33.

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."[7]

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. *Auer* deference to informal agency opinions is antithetical to that purpose.

We take no position here on Title IX's definition of "discrimination on the basis of sex," the meaning of the statute's exception for "separate living facilities for the different sexes," or the meaning of OCR regulations extending that exception to bathrooms, locker rooms, showers, or sports teams.[8] Congressional and administrative hearings—and public discourse more generally—are the best ways for our society to ruminate on such novel questions. A letter written by a low-level bureaucrat is not. Acting Deputy Assistant Secretary of Policy Ferg-Cadima may be the wisest man since Solomon—or not—but our system of legislation and regulation is not dependent on the Solomonic wisdom of acting deputy assistant secretaries.

The deference issues in this case are important because *process matters*. Those who hold the reins of political power will not always be benevolent, self-restrained public servants, and the procedural safeguards that seem frustrating and counterproductive in one instance may very well be necessary bulwarks against arbitrariness or oppression in another. As anyone who has lived in a hurricane-prone area can attest, the right time to board up your windows is before the storm hits, not after they've already been shattered.

The Court should thus, in the next appropriate case, limit the scope of its rule from *Auer v. Robbins*.[9] Under the *Auer* doctrine, courts afford agency interpretations of their own regulations controlling deference. This deference, we submit, must not be afforded to informal, non-binding agency pronouncements that have not been subjected to either of the paths for giving agency action the force of law: adjudication or rulemaking.

I. *Auer* Deference Is Unjustifiably Broader Than *Chevron* Deference

Once largely considered uncontroversial, *Auer* deference has come under increasing scrutiny. Various judges—including Supreme Court justices—have recently voiced concerns with the doctrine's effects on due process and the separation of powers, with some going as far as calling for *Auer* to be overruled.[10] There is also serious debate among the circuit courts on several questions concerning *Auer*'s scope, particularly on the question 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

7 G.G. v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 722 (4th Cir. 2016).

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/2jbBEkL.

9 519 U.S. 452 (1997).

10 *See, e.g.,* Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1208 (2015) (Sotomayor, J.); *id.* at 1211 (Scalia, J. concurring in the judgment); *id.* at 1213 (Thomas, J., concurring in the judgment); Decker v. N.W. Env. Def. Ctr., 133 S. Ct. 1326, 1338–39 (2013) (Roberts, C.J., concurring); *id.* at 1339–42 (Scalia, J., dissenting); Talk America, Inc. v. Mich. Bell Telephone Co., 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring); *see also* Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting).

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*

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 the mechanism by which a ruling acquired the force of law.[15] That congressional intent requirement is generally (but not necessarily) satisfied by notice-and-comment rulemaking.[16] Agency 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.*[17]

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 muddies the core 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.[18] 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.[19] *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 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,

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).

12 467 U.S. 837, 842–44 (1984).

13 529 U.S. 576, 587 (2000).

14 United States v. Mead Corp., 533 U.S. 218 (2001).

15 *Id.* at 221.

16 *Id.* at 227–31.

17 323 U.S. 134 (1944).

18 20 U.S.C. §1681(a).

19 *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").

20 Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 733 (6th Cir. 2013) (Sutton, J., concurring).

21 Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 Stan. L. Rev. 999, 1066 (2015).

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."[22]

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 interpretive letters "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation."[23] 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 reinterpreting 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 34 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 APA's 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."[25] Then *Christensen* explained that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy

22 *Perez*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment).

23 Decker v. Nw. Envtl. Def. Center., 133 S. Ct. 1326, 1342 (Scalia, J., concurring).

24 Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 5 (1996) (noting how *Seminole Rock* [and *Auer*]'s "plainly erroneous" standard "has produced the bizarre anomaly that a nonlegislative or ad hoc document interpreting a regulation garners greater judicial deference (and thus potentially greater legal force) than does a legislative rule, such as the one involved in *Chevron*, in which an agency interprets a statute").

25 467 U.S. at 842–44.

statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[26] Then *Mead* reaffirmed *Christensen*'s central holding that informal interpretative statements lacking the force of law should be afforded only the lesser *Skidmore* deference.[27]

In *Auer*, the Court held that an agency's interpretation of its own regulation is controlling unless "plainly erroneous or inconsistent with the regulation."[28] 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.

26 529 U.S. at 587.

27 533 U.S. at 229–34.

28 519 U.S. at 461 (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).