DEFERENCE IN WONDERLAND: INTO THE MANY RABBIT HOLES OF *CHEVRON*, *SKIDMORE*, AND *AUER* DEFERENCE

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I. INTRODUCTION

Agencies issue guidance documents, opinion letters, Dear Colleague Letters, and Question-and-Answer documents clarifying existing regulations to give covered individuals and entities a better understanding of their duties under the relevant statutes. Oftentimes, these agency interpretations are more informally adopted[1] and did not go through the notice-and-comment rulemaking procedure provided in the Administrative Procedure Act (APA).[2]

For the past seventy-two years, courts have customarily accorded agency interpretations of their own ambiguous regulations "controlling weight" under the doctrine enunciated by the US Supreme Court in *Bowles v. Seminole Rock & Sand Co.*[3] and reaffirmed in *Auer v. Robbins*.[4] This type of deference is now popularly known as *Auer* deference.[5] Moreover, when agencies interpret an ambiguous statutory mandate, their construction of the ambiguous law is usually given either "substantial weight" under the framework laid out in *Chevron U.S.A. v. Natural*

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1. Although under the Administrative Procedure Act (APA), "informal rulemaking" means that the formal procedures under the APA were not used, whenever "informal rulemaking" is referred to in this article, it means that there was no notice-and-comment rulemaking.
2. Administrative Procedure Act, 5 U.S.C. § 553 (2012).
3. 325 U.S. 410, 414 (1945).
4. 519 U.S. 452, 461 (1997).
5. *See* Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 616 (2013) (Scalia, J., concurring in part and dissenting in part).

Resources Defense Council, Inc.[6] or "respect" under *Skidmore*.[7] Although seemingly straightforward, however, the clarity ends there. The line between which type of deference is due to agency interpretations is frequently unclear, and the agency's interpretation could be entitled to either *Chevron, Skidmore, Auer, Chevron-Auer* deference, or it may even be due no deference at all.

Currently, an agency's interpretation of its own regulations that are informally adopted may be entitled to either controlling weight under *Auer*[8] (if they construe the agency's ambiguous regulations), substantial deference under *Chevron*,[9] respect under *Skidmore*[10] (if they are found to be interpretations of ambiguous statutes),[11] or no deference at all under the major-questions doctrine of *King v. Burwell*.[12]

This Note walks the reader through the analysis in determining which deference framework would be appropriate for a guidance document and anticipates the many rabbit holes that a court could fall into when determining the proper deference lens; it illustrates how one guidance document can be viewed through the lens of any of the deference frameworks and why courts vary in their decisions on whether an agency's guidance document is acceptable. This Note seeks a clearer method of analysis than the mess that is *Chevron, Skidmore,* and *Auer* and precisely delineates in which situations a particular deference doctrine should apply. This standard for determining the appropriate deference would lead to more uniform results when an agency interprets its own ambiguous regulation, which may sometimes contain provisions that interpret the statute itself.[13] Then, I will apply this standard for the different frameworks

6. 467 U.S. 837(1984); *see* Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737, 739–40 (2004), 467 U.S. 837 (1984).

7. 323 U.S. 134, 140 (1944); *see* Jim Rossi, *Respecting Deference:Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1108 (2001) (citing *Skidmore*, 323 U.S. at 140 (1944)).

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

9. Mendelson, *supra* note 6, at 740 & n.11.

10. *Skidmore*, 323 U.S. at 140.

11. *See* Gonzales v. Oregon, 546 U.S. 243, 255 (2006) (discussing that an interpretation of a regulation that parrots the statute is really an interpretation of the statute itself).

12. 135 S.Ct. 2480 (2015); *see* Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479, 480 (2016) (citing *King*, 135 S. Ct. at 2488–89).

13. This scenario contemplates facts similar to those in *Gonzales*, 546 U.S. at 281 (Scalia, J., dissenting), where the agency's interpretation of the statute merely "parroted"

to an outlier case, enabling examination of the precise issues raised by both the proponents and opponents of court deference to agencies' interpretative documents that did not go through the formal procedures, such as through the notice and comment rulemaking process.[14] The discussion follows the structure of *Chevron*'s two-step process and uses the illustrative facts in *G.G. ex rel. Grimm v. Gloucester County School Board*.[15]

II. TITLE IX, THE OCR'S REGULATIONS, AND GUIDANCE DOCUMENTS

A. Title IX and 34 C.F.R. § 106.33

Title IX provides 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."[16] Accordingly, Congress charged the Department of Education (DOE), through the Office for Civil Rights (OCR), with the statute's enforcement.[17]

Pursuant to its authority under Title IX, the OCR promulgated 34 C.F.R. § 106 using the procedures specified in § 553 of the Administrative Procedure Act (APA). Although the language *on the basis of sex* can be seen in several provisions under Title 34 of the Code of Federal Regulations, this Note focuses on 34 C.F.R. § 106.33, which states that "[a] recipient may provide separate toilet[s], locker room[s], and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[18]

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the statute itself.

14. The concerns brought forth by proponents and opponents of deference to agencies can be seen in the court's opinion in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 721.

15. 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017). *Gloucester* involves the provisions of Title IX and 34 C.F.R. § 106.33, the Department of Education, Office of Civil Rights' (OCR) interpretation in the guidance documents relating to transgender students, and the Agency's Dear Colleague Letter issued on February 22, 2017 withdrawing its interpretations in the aforementioned guidance documents.

16. 20 U.S.C. § 1681(a) (2012).

17. *See* 20 U.S.C. §§ 3413, 3441 (2012).

18. 34 C.F.R. § 106.33 (2016).

The OCR issued an opinion letter[19] and a "Dear Colleague Letter on Transgender Students" (DCLTS)[20] construing the language *on the basis of sex* under Title IX to include *gender identity*. Citing 34 C.F.R. § 106.33, the DCLTS opined:

> A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so. A school may, however, make individual-user options available to all students who voluntarily seek additional privacy.[21]

The opinion letter that was issued prior to the DCLTS similarly construed the term *sex* to include gender identity:

> The Department's Title IX regulations permit schools to provide sex-segregated restrooms, locker rooms, shower facilities, housing, athletic teams, and single-sex classes under certain circumstances. When a school elects to separate or treat students differently on the basis of sex in those situations, a school generally must treat transgender students consistent with their gender identity.[22]

Both of these documents were issued without using the notice-and-comment rulemaking procedure under the APA. Recently, on February 22, 2017, the OCR announced in another Dear Colleague letter (DCL) that it

19. Letter from James A. Ferg-Cadima, Acting Deputy Assistant Sec'y for Policy, Office for Civil Rights, U.S. Dep't of Educ., to Emily T. Prince, Esq. (Jan. 7, 2015) [hereinafter Ferg-Cadima Letter], http://www.bricker.com/documents/misc/transgender_student_restroom_access_1-2015.pdf [perma.cc/5RZB-KUQC].

20. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Att'y Gen. for Civil Rights, Civil Rights Div., U.S. Dep't of Justice, to Colleague (May 13, 2016) [hereinafter Dear Colleague Letter on Transgender Students], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/5LMN-NFTZ].

21. *Id.* at 3 & n.14. (footnotes omitted).

22. Ferg-Cadima Letter, *supra* note 19.

was "withdrawing the statements of policy and guidance reflected in" the previously mentioned documents.[23] Opponents of *Auer* warned of a situation such as this since, according to them, *Auer* would leave covered institutions and individuals at the mercy of agencies' changing interpretations, leaving these entities confused and without fair notice.[24]

B. G.G. ex rel. Grimm v. Gloucester County School Board

In 2015, a transgender boy, G.G., challenged the Gloucester County School Board's resolution that stated:

> It shall be the practice of the [Gloucester County Public Schools] to provide male and female restroom and locker room facilities in its schools, and [their] use . . . shall be limited to the corresponding biological genders, and students with gender identity issues shall be provided an alternative appropriate private facility.[25]

G.G., who identifies as male, alleged that depriving him of the use of the boys' bathroom is sex discrimination covered under Title IX.[26] The district court found that pursuant to the Department of Education's regulations, particularly 34 C.F.R. § 106.33, G.G. did not have a claim under Title IX.[27] According to the district court, this regulation permits schools to have separate, sex-based bathrooms, regardless of whether the segregation is based on biological sex or gender, provided that "the bathrooms for each sex are comparable."[28]

Interpreting the regulation, the OCR elaborated in an opinion letter

23. Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. & T.E. Wheeler, II, Acting Assistant Att'y Gen. for Civil Rights, Civil Rights Div., U.S. Dep't of Justice, to Colleague (Feb. 22, 2017) [hereinafter Dear Colleague Letter Withdrawing Title IX Guidance Documents], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf [https://perma.cc/6RZU-9MMT].

24. *See* Derek A. Woodman, Essay, *Rethinking* Auer *Deference: Agency Regulations and Due Process Notice*, 82 GEO. WASH. L. REV. 1721, 1725 (2014).

25. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 738–41 (E.D. Va. 2015) (first alteration in original) (quoting Complaint at ¶ 34, *Gloucester*, 132 F. Supp. 3d 736 (No. 4:15cv54)), *rev'd in part, vacated in part, and remanded*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).

26. *Id.* at 742.

27. *Id.* at 744.

28. *See id.* at 744–45.

dated January 7, 2015, "When a school elects to separate or treat students differently on the basis of sex in . . . situations [such as those relating to sex-segregated bathrooms], a school generally must treat transgender students consistent with their gender identity."[29] The OCR also issued another guidance document, the DCLTS,[30] and another document entitled "Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities."[31]

According to the district court, *Auer* deference could be accorded to the agency's interpretation if 34 C.F.R. § 106.33 was ambiguous and the interpretation was not plainly erroneous or inconsistent with prior laws.[32] But the district court found that the regulation was not ambiguous because the regulation "clearly allows the School Board to limit bathroom access 'on the basis of sex,' including birth or biological sex."[33] The court also found that the agency's interpretation was "plainly erroneous and inconsistent with the regulation [because] … under the most liberal reading, 'on the basis of sex' . . . means both 'on the basis of gender' and 'on the basis of biological sex.' It does not mean 'only on the basis of gender.'"[34] Accordingly, the district court did not give *Auer* deference to the OCR's interpretations of 34 C.F.R. § 106.33 and dismissed G.G.'s Title IX claims.[35]

However, the Fourth Circuit reversed the district court's ruling.[36] In determining the meaning of the term *sex*, the Fourth Circuit held that the guidance documents were entitled to *Auer* deference because there was ambiguity: "The regulation is silent as to which restroom transgender individuals are to use when a school elects to provide sex-segregated restrooms, and the Department's interpretation, although perhaps not the intuitive one, is permitted by the varying physical, psychological, and social aspects . . . included in the term 'sex.'"[37] The Fourth Circuit found that the OCR's interpretation is not plainly erroneous or inconsistent with

29. Ferg-Cadima Letter, *supra* note 19.

30. Dear Colleague Letter on Transgender Students, *supra* note 20.

31. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SINGLE-SEX ELEMENTARY AND SECONDARY CLASSES AND EXTRACURRICULAR ACTIVITIES 25 (2014).

32. *Gloucester*, 132 F. Supp. 3d at 746.

33. *Id.*

34. *Id.* (emphasis omitted).

35. *Id.* at 746–47.

36. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 715 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).

37. *Id.* at 721–22.

the regulation's text, and was likewise not a "convenient litigating position."[38] Therefore, the Fourth Circuit decided that the OCR's interpretation should be accorded *Auer* deference.[39]

In August 2016, Gloucester County School Board filed a writ of certiorari raising three questions:

> (1) Should this Court retain the *Auer* doctrine despite the objections of multiple Justices who have recently urged that it be reconsidered and overruled?
> (2) If *Auer* is retained, should deference extend to an unpublished agency letter that, among other things, does not carry the force of law and was adopted in the context of the very dispute in which deference is sought?
> (3) With or without deference to the agency, should the Department's specific interpretation of Title IX and 34 C.F.R. § 106.33 be given effect?[40]

On October 28, 2016, the Supreme Court granted Gloucester County's petition but limited the issues to questions two and three,[41] thereby refusing to entertain the issue regarding *Auer*'s validity. On February 22, 2017, the DOE and the Department of Justice (DOJ) jointly issued a "Dear Colleague Letter" withdrawing the DOE's interpretations in the prior guidance document and the opinion letter.[42] The Supreme Court subsequently vacated and remanded the case back to the Fourth Circuit for reconsideration given the new circumstances.[43]

Although *Gloucester* was predominantly constrained to *Auer's* validity and applicability, arguments could be made that either *Chevron* or *Skidmore* was applicable instead.

III. PRELIMINARY MATTERS: TO BE ENTITLED TO DEFERENCE, THE

38. *See id.* at 722.
39. *Id.* at 723.
40. *See* Petition for a Writ of Certiorari at i, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (Aug. 29, 2016) (No. 16-273).
41. *Gloucester*, 137 S. Ct. 369 (mem.) ("Petition . . . granted limited to Questions 2 and 3 presented by the petition.").
42. Dear Colleague Letter Withdrawing Title IX Guidance Documents, *supra* note 23.
43. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (mem.).

AGENCY'S INTERPRETATION MUST NOT BE PROCEDURALLY DEFECTIVE

There are different degrees of deference based on the framework used.[44] The frameworks used to determine the amount of deference appropriate to an agency interpretation, *Auer*, *Chevron*, and *Skidmore*, vary in the degree of deference accorded to an agency's interpretation based on the type of rule that the agency is interpreting. *Auer* deference gives controlling weight to agency interpretations of the agency's own ambiguous regulations.[45] Some say that this is "even more deferential" than *Chevron*.[46] Under *Chevron*, courts substantially defer, and are therefore highly deferential, to an agency's regulation when it is a reasonable interpretation of an ambiguous statute.[47] In applying *Skidmore*, the agency's questioned interpretation may only be "entitled to respect" based on various factors, including the "power to persuade."[48]

However, none of these frameworks of deference apply if a rule is defective because it did not go through the proper procedural process: If the regulation is invalid, courts will not defer to it.[49] To be valid, the regulation must have been promulgated using the correct procedures required by the governing statute and the Administrative Procedures Act (APA).[50] The APA allows rules to be enacted formally, informally, or in a hybrid method determined by the agency that is consistent with other relevant law.[51] For example, legislative rules that add new duties or impose

44. *See* United States v. Mead Corp., 533 U.S. 218, 236–37 (2001).

45. *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413–14 (1945); Auer v. Robbins, 519 U.S. 452, 461 (1997).

46. Stephen M. Johnson, *Bringing Deference Back (But for How Long?): Justice Alito* Chevron, Auer, *and* Chenery *in the Supreme Court's 2006 Term*, 57 CATH. U. L. REV. 1, 31 (2007); *see also* Cynthia Barmore, Auer *in Action: Deference After* Talk America, 76 OHIO ST. L.J. 813, 817 (2015) ("[C]ourts have called *Auer* 'extremely deferential'. . . ." (quoting Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1074 (9th Cir. 2001))).

47. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

48. *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

49. *See Mead*, 533 U.S. at 227 (discussing that a regulation is binding unless "procedurally defective").

50. *See* 5 U.S.C. § 706(2)(D) (2012).

51. *See* 5 U.S.C. § 553; Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

responsibilities are required to go through the notice and comment rulemaking process. Some rules do not have to go through this more formal procedure. Section 553 of the APA exempts "interpretive rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from the notice-and-comment requirement.[52] Even though an interpretative rule is enacted "through means less formal than 'notice and comment' rulemaking, [that fact] does not automatically deprive that interpretation of the judicial deference otherwise its due."[53]

A. Interpretive Rules

Of the rules that are exempted from notice-and-comment rulemaking, this Note will focus on interpretive rules. The strongest argument in favor of these guidance documents' procedural validity is that the rules were interpretive and thus valid despite the absence of notice and comment.

Interpretive rules are statements that are "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers."[54] There is no hard and fast rule to determine whether a rule is interpretive, but most courts apply the *legally binding* test.[55] The test simply provides that if the rule is "legally binding," then it is not interpretive.[56] To evaluate whether a rule is legally binding rather than interpretive, courts look to several factors.[57] The D.C. Circuit summarized some of the factors in *American Mining Congress v. Mine Safety & Health Administration*[58]:

> (1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively

52. 5 U.S.C. § 553(b).
53. Barnhart v. Walton, 535 U.S. 212, 221 (2002) (citation omitted).
54. Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99 (1995) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979)).
55. William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1326 (2001).
56. *Id.*
57. *Id.*
58. 995 F.2d 1106 (1993).

> amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.[59]

The Supreme Court explains factor four in *Shalala v. Guernsey Memorial Hospital*,[60] stating that a rule is also not legislative, and therefore interpretive, if it does not "effect a substantive change in the regulations."[61] In *Guernsey*, the Court found that the questioned provision that purportedly interpreted the regulations in that case, resolved an issue that the regulations, although comprehensive, did not address.[62] The *Guernsey* Court ruled that the measure was "a prototypical example of an interpretive rule" because the questioned provision merely applied existing law and was not "inconsistent with any of the Secretary's existing regulations."[63] Thus, when interpretive rules clarify an area of ambiguity, they do not establish any new standard because (1) they do not effectively amend a prior legislative rule and (2) they are not themselves legislative rules requiring notice-and-comment rulemaking.[64]

B. Interpretive Rules, When Withdrawn, Do Not Require Notice and Comment

Until recently, when an agency adopted a certain interpretation, it could not amend or repeal that prior interpretation without first subjecting the new interpretation to formal notice-and-comment rulemaking.[65] However, in the 2015 case *Perez v. Mortgage Bankers Ass'n*,[66] the Court ruled that an agency is not required to do so.[67] It explained that since the APA does not require notice-and-comment rulemaking in enacting an interpretive rule, agencies should not be required to use additional steps

59. *Id.* at 1112.
60. 514 U.S. 87 (1995).
61. *See id.* at 99–100 (quoting Guernsey Mem'l Hosp. v. Sec'y of Health & Human Servs., 996 F.2d 830, 832 (6th Cir. 1993)).
62. *See id.* at 100.
63. *Id.* at 99–100.
64. *See id.*; Warder v. Shalala, 149 F.3d 73, 80–81 (1st Cir. 1998).
65. *See* Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 583, 586 (D.C. Cir. 1997), *abrogated by* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015); Alaska Prof'l Hunters Ass'n, Inc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999), *abrogated by Perez*, 135 S. Ct. at 1203.
66. 135 S. Ct. 1199.
67. *Id.* at 1206.

than what is required by the APA in repealing that informally enacted prior rule.[68] Like interpretive rules, they are exempt from the notice-and-comment rulemaking requirement.

IV. *CHEVRON* DEFERENCE AND *CHEVRON* STEP ZERO

Chevron is the deference framework that is applied "[w]hen a court reviews an agency's construction of the statute" that Congress designated the agency to administer.[69] The Supreme Court, in *United States v. Mead Corp.*,[70] explained that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[71] The foundation of *Chevron* lies in "the theory that [Congress] implicit[ly] delegat[ed] . . . to the agency [the authority] to fill in the statutory gaps" when leaving the statute ambiguous or silent on a matter.[72]

In ascertaining whether *Chevron* may apply to an agency's interpretation, an inquiry popularly known as the *Chevron* step zero,[73] three cases are relevant. In *Christensen v. Harris County*,[74] the Court used the *force of law* test in determining whether *Chevron* applied, holding 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" because they do not have the force of law.[75] Thus, *Christensen* constrained the application of *Chevron* to rules that have the force of law, which are generally rules that have gone through the notice-and-comment rulemaking process.[76]

68. *See id.*

69. Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

70. United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

71. *Id.*

72. King v. Burwell, 135 S. Ct. 2480, 2488 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

73. For a more in-depth discussion of *Chevron* step zero, see Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 236–42 (2006).

74. 529 U.S. 576 (2000).

75. *Id*. at 587.

76. *See id.*; Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court's Retreat from* Chevron *Principles in* United States v. Mead, 107 DICK. L. REV. 289, 317–18 (2002) ("[A]n [agency] action with the 'force of

A year later, in *Mead*, the Supreme Court seemed to reject this position.[77] Although the *force-of-law* test remains, it is no longer dispositive of whether an agency's interpretation of its statutory mandate is due *Chevron* deference.[78] The *force of law* test became only one of several factors.[79] This change opened the door to the possibility that *Chevron* could apply to more informally adopted rules.

Reading *Christensen* and *Mead* together, "this much appear[s] to be clear[:] An agency receives *Chevron* deference for rulemaking and formal adjudication, and an agency might receive *Chevron* deference when the interpretation is made more informally, if the circumstances suggest it was exercising law-making authority."[80] However, the advent of *Barnhart v. Walton*[81] brought important changes to the *Chevron* step zero analysis. If *Mead* left any doubt about whether *Chevron* could apply to interpretive rules that did not go through the notice-and-comment rulemaking process, the Court clearly dispelled any of those uncertainties in *Barnhart*.[82] In *Barnhart*, the Court explicitly said that the absence of "'notice and comment' rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due. If this Court's opinion in *Christensen* v. *Harris County* suggested an absolute rule to the contrary, our later opinion in *United States* v. *Mead* denied [that] suggestion."[83]

In *Barnhart*, the Court applied *Chevron* and gave deference to an interpretive rule.[84] As such, it reinforced *Mead*'s declaration that the *legally binding* test was no longer the only factor that decided whether *Chevron* applied.[85] In *Barnhart*, the *Chevron* step zero inquiry focused instead on whether Congress would have intended the courts to defer to an interpretive rule by looking at "the interpretive method used and the nature

law'…[has] binding [effect] on those that act, those acted upon, and on the courts that are entrusted with reviewing the agency's interpretation. The authority to act with the force of law comes from Congress, often, as noted in *Mead*, in the ability to act through notice and comment.").

77. *Id.* at 227–31 (2001).

78. *See id.*

79. *Id.*

80. WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE 403 (5th ed. 2014).

81. 535 U.S. 212 (2002).

82. *Id.* at 221–22.

83. *Id.* (citations omitted).

84. *Id.*

85. *See id.* at 222 (citing United States v. Mead Corp., 533 U.S. 218, 230–31 (2001)).

of the question at issue."[86] The *Barnhart* Court then looked to "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" in determining whether "*Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation."[87]

Mead and *Barnhart* added to the existing *Chevron* confusion because whether an interpretive issue is committed to agency discretion is another question that leads to no clear answer. Appellate courts have alternated between using the *Mead* factors and the *Barnhart* factors in determining whether *Chevron* applied.[88] And they have not "generally acknowledge[d]" that they have chosen a particular method.[89] As a result, *Chevron* and its applicability hinges on a court's test preference rather than the "procedure [the] agency uses" to promulgate the interpretation.[90]

According to legal scholar Eric R. Womack, courts have applied the *Mead* test in three main ways.[91] In the first method, the court makes two inquiries: "(1(a)) requires that the reviewing court determine whether Congress has granted the agency the power to act with the force of law generally (that is, whether the agency has the ability to engage in notice-and-comment rulemaking or formal adjudications),"[92] and "under (1(b)) the court … determine[s] whether the agency is acting with the force of law in the particular action in question."[93] If both questions are not answered in the affirmative, then *Chevron*-style deference is not appropriate.[94]

The second method is more of a bright-line rule. If the procedure or form that the agency used was among those that the *Mead* Court determined deserves *Chevron* deference, then the court would apply *Chevron*; if the form was one that *Mead* found to be "less deserving of

86. *Id.*
87. *Id.*
88. Lisa Schultz Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1459 (2005).
89. *Id.*
90. *Id.*
91. Womack, *supra* note 76, at 318–23.
92. *Id.* at 309–10.
93. *Id.* at 310.
94. *See id.* at 309–10.

deference," the court would apply *Skidmore*.[95] This second method "risks eliminating actions that are traditionally categorized as informal" but would have otherwise met *Mead*'s mandate.[96]

Under the third method, the court "look[s] solely to the adequacy of the procedural protections provided by the agency in issuing an interpretation or decision affecting a regulated entity."[97] This method centers on the agency's procedures to ensure regulated entities are informed of the agency's interpretation.[98] This inquiry "eliminates any check on the general delegation of lawmaking authority to agencies by Congress under 1(a)."[99] This analytical method would allow an agency to interpret a statute without legal authority from Congress to act with the force of law, and that interpretation would be entitled to *Chevron* deference.[100]

Among the three methods, I agree with Womack that the first method, as applied in *American Wildlands v. Browner*[101] and *Native American Arts, Inc. v. Bundy-Howard, Inc.*,[102] is the correct test,[103] and when coupled with the third method is the best approach. This analysis is clearer and properly focused on the substantive value of procedure while remaining more flexible than the bright-line rule in the second method of applying *Mead*.[104]

The *Mead* Court said, "It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[105] The Court further stated, "[However,] *Chevron* deference [may be appropriate] even when [notice and comment is not] required and none was afforded."[106] Consistent with *Mead's* mandate, I agree that *Chevron's* application is not limited to rules promulgated through notice-and-comment rulemaking, allowing room for interpretive rules to be afforded

95. *See id.* at 318–19.
96. *Id.* at 319.
97. *Id.* at 320.
98. *Id.*
99. *Id.* at 320-21.
100. *See id.*
101. 260 F.3d 1192 (10th Cir. 2001).
102. 168 F. Supp. 2d 905, 915 (N.D. Ill. 2001).
103. Womack, *supra* note 76, at 313–15 (first citing *Browner*, 260 F.3d 1192; and then citing *Native Am. Arts*, 168 F. Supp. 2d 905).
104. *Id.*
105. United States v. Mead Corp., 533 U.S. 218, 230 (2001).
106. *Id.* at 230–31.

deference. At the same time, this would also restrict *Chevron*'s applicability to rules that have gone through procedures that ensure "fairness and deliberation," such as those procedures that Congress placed in the applicable statute, so that covered entities may not be found liable under the rule as a result of unfair surprise.[107]

Applying the first method ensures that Congress gave the agency the authority to bind covered entities and also ensures that the agency acted with that authority to bind parties when it enacted the disputed rule, before according substantial deference under *Chevron* to the agency's interpretation.[108] By adding the procedural check from the third method mentioned above, the proposed combination test provides an additional check to ensure the bound parties are given appropriate notice and rules are enacted with "fairness and [sufficient] deliberation" (according to *Mead*) before covered entities are held liable.[109] Although under this analysis the additional step may mean that several interpretive rules may not be entitled to *Chevron* deference, agencies may still be accorded much deference because *Skidmore* deference may apply. Under *Skidmore*, the degree of deference is determined based on an evaluation using several factors, as will be discussed later.[110]

V. APPLYING THE CURRENT *CHEVRON* STEP ZERO ANALYSIS TO THE OCR'S INFORMALLY ADOPTED GUIDANCE DOCUMENTS

Applying the first method to *Gloucester*, the guidance documents' interpretation would not be due *Chevron* deference because the documents did not go through the procedure required under 20 U.S.C. § 1682, which mandates presidential approval before the rule becomes effective.[111] Using the second method, the guidance documents also would not be entitled to *Chevron* deference because Dear Colleague Letters and opinion letters are less deserving of deference according to the *Mead* Court and thus only likely entitled to *Skidmore* deference. However, under the third method, the guidance documents in *Gloucester* might be entitled to *Chevron* deference if the OCR could show that the covered entities had notice of the OCR's interpretation. However, even under this method, the guidance

107. *Id.*
108. *See* Womack, *supra* note 76, at 314.
109. *See Mead*, 533 U.S. at 230–31.
110. *See* Womack, *supra* note 76, at 312.
111. 20 U.S.C. § 1682 (2012).

documents would arguably still not be entitled to *Chevron* deference because these documents did not go through notice and comment, which may be the best indicator of fair notice. These methods all go to the current *Chevron* step zero analysis. Applying the *Chevron* step zero analysis to the case sample, reading *Mead* and *Christensen* together, *Chevron* would likely not apply because the guidance documents were not enacted through notice-and-comment rulemaking, and did not go through the other formalities provided by Congress—such as getting presidential approval.[112]

However, guided by the *Barnhart* factors, the DCLTS and the opinion letter arguably deserve *Chevron* deference. First, under *Gonzales v. Oregon*,[113] if the language *on the basis of sex* was merely parroted by the OCR, then the guidance documents are really interpreting the statute.[114] Second, the OCR is the agency that is responsible for administering and enforcing Title IX. The issue on whether the term *sex* includes *gender identity* in the context of access to bathrooms and other school facilities falls squarely within the agency's field of expertise. Third, looking at Title IX's broad text and remedial purpose, Congress would have intended the OCR to determine whether *sex* should include *gender identity* because it is aware of the intricacies that are apparent in the enforcement of such a sweeping area of administration. Last, the OCR has carefully considered, over a significant period of time, the issue of how transgender students should be treated in different contexts, as can be gleaned from the OCR's issuance of several letters concerning transgender students on the OCR's website.[115]

Moreover under *Mead* and *Barnhart*, which rejected *Christensen*'s restrictive view, *Chevron* can apply to the DCLTS and the opinion letter here because: (1) *Chevron* deference may be afforded to interpretive rules like the two guidance documents here in question, and (2) the factors used by the Court in *Barnhart* point to *Chevron* as the "appropriate legal lens" to review the questioned regulations.[116]

If my proposed test is applied, this rabbit hole could be avoided since

112. *Id.*

113. 546 U.S. 243 (2006).

114. *Cf. id.* at 256–58 (holding that a regulation that merely "parrots" the language of a statute does not warrant *Auer* deference).

115. *See OCR Reading Room*, OFFICE FOR CIVIL RIGHTS, DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/publications.html#TitleIX [https://perma.cc/B3DG-NFNZ].

116. Barnhart v. Walton, 535 U.S. 212, 222 (2002).

it would clearly take out the possibility that *Chevron* could apply to the DCLTS and the opinion letter. Here, 20 U.S.C. § 1682 provides that "any 'rule, regulation, or order' issued by a federal agency to effectuate Title IX must be approved by the President in order to be effective."[117] Neither the DCLTS nor the opinion letter were signed by the President. Although this by itself does not render the interpretation ineffective since interpretive rules are not required by the APA to go through these procedures,[118] they are not entitled to *Chevron* deference because they did not go through the additional procedures that ensure fairness and deliberation. After all, *Chevron* deference is a high degree of deference, and once a court gives substantial deference to interpretive rules that are otherwise suppposedly not binding upon entities, such affirmation of the interpretation makes the interpretation binding. It is only right that the test afford sufficient protections to covered entities before they may be held liable under a "pronouncement of such force."[119]

VI. *CHEVRON* STEP ONE, THE *CHEVRON–AUER* INTERPLAY, AND APPLYING THESE FRAMEWORKS TO THE INFORMALLY ADOPTED GUIDANCE DOCUMENTS

Once a court finds that *Chevron* applies, it will then use a two-step analysis to determine the appropriate level of agency deference.[120] The first step in *Chevron* asks whether Congress clearly spoke on the particular subject or whether there is an ambiguity in the statute.[121] By asking whether there is ambiguity, *Chevron* step one determines the amount of

117. Equity in Athletics, Inc. v. Dep't of Educ., 675 F. Supp. 2d 660, 677 (W.D. Va. 2009), *aff'd*, 639 F.3d 91 (4th Cir. 2011) (quoting 20 U.S.C. § 1682 (2012)).

118. *Id.* at 677–78 ("[H]owever, [20 U.S.C. § 1682] does not require Presidential approval each and every time an agency issues interpretive guidelines. Equity's argument to this effect has been expressly rejected by other courts, and this court similarly concludes that the claim is without merit.") (citing Cohen v. Brown Univ., 879 F. Supp. 185, 199 (D.R.I. 1995), ("The Policy Interpretation . . . is not a rule, regulation, or order, but is a guideline designed to interpret a rule, regulation, or order . . . . The Policy Interpretation therefore need not be approved by the President in order to become effective."); and citing Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n, 2001 U.S. Dist. LEXIS 5834, at *6 (W.D. Mich. May 2, 2001) ("[T]he Court finds no reason why the Policy Interpretation must be signed by the President as it is only a guideline to interpret Title IX and not a rule, regulation, or order.") *rev'd in part on other grounds*, 101 F.3d 155 (1st Cir. 1996)).

119. *See* United States v. Mead Corp., 533 U.S. 218, 230 (2001).

120. *See* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291–92 (1988).

121. *See id.* at 291.

discretion agencies have under the law.[122] To determine whether an ambiguity exists, courts use the traditional tools of statutory construction, such as the plain meaning of the statute,[123] the context of the entire statute viewed as a whole,[124] and legislative history.[125] If the court believes that Congress was clear on the issue before the court, then the analysis ends at step one.[126]

In determining whether ambiguity exists, which is the main thrust of *Chevron* step one, the trial court in *Gloucester* found that the language *on the basis of sex* is not ambiguous because it "clearly" includes both birth or biological sex and gender.[127] However, the Fourth Circuit found ambiguity. In reaching this conclusion, the court looked to the definition of the term *sex* in a dictionary published contemporaneously with the statute.[128] According to the court, the questioned provisions do not provide how to determine "maleness" and "femaleness," and the provisions were "susceptible to more than one plausible reading."[129]

122. Brief of Professors—Dean Ronald A. Cass et al.—as *Amici Curiae* in Support of Petitioner at 12, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2017) (No. 16-273), 2017 WL 104591, at *12 [hereinafter Brief of Professors].

123. *See K Mart Corp.*, 486 U.S. at 291–92; King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("[W]hen deciding whether the language is plain, [the court] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000))); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("A [statutory] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *King*, 135 S.Ct. at 2492.).

124. *See* Dole v. United Steelworkers of Am., 494 U.S. 26, 35 (1990).

125. Funk, *supra* note 55, at 1328.

126. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

127. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d 736, 746 (E.D. Va. 2015), *rev'd in part, vacated in part, and remanded*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).

128. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 720–22 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017) ("We conclude that the regulation is susceptible to more than one plausible reading because it permits both the Board's reading—determining maleness or femaleness with reference exclusively to genitalia—and the Department's interpretation—determining maleness or femaleness with reference to gender identity.").

129. *Id.* at 721.

A. Chevron–Auer Interaction

In step one, a court may also determine that the agency's regulation interpreting an ambiguous statutory mandate is itself ambiguous. In this scenario, both *Chevron* and *Auer* are applied to determine the appropriate deference that should be afforded to the agency's interpretation. Applying *Chevron* to a set of regulations does not preclude applying *Auer*.[130] *Auer* and *Chevron* meet when a court reviews an agency's interpretation of its own regulation that, like the statutory mandate it interprets, is silent or ambiguous.[131] When an agency interprets a statute that is vague on a particular issue, and the court finds "that Congress intended the [a]gency's interpretation," *Chevron* deference is appropriately given to that agency's statutory interpretation.[132] If in turn, the agency's regulation interpreting the relevant statute is also ambiguous or silent on the same matter in question, the court then looks to the interpretive rules adopted by the agency to clarify its own regulation.[133] If the court concludes that the agency's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation," under *Auer*, the court must give controlling weight to the agency's interpretation of its own regulation.[134]

This *Chevron–Auer* relationship is apparent in the Court's analysis of the issue involved in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*.[135] Applying *Chevron* step one, the *Coeur* Court found that the Clean Water Act was ambiguous respecting the question of who between the Army Corp of Engieneers and the EPA had the authority to issue a permit for the "slurry discharge."[136] After holding that both regulations at issue were entitled to *Chevron* deference if the ambiguities were resolved, the *Coeur* Court "turn[ed] to the agencies' subsequent interpretation of those regulations" in a joint memorandum.[137] Finding that the memorandum resolved the relevant ambiguity and was "not plainly

130. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 557 U.S. 261, 277–78 (2009).
131. *See id.*
132. *See* Barnhart v. Walton, 535 U.S. 212, 217–22 (2002).
133. *See Coeur*, 557 U.S. at 277–78.
134. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)).
135. 557 U.S. 261.
136. *Id.* at 277.
137. *Id.* at 277–78.

erroneous or inconsistent with the regulation[s]," the Court concluded that the memorandum was entitled to *Auer* deference even though it had not been subjected to "formal procedures to merit full *Chevron* deference."[138]

B. Chevron–Auer *Interplay Applied to Informally Adopted Rules in* Gloucester

By analogy, the *Coeur* Court's analysis might apply to the DCLTS and the opinion letter. The relevant issue could be couched as whether a university violates Title IX when it refuses to give a transgender student access to the bathroom facilities consistent with his or her gender identity. A party wanting *Coeur* to apply could argue that Title IX does not address this issue: Title IX provides 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."[139] Although the issue relates to the meaning of sex in Title IX, the statute is silent as to whether schools are required to provide access to bathrooms that correspond to transgendered students' gender identity rather than biological sex.[140] The OCR enacted 34 C.F.R. § 106.33 via notice-and-comment rulemaking. But this regulation does not answer the question either. Section 106.33 states that "[a] recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."[141]

Since both the statute and the regulation enacted pursuant to it do not address the present issue, a court, guided by *Coeur*, may then turn to the DCLTS and the opinion letter clarifying the earlier regulation. A reading of both of these documents resolves the question squarely: When an educational institution that receives federal funds chooses to segregate its students "on the basis of sex . . . , [it] must treat transgender students consistent with their gender identity."[142]

Once the court finds that there is a genuine ambiguity and that the letters address these ambiguities, it should then determine whether these

138. *Id.* at 263, 274–75, 283–84 (quoting *Auer*, 519 U.S. at 461).
139. 20 U.S.C. § 1681(a) (2012).
140. *See id.*
141. 34 C.F.R. § 106.33 (2016).
142. Ferg-Cadima Letter, *supra* note 19; *see also* Dear Colleague Letter on Transgender Students, *supra* note 20.

interpretations are plainly erroneous or inconsistent with prior law.[143] The interpretation espoused by the OCR through the DCLTS and the opinion letter are not plainly erroneous constructions of 34 C.F.R. § 106.33. In *Gloucester*, the Fourth Circuit found, after looking at the meaning of *sex* in dictionaries from the time the regulation was enacted, that *sex* encompasses gender identity.[144] Thus, by clarifying that *sex* includes *gender identity*, the rule merely fills in the statutory and regulatory gaps and addresses an issue that educational institutions currently face.[145]

Finally, for *Auer* to apply, the interpretive rule must not be inconsistent with prior laws.[146] The Court in *Stinson v. United States*[147] analyzed whether an interpretive rule contradicted the Constitution or federal statutes to determine inconsistency.[148] Here, there is no law that contradicts or prohibits the construction of sex to include gender identity. As such, the OCR's interpretation in the DCLTS and the opinion letter is debatably reasonable and therefore not plainly erroneous or inconsistent with prior laws.

C. The Auer *Framework*

1. *Auer* Explained

To better understand and apply the *Chevron–Auer* combination, it is essential to also understand how *Auer* works. "*Auer* deference is *Chevron* deference applied to regulations rather than statutes."[149] Under *Auer*, an agency's interpretation of its own regulations is afforded controlling weight if the questioned interpretation is not plainly erroneous or inconsistent with the regulation.[150] Like in *Chevron*, the analysis under *Auer* requires a court to determine whether the relevant interpreted law is ambiguous.[151] But, instead of looking to the statute that the agency administers, the court applying *Auer* looks to the pertinent regulation that

143. *See* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).
144. *See id*.
145. *See id.*
146. *See* Stinson v. United States, 508 U.S. 36, 45 (1993).
147. 508 U.S. 36 (1993).
148. *Id.* at 45.
149. Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part).
150. Auer v. Robbins, 519 U.S. 452, 461 (1997).
151. *See id.* at 459–61.

the agency adopted pursuant to its statutory mandate, to determine whether there is ambiguity with respect to the issue before it. If a court finds ambiguity or silence on the issue, the court determines whether the agency's interpretation is reasonable.[152] A "reasonable" interpretation of an ambiguous regulation is an "interpretation [that] 'sensibly conforms to the purpose and wording of the regulations.'"[153]

Auer's premise is this: "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, [courts] presume that the power [to authoritatively] interpret its own regulations is a component of the agency's delegat[ing] lawmaking powers."[154] Accordingly, courts give agency interpretations of vague regulations controlling weight.[155]

2. *Auer* Applies to Interpretive Rules and Guidance Documents

On several occasions, the Court has affirmed *Auer*'s highly deferential stance to agency interpretation of their own regulation, regardless of "the form in which the agency promulgated its regulatory interpretation."[156] In *Auer*, the Court deferred to the secretary of labor's interpretation although it was contained in an amicus curiae brief filed by the agency and submitted at the request of the *Auer* Court.[157] The Court explained that even though the secretary's interpretation was embodied in a legal brief, it was still worthy of deference because "[t]here [was] simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[158]

Similarly, in *Stinson*, the Court applied *Auer* to an interpretive rule in the form of a commentary.[159] The Court vacated the Eleventh Circuit's ruling, which denied deference to the questioned interpretation, giving the

152. *See id.*

153. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991) (quoting N. Ind. Pub. Serv. Co. v. Porter Cty. Chapter of Izaak Walton League of Am., Inc., 423 U.S. 12, 15 (1975)).

154. *Id.* at 150–51.

155. Bowles v. Seminole Rock & Sand Co., 325 US 410, 414 (1945); *Auer*, 519 U.S. at 452.

156. Matthew C. Stephenson & Miri Pogoriler, Seminole Rock*'s Domain*, 79 GEO. WASH. L. REV. 1449, 1484–85 (2011); Stinson v. United States, 508 U.S. 36, 44 (1993); *Martin*, 499 U.S. at 150–51.

157. *Auer*, 519 U.S. at 461.

158. *Id.* at 462.

159. *Stinson*, 508 U.S. at 47.

commentary to the U.S. Sentencing Commission Guidelines Manual controlling weight under *Auer*.[160] In *Long Island Care at Home, Ltd. v. Coke*,[161] the Court afforded *Auer* deference to the agency's interpretation of its own regulation even though it was in an intra-agency memorandum.[162]

D. Deliberating Auer's Validity

In recent years, some have considered overruling *Auer*. In 2011, in *Talk America, Inc. v. Michigan Bell Telephone Co.*,[163] Justice Scalia questioned the validity of *Auer*.[164] Since then, Justices Alito, Roberts, and Thomas have expressed interest in reconsidering *Auer* as well.[165] Recent cases have called for the overruling of *Auer*,[166] but the Supreme Court has not yet entertained the issue.[167] Is *Auer* "on its last gasp"?[168] The next section explains the arguments for and against overruling *Auer*.

160. *Id.* at 47–48.
161. 551 U.S. 158 (2007).
162. *Id*. at 171.
163. 564 U.S. 50 (2011).
164. *Id.* at 67–69 (Scalia, J., concurring).
165. *See* Brief in Opposition at 2, 16, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2017) (No. 16-273), 2016 WL 4938270; Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210–11 (2015) (Alito, J., concurring in part and concurring in judgment); *Perez*, 135 S. Ct. at 1213, 1225 (Thomas, J., concurring); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 615–16 (2013) (Robert, C.J., concurring).
166. *See Decker*, 568 U.S. at 615–16 (Roberts, C.J., concurring) ("The issue is a basic one going to the heart of administrative law. Questions of *Seminole Rock* and *Auer* deference arise as a matter of course on a regular basis. The bar is now aware that there is some interest in reconsidering those cases, and has available to it a concise statement of the arguments on one side of the issue. I would await a case in which the issue is properly raised and argued."); *Decker*, 568 U.S. at 617 (Scalia, J., concurring in part and dissenting in part) ("[R]espondent has asked us, if necessary, to 'reconsider *Auer*.' I believe that it is time to do so."); Petition for a Writ of Certiorari, *supra* note 40, at i; G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 137 S. Ct. 369 (2016) (mem.) ("Petition . . . granted limited to [q]uestions 2 and 3 presented by the petition.").
167. In *Gloucester County School Board v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.), the Supreme Court decided not to entertain the question regarding *Auer*'s validity presented in Petition for a Writ of Certiorari, *supra* note 40, at i. The Supreme Court has also declined to address this question in *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608–09 (2016) (Thomas, J., dissenting from denial of certiorari).
168. *Bible*, 136 S. Ct. at 1608.

1. Constitutional Issues

a. Separation of Powers

One of the most cited alleged infirmities of *Auer* is that it violates the separation of powers.[169] According to Justice Scalia, who himself authored *Auer*, "[W]hen an agency promulgates an imprecise rule, it leaves to itself the implementation of that rule, and thus the initial determination of the rule's meaning. . . . It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."[170] Justice Thomas bolstered this view, essentially asserting that by retaining *Auer* the Court effectively acquiesces to the "transfer of judicial power to the Executive Branch."[171]

However, the argument that *Auer* violates the principle of separation of powers, although seemingly sound, is unfounded. Commingling of functions in itself is not a constitutional problem.[172] Contrary to critiques, "there is no [impermissible] commingling of functions [when] agencies"

169. *See Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring); *id.*; *Perez*, 131 S. Ct. at 1217–22, 1223 (Thomas, J., concurring in judgment); *Decker*, 568 U.S. at 619 (Scalia, J., concurring in part and dissenting in part); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 676–78 (1996); James Phillips & Daniel Ortner, *Rejecting* Auer*: The Utah Supreme Court Shows the Way*, YALE J. ON REG.: NOTICE & COMMENT (Sept. 20, 2016), http://yalejreg.com/nc/rejecting-auer-the-utah-supreme-court-shows-the-way-by-james-phillips-daniel-ortner/ [https://perma.cc/5ZJ5-TWGP]; Barmore, *supra* note 46, at 817–18 ("Critics offer a formalist objection to *Auer*, contending it offends the core principle of the separation of powers and that constitutional norms should inform how courts interpret ambiguous regulations. The problem, the argument goes, is straightforward: *Auer* allows an agency to both write the law (the regulation) and determine its application by requiring courts to defer to any plausible interpretation the agency offers. Courts, rather than agencies, should hold 'the ultimate interpretive power,' but *Auer* allows agencies to control judicial conclusions." (footnotes omitted) (quoting Michael P. Healy, *The Past, Present, and Future of* Auer *Deference:* Mead*, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. KAN. L. REV. 633, 692 (2014))).

170. *Talk Am.*, 564 U.S. at 68 (Scalia, J., concurring) (emphasis omitted).

171. *See Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in judgment); *Bible*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari) ("The doctrine [of *Auer*] has metastasized, and today 'amounts to a transfer of the judge's exercise of interpretive judgment to the agency.'" (citation omitted) (quoting *Perez*, 135 S. Ct. at 1219 (Thomas, J., concurring in judgment))).

172. Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of* Auer, 84 U. CHI. L. REV. 297, 312 (2017) (first citing Withrow v. Larkin, 421 U.S. 35, 54–55 (1975); Marcello v. Bonds, 349 U.S. 302, 311 (1955); and then citing FTC v. Cement Inst., 333 U.S. 683, 702–03 (1948)).

interpret their own ambiguous rules because when they enact rules and interpret them, they are exercising executive power.[173] As a consequence of exercising that executive power, agencies necessarily have "subsidiary powers[] to make and interpret rules."[174] To be sure, "the [Supreme] Court has consistently held that agencies implementing statutory grants of authority always and only exercise executive power . . . [even when they] make and interpret rules."[175]

Moreover, in asserting that *Auer* should be reconsidered, Justice Thomas pointed out the Supreme Court's rationale in applying *Auer* was that "the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers."[176] This reasoning would fail because the Constitution's structure granted the power to interpret to courts, and not to Congress.[177] Thus, Congress cannot validly delegate to agencies the authority to interpret its own rules because it cannot grant to the agencies a power that it does not have.[178]

This assertion is contrary to the structure of the APA itself.[179] The APA's structure legitimizes mixing functions within the agency.[180] Under 5 U.S.C. §§ 555–554, Congress can validly delegate to the agencies not only rulemaking powers but also adjudicatory powers,[181] a function that is primarily the courts'. If the Court overruled *Auer* on this basis, it would effectively overrule the APA. Thus, abandoning *Auer* "would have radical implications for delegation, the combination of functions in agencies, and

173. *See id.* at 310–11("[T]he traditional and mainstream understanding in American public law is that when agencies—acting within a statutory grant of authority—make rules, interpret rules, and adjudicate violations, they exercise *executive* power, not legislative or judicial power. Executive power itself includes the power to make and interpret rules, in the course of carrying out statutory responsibilities.").

174. *Id.* at 315–16.

175. *Id.* (emphasis omitted); *accord* United States v. Grimaud, 220 U.S. 506, 521 (1911); *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in judgment) ("[T]he Constitution imposes a duty on all three branches to interpret the laws within their own spheres . . . .").

176. *Perez*, 135 S. Ct. at 1224 (Thomas, J., concurring in judgment) (quoting Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 151 (1991)).

177. *Cf. id.* ("[T]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986))).

178. *Cf. id.*

179. *See* Administrative Procedure Act, 5 U.S.C. §§ 553–54 (2012) (providing the procedures that agencies must take when they exercise their rulemaking and adjudicative functions respectively).

180. *See id.*

181. *See id.*

other fundamental features of the modern administrative state."[182]

Critics also reason that the general assumption that "Congress has given an agency discretion to make choices within the array of possible meanings of an instruction [is] simply . . . not available as a general assumption when dealing with [*Auer*] … because the agency cannot be deemed to have authorized itself to exercise discretion."[183] However, contrary to what *Auer* critics assert, under *Auer*, the agency is not acting under its own authority "to exercise discretion."[184] In delegating to agencies the authority under the statute, Congress sets the boundaries within which the agency has discretion. It is from this original grant of discretion that the agency derives the authority to interpret its own rules. After all, a premise in Congress's delegation of an ambiguous statute is that Congress recognized the interstitial nature of the issue. When it delegates enforcement to agencies, Congress effectively grants all the subsidiary powers needed for the agencies to meet their responsibilities.[185]

Contrary to further critiques, *Auer* does not undermine the judicial branch's authority to ensure that the political branches do not aggrandize their constitutionally assigned powers.[186] "Unlike the Legislative and Executive Branches, each of which possesses several political checks on the other, the Judiciary has one primary check on the excesses of political branches. That check is the enforcement … of law through the exercise of judicial power."[187] According to Professors Cass Sunstein and Adrian Vermeule, *Auer* does not permit agencies to abuse their power to the detriment of the judiciary.[188] *Auer*'s framework recognizes certain

182. Sunstein & Vermeule, *supra* note 172, at 298.

183. Brief of Professors, *supra* note 122, at 24 (emphasis omitted). Dean Ronald A. Cass and Professors Christopher C. Demuth, Sr. and Christopher J. Walker refer to this as a "'nested' grant of authority." *Id.*

184. *See id.* at 23–24.

185. *See* Sunstein & Vermeule, *supra* note 172, at 315–16.

186. *See* Barmore, *supra* note 46, at 818; Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1210 (Alito, J., concurring in part and concurring in judgment); *Perez*, 135 S. Ct. at 1217 (Thomas, J., concurring in judgment).

187. *Perez*, 135 S. Ct. at 1220 (Thomas, J., concurring in judgment).

188. *See* Sunstein & Vermeule, *supra* note 172, at 310–11. The *Auer* critics' view on the checks and balances issue can be read in the trial court's decision in *Gloucester*. The trial court in G.G. ex rel. Grimm v. Gloucester County School Board, 132 F. Supp. 3d 736, 746–47 (E.D. Va. 2015), *rev'd in part, vacated in part, and remanded*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017), ruled that allowing interpretive rules of agencies, such as the OCR's letter in that case, to control would implicate a violation of the Constitution's "well-designed system of checks and balances."

safeguards against agencies' arbitrary actions that exceed the scope of their authority.[189]

First, there is the "[j]udicial enforcement of clear regulations and statutes."[190] As Justice Scalia himself said, "Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow."[191] By striking down agencies' actions that are in excess of the given authority, courts ensure that these parameters will not be breached.[192] Moreover, the *Auer* framework allows judges to determine that a regulation is unambiguous.[193] When they do so, and declare what they believe is the correct meaning, they assert their authority under the Constitution to interpret the statute in a way that it deems clearly proper.[194]

Second, in *Perez v. Mortgage Bankers Ass'n*,[195] the Supreme Court noted that the "arbitrary and capricious standard" of review is among the most notable forms of "constraint[] on agency decisionmaking."[196] Through the lens of the arbitrary and capricious standard of review, courts, by requiring agencies to give a cogent reason for their interpretations and taking into consideration "serious reliance interests,"[197] ensure procedural fairness in the enactment of rules.[198]

189. *See* Sunstein & Vermeule, *supra* note 172, at 316–18.

190. *Id.* at 316 ("First and foremost, the regulation that is being interpreted . . . provides the law, and any interpretation must comply with it. The regulation itself must also comply with the underlying statute . . . . Judges, not anyone else, decide whether these requirements are satisfied.").

191. City of Arlington v. FCC, 133 S. Ct. 1863, 1874 (2013).

192. *See* Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 64–65 (2011) ("Each time, the Commission's efforts were rejected for taking an unreasonably broad view …."); AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 390–92 (1999), *aff'd in part*, Verizon Commc'ns Inc. v. FCC, 535 U.S. 467 (2002); U.S. Telecom Ass'n. v. FCC, 290 F.3d 415, 428 (D.C. Cir. 2002), *cert. denied*, WorldCom, Inc. v. U.S. Telecom Ass'n, 538 U.S. 940 (2003).

193. *See* Sunstein & Vermeule, *supra* note 172, at 316.

194. *See id.* at 316–17; Chase Bank USA v. McCoy, 562 U.S. 195, 211 (2011) ("In *Christensen*, … we declined to apply *Auer* deference because the regulation in question was unambiguous, and adopting the agency's contrary interpretation would 'permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.'" (citation omitted) (quoting Christensen v. Harris Cty., 529 U.S. 576, 588 (2000))).

195. 135 S. Ct. 1199 (2015).

196. *Id.* at 1209; *see also* Sunstein & Vermeule, *supra* note 172, at 316–17.

197. *Id.* (quoting FCC v. Fox Television Stations, 566 U.S. 502, 515 (2009)).

198. *See* Sunstein & Vermeule, *supra* note 172, at 316–17 (quoting *Perez*, 135 S. Ct. at 1209).

Third, Congress safeguards against agencies' abuses of authority.[199] Cognizant that agencies adopt interpretations that may be contrary to previous interpretations, Congress sometimes provides for "safe-harbor provisions" to insulate affected entities when they justifiably relied on a prior interpretation.[200]

Fourth, *Auer*'s "plainly erroneous or inconsistent with [prior laws]" prong gives discretion to the courts to strike down an interpretation that they regard as contrary to the purpose of the construed language and prior law.[201] In refusing to give deference to an agency's interpretation, the Supreme Court has reasoned that "[d]eference is undoubtedly inappropriate . . . when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.'"[202]

Finally, the Supreme Court also has the authority to refuse to afford *Auer* deference in certain situations, narrowing its application. For example, in *Gonzales v. Oregon*,[203] the Court did not apply *Auer*, ruling that "[a]n agency does not acquire special authority to interpret its own words when . . . it merely . . . paraphrase[s] the statutory language."[204] In *Christopher v. SmithKline Beecham Corp.*,[205] Justice Alito enumerated the scenarios when the Court will deem *Auer* to be inapplicable:

> Although *Auer* ordinarily calls for deference to an agency's interpretation of its own ambiguous regulation, even when that interpretation is advanced in a legal brief, this general rule does not apply in all cases. Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "plainly erroneous or inconsistent with the regulation." And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a

199. *See Perez*, 135 S. Ct. at 1209.
200. *Id.*
201. *See* Barmore, *supra* note 46, at 823 (quoting Auer v. Robbins, 519 U.S. 452, 461 (1997)).
202. Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012) (quoting *Auer*, 519 U.S. at 461).
203. 546 U.S. 243 (2006).
204. *Id.* at 257.
205. 567 U.S. 142.

> "convenient litigating position," or a "'*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."[206]

b. Agency Incentives, Unique Expertise, and Greater Accountability

i. Interpretation, Policymaking, and the Agencies' Unique Expertise and Greater Accountability

After reviewing the history behind the courts' interpretive power, Justice Thomas justified, in his concurrence in *Perez*, that it is the courts' authority to interpret the agencies' rules because the Framers of the Constitution, through the Constitution's structure, ensured that the judicial branch would be capable of independent judgment by insulating it from external pressures.[207] The other political branches, by contrast, were purposely subjected to these external pressures to make them accountable to the American people.[208] Because of this, and because interpreting agency regulations require the "exercise of judgment," "agenc[ies are] thus not properly constituted to exercise the judicial power under the Constitution," per Justice Thomas.[209]

However, Justice Thomas partly concedes that "the Constitution imposes a duty on all three branches to interpret the laws, [but only] within their own spheres."[210] If agencies are not fit to interpret rules, Justice Thomas fails to explain why they would then be fit to interpret the rules if these rules were within the agencies' spheres.[211] Furthermore, as Justice Scalia himself acknowledged earlier, interpreting the law unavoidably entails the "consideration of policy consequences."[212] It "requires judgments of policy."[213]

This can best be illustrated by, for example, the language sex under

206. *Id.* at 155 (alteration in original) (citations omitted) (first quoting Auer v. Robbins, 519 U.S. 452, 461 (1997); then quoting *id.* at 462; then quoting Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988); and then quoting *Auer*, 519 U.S. at 462).

207. *See* Perez v. Morg. Bankers Ass'n, 135 S. Ct. 1199, 1217–20 (2015) (Thomas, J., concurring in judgment).

208. *Id.* at 1218.

209. *Id.* at 1219–20.

210. *Id.* at 1224.

211. *See id.*

212. Sunstein & Vermeule, *supra* note 172, at 299; Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

213. Sunstein & Vermeule, *supra* note 172, at 307.

Title IX. The issue facing the court in *Gloucester* was whether *sex* means *gender identity*.[214] According to the *Gloucester* court and two dictionaries published around the time the regulation in Title IX was enacted, the term can either mean biological sex or gender identity.[215] To a certain extent, courts have to resort to political inferences[216]: Would construing sex to include gender identity result in more harm than good in the educational field? Are the privacy concerns legitimate?[217] Would allowing this construction increase sexual harassment?[218] Would any religious rights be violated?[219] In cases like these, arguably, agencies such as the OCR are in a better position than the courts to determine what the language in the questioned regulation or statute should mean, especially given the policy judgments involved. The agency's unique expertise and greater accountability validate the agency's power and advantage over the court to interpret ambiguous regulations, like 34 C.F.R. § 106.33.[220]

214. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).

215. *See id.* at 721 ("Two dictionaries from the drafting era inform our analysis of how the term 'sex' was understood at that time. The first defines 'sex' as 'the character of being either male or female' or 'the sum of those anatomical and physiological differences with reference to which the male and female are distinguished….' The second defines 'sex' as: 'the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evoluntionary change, that in its typical dichotomous occurrence is usu[ally] genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness .... '" (alteration in original) (first quoting AMERICAN COLLEGE DICTIONARY 1109 (1970); then quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1971))).

216. *See* Brief of *Amici Curiae* Women's Liberation Front and Family Policy Alliance in Support of Petitioner at 3, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2017) (No. 16-273), 2016 WL 5673283.

217. *See id.* at 2–3.

218. *See id.* at 5–10.

219. *See* Brief of Major Religious Organizations as *Amici Curiae* Supporting Petitioner at 2–4, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 369 (2017) (No. 16-273), 2017 WL 192761.

220. *See* Sunstein & Vermeule, *supra* note 172, at 307 ("To be sure, the 'traditional tools of statutory construction' can be used to determine whether there is ambiguity at all. But where there is genuine ambiguity, the agency has comparative policy-making advantages—precisely parallel to its advantages in the *Chevron* setting." (quoting Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.19 (1984)).

ii. Agency Incentives and Interpretation Changes Under Different Administrations

Another frequently raised issue concerning *Auer* is that the doctrine allegedly incentivizes or motivates agencies to promulgate imprecise rules to give themselves leeway to interpret the rule in any way convenient.[221] Moreover, agency interpretations can change every time there is a change in administration.[222] These two justifications for invalidating *Auer* inherently conflict with each other. The uncertainty involved in a subsequent administration's stance on a particular issue, and whether it will have a similar interpretation, can instead motivate the current administration to enact clearer, more precise regulations in an attempt to prevent changes to its policy.[223] In fact, after what happened with the OCR's guidance documents on transgender students where the agency withdrew its interpretations under the prior administration,[224] agencies would be encouraged to make clearer rules to establish rights and duties, and enact these rules under more formal procedures so that a subsequent administration could not easily change the prior administration's desired interpretation.[225] The subsequent administration would have to go through the same procedures to change formally adopted interpretations.[226]

The Court is aware that there may be situations where agencies adopt

221. *See* Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 68–89 (2011) (Scalia, J., concurring) ("[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases."); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 620 (2013) (Scalia, J., concurring in part and dissenting in part) ("*Auer* deference encourages agencies to be 'vague in framing regulations, with the plan of issuing interpretations to create the intended new law without observance of notice and comment procedures.... [It is] a dangerous permission slip for the arrogation of power." (citations omitted) (quoting Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 ADMIN. L.J. AM. U. 1, 12 (1996))); Sunstein & Vermeule, *supra* note 172, at 308 ("*Auer* creates an unfortunate and even dangerous incentive for agencies, which 'is to speak vaguely and broadly, so as to retain a 'flexibility' that will enable 'clarification' with retroactive effect.'"(quoting *Decker*, 568 U.S. at 620)).

222. *See Decker*, 568 U.S. at 618–19 (Scalia, J., concurring in part and dissenting in part) (discussing how changes in presidential administrations also result in changes in agency interpretations of a regulation or statute).

223. *See* Sunstein & Vermeule, *supra* note 172, at 308–09.

224. Dear Colleague Letter Withdrawing Title IX Guidance Documents, *supra* note 23.

225. *See* Sunstein & Vermeule, *supra* note 172, at 308–09.

226. *See id.*

new interpretations to a statute that they genuinely perceive to be clear.[227] Issues may arise that the agency did not and could not have contemplated.[228] "[N]ovelty alone is not a reason to refuse deference."[229] And courts have rightly upheld these questioned interpretations in those cases because agencies cannot be expected (and it is impossible) to foresee every single conceivable construction to a regulation's language as unique situations arise.[230]

Empirical data suggests that agencies do not intend to create ambiguous rules.[231] A study published in 2015 shows that agencies were not as familiar with *Auer* as they were with *Chevron* and *Skidmore*.[232] Also, there is no ready example of a regulation that was purposely enacted ambiguously so that the agency could manipulate its interpretation to its convenience.[233] Here the issue of whether transgender students should be given access to bathrooms consistent with their gender identities under Title IX and 34 C.F.R. § 106.33 is a recent development.[234] The *Gloucester* Court found that the issue arose when schools started to deny transgender students access to these facilities, citing to the provisions under 34 C.F.R. § 106.33 as support.[235] Nothing in the record shows that the OCR purposely drafted these regulations to be vague. Thus, it is possible that the OCR is not attempting to aggrandize its powers by purposely creating a vague law.

Significantly, anti-*Auer* advocates' apprehensions seemingly materialized after the OCR withdrew its interpretations relating to transgender students. Because of the OCR's withdrawal, the court could

227. *See* Talk Am., Inc. v. Michigan Bell Tel. Co., 564 U.S. 50, 64 (2011); G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 722 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).

228. *See Talk Am.*, 564 U.S. at 64.

229. *Id.*

230. *See* Barmore, *supra* note 46, at 820 ("*Auer* tells agencies they need not attempt the impossible by anticipating every conceivable question about a regulation's meaning. Instead, *Auer* allows agencies to apply their rules to unanticipated situations that fall within the interstices of the regulatory language.").

231. *See id.* at 309.

232. Sunstein & Vermeule, *supra* note 172, at 309. *See* Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1061–62, 1065–66 (2015). Several of those involved in making regulations in agencies know about *Chevron* and *Skidmore*. *Id.* at 1065–66. Only half knew of *Auer*. *Id.* at 1061–62.

233. *See* Sunstein & Vermeule, *supra* note 172, at 308.

234. *See* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 718 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369, *vacated and remanded*, 137 S. Ct. 1239 (2017).

235. *Id.* at 722.

likely find that G.G. no longer has a claim under Title IX. However, the very essence of an interpretive rule is that it does not create new rights, duties, or obligations to covered entities. It is merely an extension of the duties that already existed in the regulations or the interpreted statutes, such that the withdrawal of the OCR's interpretation does not necessarily negate G.G.'s Title IX claim. After all, as the Fourth Circuit recognized, the issue may be formulated as whether the exclusion of a transgender student from using the bathroom of the *sex* she or he identifies with constitutes discrimination *on the basis of sex* under Title IX.[236] If G.G. posited the issue this way, he may have a Title IX claim regardless of the opinion letter and the DCLTS.

Finally, the argument that *Auer* allows interpretations to change with different administrations does not hold much weight since interpretive rules merely clarify already existing duties and obligations. As illustrated above, despite the changing interpretations, to change the parties' existing duties under regulations and statutes, the agency would have to go through a more formal procedure such as through notice-and-comment rulemaking. Absent more formal procedures, the duties remain. And, theoretically, because interpretive rules are not supposed to create new duties, changed interpretations would not supposedly affect the parties.

2. Administrative and Judicial Efficiency

a. Judicial Efficiency

Auer promotes judicial efficiency in that it allows courts to abstain from overseeing or "polic[ing] diverse application[s]" of a law through a case-by-case evaluation, thereby preventing court dockets from clogging up.[237] Professors Sunstein and Vermeule pointed out that Justice Scalia's justification of *Chevron* similarly justifies *Auer*.[238] Justice Scalia's words put it more aptly:

> An ambiguity in a statute committed to agency implementation can be attributed to either of two congressional desires: (1) Congress intended a particular result, but was not clear about it;

236. *Id.* at 715.

237. *See* Sunstein & Vermeule, *supra* note 172, at 304–05 (quoting Scalia, *supra* note 212, at 516–17).

238. *See id*. at 306.

> or (2) Congress had no particular intent on the subject, but meant to leave its resolution to the agency. . . . [T]he pre-*Chevron* decisions sought to choose between (1) and (2) on a statute-by-statute basis. . . . *Chevron*, however, if it is to be believed, replaced this statute-by-statute evaluation (which was assuredly a font of uncertainty and litigation) with an across-the-board presumption that, in the case of ambiguity, agency discretion is meant.[239]

Applying this to *Auer*, a "statute-by-statute evaluation" would cause uncertainty and inconsistency in its application, leading to more litigation.[240] Rightly so, especially because every regulation can contain ambiguous terms or words that can be interpreted more than one way. Even a statute that is seemingly clear today may be found ambiguous in the future, like 34 C.F.R. § 106.33 in this case. Overruling *Auer* will open the door to numerous cases seeking to clarify regulations that are allegedly ambiguous when parties simply do not agree with agency interpretations. Courts cannot possibly take on this huge responsibility without sacrificing judicial efficiency. However, a logical proposition is that courts should only assert their authority to interpret agencies' regulations when an agency blatantly exceeds the authority that it was given, and not necessarily every time an agency's interpretation of an ambiguous language is questioned.

b. Administrative Efficiency and the Issue of Notice

Auer traditionally applies to informally adopted interpretation of agencies, as discussed earlier. Some legal scholars argue that *Auer* should only apply to those interpretations that have the force of law, like in *Chevron*.[241] Using this argument, legal scholars urge the use of the *Chevron* factors to determine whether the law is legally binding and similarly apply these to *Auer*.[242] This proposition (1) fails to consider that *Chevron* is now applicable to informally adopted agency interpretations of statutes,[243] (2) fails to consider that the factors that determine *Chevron*'s application have spurred confusion in courts, and (3) contravenes the

239. Scalia, *supra* note 212, at 516.
240. *See id.* at 516–17.
241. *See* Brief of Professors, *supra* note 122, at 27.
242. *See id.* at 26.
243. *See* Barnhart v. Walton, 535 U.S. 212, 221–22 (2002).

provisions of the APA and the long-standing principle enunciated in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[244] that the APA provides the "maximum procedural requirements . . . [that courts may] impose upon agencies in conducting rulemaking procedures."[245] Therefore, if a rule is interpretive, as the opinion letter and the DCLTS arguably are here, then requiring agencies to submit these rules to the notice-and-comment rulemaking process will contradict the APA's structure[246] and overturn the decades-old principle enunciated in *Vermont Yankee*, contrary to the the doctrine of stare decisis.[247]

The suggestion of narrowing *Auer* to apply only to rules enacted through notice-and-comment rulemaking stemmed from the concern that without this procedure parties will be unfairly surprised, a risk that the Supreme Court warned about on several occasions.[248] According to critics of *Auer*'s current application, *Seminole Rock*'s application has been taken out of context and thus made to apply too broadly.[249] They allege that *Seminole Rock* deference is high because the interpretation was promulgated almost simultaneously with the regulation, and the information was extensively circulated[250]: "[T]he combination of simultaneity [in promulgating the regulation and the interpretation together] and widespread dissemination ... made deference to the interpretation [in *Seminole Rock*] the same as deference to the rule itself."[251]

Although ideal, simultaneity is not always possible. In this case, the questioned regulation was adopted in 1975.[252] The issue on the

244. 435 U.S. 519 (1978).

245. *Id.* at 524; Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1207 (2015).

246. 5 U.S.C. § 553(b) (2012).

247. *See Vermont Yankee*, 435 U.S. at 524 ("Agencies are free to grant additional procedural rights in the exercise of their discretion, but reviewing courts are generally not free to impose them if the agencies have not chosen to grant them.").

248. Brief of Professors, *supra* note 122, at 28 (first quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 156 (2012); and then citing *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007); then citing *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157 (1991); and then citing *NLRB v. Bell Aerospace*, 416 U.S. 267, 295 (1974)).

249. *See id.* at 26–27.

250. *See id.*

251. *Id.* at 27.

252. G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 (4th Cir. 2016) ("Title IX regulations were promulgated by the Department of Health, Education, and Welfare in 1975 and were adopted unchanged by the Department in 1980." (citing 45 Fed. Reg. 30802, 30955 (May 9, 1980))), *cert. granted in part*, 137 S. Ct. 369, *vacated and*

construction of *on the basis of sex* in the regulation did not arise until recently.[253] Moreover, widespread dissemination can be achieved through means other than formal notice-and-comment rulemaking. For example, the OCR can disseminate its interpretations to covered entities on its website where it currently posts all opinion letters, Dear Colleague letters, and other guidance documents for anyone to access. Agencies could timely apprise Title IX officers in educational institutions of newly promulgated interpretations. For example here, although copies of opinion letters are readily available through the OCR's webpage,[254] the OCR can mail or e-mail or similarly disseminate copies of the interpretation to covered entities.

Requiring interpretive rules to go through the notice-and-comment rulemaking process will significantly impair administrative efficiency:

> [T]he courts have [already] interpreted the APA mandated procedures in ways that make them more difficult with which to comply. . . . [A]s a result, the [notice-and-comment] rulemaking process can take a long time for complex and controversial rules—typically four to eight years or longer. This slowdown is referred to as the "rulemaking ossification."[255]

VII. *CHEVRON* STEP TWO

If the statute is silent or ambiguous, then *Chevron* step two inquires as to whether the agency's interpretation is a permissible construction of that statute.[256] Per the Court in *Martin v. Occupational Safety and Health Review Commission*,[257] a reasonable or permissible interpretation of an ambiguous regulation is one that "sensibly conforms to the purpose and wording of the regulations."[258] This step, therefore, asks whether the agency has "reasonably exercised [the] discretion" Congress gave it.[259]

remanded, 137 S. Ct. 1239 (2017).

253. *See id.* at 718.

254. *OCR Reading Room*, *supra* note 115.

255. FUNK ET AL., *supra* note 80, at 30 (citing Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997)).

256. *Id.* at 149–50 (quoting K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291–92 (1988)).

257. 499 U.S. 144 (1991).

258. *Id*. at 150–151 (quoting N. Ind. Pub. Serv. Co. v. Porter Cty. Chapter of the Izaak Walton League of Am., Inc., 423 U.S. 12, 15 (1975)).

259. Brief of Professors, *supra* note 122, at 12.

The agency's interpretation of the ambiguous statute is entitled to deference only if it is reasonable.[260] This step is very deferential.[261] This analysis is similar to the *plainly erroneous or inconsistent* standard of *Auer* discussed above.[262] Applying *Chevron* step two to the *Gloucester* facts, arguably the agency's interpretation of the statute is a permissible construction of the language *on the basis of sex* in Title IX because even the courts differed as to their interpretations, and one court even adhered to the agency's interpretation.[263] However, it could also be argued that the agency's construction is not permissible or reasonable because the text of the statute, considering the time it was enacted, could reveal that "gender" was not contemplated to be synonymous to "sex."

VIII. THE *SKIDMORE* FRAMEWORK

Before the advent of the Court's ruling in *Barnhart*, courts applied the *Skidmore* framework to interpretive rules that were informally adopted.[264] *Christensen* clearly supports the application of *Skidmore* to interpretive rules which may not have the force of law: "[I]nterpretations contained in formats such as opinion letters are 'entitled to respect' under our decision in *Skidmore* . . . ."[265]

Although *Skidmore*'s consistent factor is used by some courts to analyze *Chevron* step two,[266] it is evident that *Skidmore* still survives and

260. *See* Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2124–25 (2016) (citing Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984)).

261. *See* Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 31 (1998) (showing that during 1995 and 1996, agencies were given deference 89% of the time at this step).

262. Healy, *supra* note 169, at 672 & n.232 ("In practice, *Auer* deference is *Chevron* deference applied to regulations rather than statutes." (quoting Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597, 617–18 (2013) (Scalia, J., concurring in part and dissenting in part))).

263. *Compare* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 132 F. Supp. 3d. 736, 745 (E.D. Va. 2015) ("[U]nder any fair reading, 'sex' in Section 106.33 clearly includes biological sex."), *with* G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 721 & n.7 (4th Cir. 2016) ("Modern definitions of 'sex' . . . implicitly recognize the limitations of a nonmalleable, binary conception of sex.").

264. *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000); Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141–43 (1976); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257–58 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

265. *Christensen*, 529 U.S. at 587 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

266. *See, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 416–17 (1993)

is used whenever a rule does not meet the requirements for *Chevron*.[267]

The Supreme Court explained that even if deference to a rule was not appropriate under *Chevron*, the rule may still be entitled to respect, reasoning that "sometimes an agency interpretation, in light of the agency's special expertise, will still have the 'power to persuade, [even] if [it has no] power to control.'"[268] For example, in *Martin*, the Court applied *Skidmore* to the Secretary of Labor's emissions citation containing an interpretation of an Occupational Safety and Health Act. The secretary, pursuant to his authority under the OSH Act of 1970, adopted standards governing employees' exposure to coke-oven emissions and requiring the use of respirators for employees in certain circumstances.[269] The Secretary cited a company for failing to provide its employees with respirators meeting the atmospheric test and exposing these employees to coke-oven emissions exceeding the regulatory limit in violation of the regulation requiring the "institut[ion of] a respiratory protection program."[270] The OSH Commission reversed the ALJ's finding and vacated the citation, concluding that the respiratory protection program only required employers to provide training to its employees on the "proper use of respirators."[271] The *Martin* Court deferred to the secretary's interpretation, finding that even if the secretary decided to use a citation as an "initial means for announcing a particular interpretation," this "interpretation is not undeserving of deference merely because the secretary advances it for the first time in an administrative adjudication."[272]

The Supreme Court has applied *Skidmore* in two different ways. In *Christensen*, the Court interpreted the statute on its own and compared its interpretation to that of the agency.[273] In comparing both constructions of the statute, it inquired into

(considering the consistency of the agency's position in determining if the interpretation is reasonable); Arkansas v. Oklahoma, 503 U.S. 91, 110 (1992) (noting that the agency's interpretation is both reasonable and consistent).

267. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part and concurring in judgment); *Christensen*, 529 U.S. at 587; Healy, *supra* note 169, at 657–58.

268. *City of Arlington*, 133 S. Ct. at 1876 (Breyer, J., concurring in part and concurring in judgment) (quoting *Skidmore*, 323 U.S. at 140).

269. Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 148 (1991).

270. *Id.* (quoting 29 C.F.R. § 1910.1029(a)(3)(1990)).

271. *Id.* at 148–49.

272. *Id.* at 158.

273. Christensen v. Harris Cty., 529 U.S. 576, 585–88 (2000).

> whether it is persuaded that the agency's interpretation is "better," without affording the agency's interpretation any presumption of validity. If the agency's interpretation is "unpersuasive," no deference is due under *Skidmore*. Only after determining which reading of the statute it believes best does the majority decide what level of deference to afford the agency interpretation.[274]

On the other hand, in *EEOC v. Arabian American Oil Co.*[275] and *General Electric Co. v. Gilbert*,[276] the Court applied *Skidmore* as a "sliding scale of deference" after weighing the *Skidmore* factors of agency expertise, "thoroughness evident in its consideration, . . . consistency with earlier and later pronouncements, and all of those factors which give it the power to persuade, if lacking power to control."[277] Courts can either apply *Skidmore* with more restraint like the *Christensen* Court or apply *Skidmore* with more flexibility like in *Arabian American Oil Co.* and *General Electric Co.*

I propose that the sliding scale of deference is the more appropriate approach to applying *Skidmore*. Since *Skidmore* applies to actions that potentially do not have the force and effect of law, as mentioned in *Christensen*, courts must weigh the importance of determining the agency's expertise and the other *Skidmore* factors against the court's expertise in interpreting the law. To use the *Christensen* method where no deference is entitled to the agency action under *Skidmore* would possibly strip the agency's expertise from the analysis.[278] For the reasons mentioned in *Auer*, it is difficult to totally divorce the statute's meaning from the political circumstances involved, especially when the agency policies and interpretations are politically driven.

Here, *Skidmore* deference can also apply to the OCR's informally adopted agency interpretations.[279] Since the OCR is the agency tasked to administer and enforce Title IX, it is the best entity to determine the

274. Rossi, *supra* note 7, at 1127 (footnotes omitted) (quoting *Christensen*, 529 U.S. at 585, 587).

275. 499 U.S. 244 (1991).

276. 429 U.S. 125 (1976).

277. Rossi, *supra* note 7, at 1135–1136 (quoting *Arabian Am. Oil Co.*, 499 U.S. at 257 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))); *see also Arabian Am. Oil*, 499 U.S. at 257–58; *Gen. Elec. Co.*, 429 U.S. at 141–43.

278. *Christensen*, 529 U.S. at 585–87.

279. *See id.*

definition of *sex* because of its level of expertise and experience in handling similar situations involving Title IX.. Furthermore, the DCLTS and the opinion letter do not contradict the existing law. Instead, they add clarification to whether *sex* under Title IX includes gender identity and guide institutions on how to treat transgender students regarding access to bathrooms. It is arguable that Congress would have intended the OCR to have authority to determine issues regarding what constitutes *sex* under Title IX because of the intricacies entailed in such a pervasive area of law. The details inherent in enforcing a statute are best assigned to an agency with expertise and experience in dealing with the matter.

IX. THE MAJOR-DECISIONS RULE AND NO DEFERENCE

Recently, in *King v. Burwell*, a majority of the Supreme Court justices decided to neither apply *Chevron* nor give deference to the agency's interpretation of the statute; the Supreme Court, through Chief Justice Roberts, explained that "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[280] In *Burwell*, the court reasoned that since "[t]he tax credits . . . available on Federal Exchanges [implicate] . . . a question of deep 'economic and political significance' that is central to this statutory scheme," Congress would have "expressly" and explicitly "assign[ed] that question to an agency" if it intended to delegate to the agencies the task of "fill[ing] in the statutory gaps."[281]

Although this Note does not cover an in-depth analysis of the major-decisions rule and the implications of *King v. Burwell*, it recognizes that there is a possibility that no deference could be accorded to the agency's interpretation in *Gloucester* because the language *sex* or *on the basis of sex* is pervasive in Title IX, as well as in several statutes all over the U.S. legal system. There could be huge implications. In deciding this issue, one that has broad effects, Congress would not have left this matter of great consequence to the agency's discretion without an express delegation. As such, this Note leaves the door open to the possibility that deference may not be accorded to the agency interpretations in this case under *Burwell*'s doctrine.[282]

280. King v. Burwell, 135 S. Ct. 2480, 2488–89 (2015) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

281. *Id.* at 2488–89 (quoting *Brown & Williamson*, 529 U.S. at 159–60).

282. For a more in-depth analysis of the major-questions doctrine in *Burwell*, *see*

X. CONCLUSION

Agency deference should remain. It is undeniable that agencies have the expertise on the different matters that are delegated to them. Agencies are also politically oriented, and any of the policies and rules that they enact are likely a reflection of the will and policies espoused by the administration, chosen by the electorate. Interpretations of the statute and the regulations, therefore, cannot be totally separated from the principles and policies espoused by the agency interpreting the statutes and regulations.

The different rabbit holes that one could fall into in the deference analysis have made a mess of *Chevron*, *Skidmore*, *Auer*, and now *Burwell*, such that the line between the deference frameworks has become blurry, and the application, inconsistent. Although there should not be a rigid, bright-line rule for determining what deference to apply to agency interpretation, a clearer separation between the principles of *Chevron*, *Skidmore*, and *Auer* should be drawn to give better guidance to courts and federally funded, covered entities.

Chevron should be applied according to *Mead*, not the sliding-scale-factors analysis of *Barnhart*. Pursuant to *Mead*, I propose that the analysis in *Chevron* step zero should be like this: (step 0(a)) "[T]he reviewing court [must] determine whether Congress has granted the agency the power to act with the force of law generally," such as, but not limited to, whether a formality was required by Congress and was followed by the agency, or whether it went through notice-and-comment rulemaking;[283] (step 0(b)) "the reviewing court [must] look[] more specifically at the particular agency action in question and attempt[] to determine whether the agency is acting with the force of law in the particular action in question."[284] Then, step 0(c) should inquire into "the adequacy of the procedural protections provided by the agency in issuing an interpretation or decision affecting a regulated entity."[285] Once all these preliminary steps are satisfied, then *Chevron* should apply, unless *Burwell* applies.

After this three-step analysis of whether *Chevron* deference is appropriate, the *Chevron* two-step analysis should follow. Once step zero

Christopher J. Walker, *Toward a Context-Specific* Chevron *Deference*, 81 MO. L. REV. 1095 (2016).

283. Womack, *supra* note 76, at 309–10.

284. *Id.* at 310.

285. *Id.* at 320.

determines that *Chevron* is not appropriate, the *Skidmore* sliding-scale test which takes into consideration factors such as agency expertise, should be applied, which would allow the court to give minimal deference if it finds that substantial deference is not appropriate. After all, rules that traditionally fell into *Skidmore*'s ambit did not have the force of law. Both *Chevron* and *Skidmore* should thus be applied to agency interpretations of a statute.

Auer, on the other hand, should be applied to an agency's informally adopted interpretations in the traditional way. If *Auer* does not apply, then *Skidmore* should not be the fallback; courts should then refrain from deferring. After all, under *Auer*, the court is dealing with an agency's interpretation of its own regulation. At this point, it is already an interpretation of a regulation that was also an interpretation of a statute. If the agency action fails *Auer*, then it should not deserve any deference and should be reviewed de novo.

Auer deference has been in existence for seventy-two years. It survives for a reason: It is valid law. *Auer* promotes judicial and administrative efficiency, while affording safeguards against aggrandizement of power by the agencies. There is no constitutional infringement because agencies are exercising the executive function when they enact and interpret rules. As evidenced by how the modern administrative state works, it cannot be disputed that in day-to-day transactions it is just inherently necessary that the executive, legislative, and judicial functions, to an extent, converge into one body. The convergence is not necessarily unconstitutional; there can be permissible commingling. And that is what *Auer* allows.