THE COLLEGE FIX

The Supreme Court just passed up a chance to hog-tie the Department of Education

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I'm glad that Prof. Jonathan Adler of Case Western University's law school is paying close attention to the Supreme Court docket, because he caught an action I would have completely missed – one that has far-reaching ramifications for the Department of Education's herculean stretching of Title IX as if it were Statutory Silly Putty.

On Monday the court declined to take *United Student Aid Funds v. Bible* (don't worry, the Scriptures aren't getting sued), which is precisely about Ed's determination to warp and twist everything in its path. One justice was sensible enough to dissent from the denied cert.

The Cato Institute has a good summary of the case, which involves a student protesting the "collection fee" on her student-loan default repayment plan, even though it is *expressly permitted* by both law and regulation. It's insanity:

The Seventh Circuit panel fractured, with one judge considering the regulatory text unambiguously *permitting* the fee, one judge considering the regulatory text unambiguously *prohibiting* the fee, and one just finding the regulations altogether ambiguous. The judges decided to resolve the case by deferring to the Department of Education's opinion on the matter.

Guess how this goes:

The Secretary of Education filed an *amicus curiae* brief, siding with [Bryana] Bible — which contradicted both the agency's previous regulations and the statute's express terms. Still, because the Secretary's brief offered novel interpretative guidance, the court was forced to defer to the agency's interpretation of its own guidance under a rule called *Auer* (or *Seminole Rock*) deference — a doctrine requiring courts to defer to agencies' interpretation of their own guidance unless plainly erroneous or inconsistent with the regulation — instead of hazarding its own interpretation.

This was the novelist in charge of Ed at the time.

Auer/Seminole Rock is the foundation of Ed's increasingly brazen attacks (some might call it blackmail) on colleges that don't presume accused students guilty and public schools that want to protect girls' privacy when they are naked. Adler explains in *The Washington Post*:

Under this doctrine, if an agency's regulations are ambiguous, courts will defer to the promulgating agency's reigning interpretation, even if the agency's own view of the regulation has changed over time and the interpretation in question has never been subject to notice-and-comment or other regulatory procedures.

This doctrine is at play in the 4th U.S. Circuit Court of Appeals' cowardly decision in *G.G. v. Gloucester*, the transgender-bathroom case in Virginia. Keep in mind that "on the basis of sex" in Title IX *unambiguously* does not refer to "gender identity" under the plain meaning of the words in the 1970s law:

Note that instead of going through notice-and-comment procedures to issue regulations defining "sex," for purposes of the relevant regulations, to include sexual identity, all the agency had to do was announce its interpretation in a letter.

Only Justice Clarence Thomas thought that this ludicrous doctrine of *Auer/Seminole Rock* – the equivalent of a Get Out of Court Free Card for reckless, lawless agencies – was worth revisiting in *Bible*:

Members of this Court have repeatedly called for [the doctrine's] reconsideration in an appropriate case. …

Here, the Court of Appeals for the Seventh Circuit deferred to the Department of Education's interpretation of the regulatory scheme it enforces … the Department's interpretation is not only at odds with the regulatory scheme but also defies ordinary English. More broadly, by deferring to an agency's litigating position under the guise of*Seminole Rock*, courts force regulated entities like petitioner here [United Student Aid Funds] to "divine the agency's interpretations in advance," lest they "be held liable when the agency announces its interpretations for the first time" in litigation. ... By enabling an agency to enact "vague rules" and then to invoke *Seminole Rock* to "do what it pleases" in later litigation, the agency (with the judicial branch as its co-conspirator) "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."

Thomas is citing his departed colleague, Justice Antonin Scalia, in that last quote. It's a fitting way to honor Scalia in a case he surely would have wanted to take.

For those readers who geek out when we talk about the Administrative Procedure Act and the Department of Ed's total disregard for rulemaking protocol, read Cato's explanation of why this disputed doctrine has been *de jure* null and void *for seven decades*, yet continues showing up *de facto* to cause regulatory mayhem.

And for those readers who are sympathetic to kids with confused gender identity but give a damn about regulatory protocol, read Robby Soave's takedown of Title IX as the vehicle for this federally mandated social engineering in *Reason*:

Could it really be the case that Title IX prohibits risqué jokes but *requires* young women to shower alongside people whose biological gender makes them uncomfortable?