

nature] would significantly impede future innovation.”<sup>81</sup> If the Federal Circuit has yet to adopt even the explicit content of Justice Breyer’s opinion, it almost certainly has not adopted the opinion’s more implicit lessons. A clearer discussion in *Prometheus* of the policy roles of the various provisions might have helped the Federal Circuit break free of its continuing fascination with rigid bright-line rules.<sup>82</sup>

In short, the Court should have recognized the increasing frequency with which courts have begun debating the appropriateness of various statutory provisions for the patentable subject matter analysis and subsequently considered the reasons behind these arguments. Doing so would likely have resulted in an opinion that provided more guidance to the Federal Circuit as it insists on maintaining its stable of bright-line rules, even in the face of repeated reversals from the Supreme Court.<sup>83</sup> Without this guidance, the Federal Circuit is not likely to give Justice Breyer’s opinion the appropriate level of consideration, setting the stage for an appeal of yet another § 101 case.

### B. Fair Labor Standards Act of 1938

*Auer Deference.* — The allocation of interpretive authority between courts and administrative agencies is one of the central difficulties in administrative law. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>1</sup> established that agencies, rather than courts, have the primary role in determining the meaning of the statutes they administer.<sup>2</sup> Long before *Chevron*, the Supreme Court in *Bowles v. Seminole Rock & Sand Co.*<sup>3</sup> also made agencies the primary interpreters of their own regulations.<sup>4</sup> The Supreme Court recently reaffirmed *Seminole Rock* in *Auer v. Robbins*.<sup>5</sup> Like *Chevron* deference, which requires courts to defer to reasonable agency interpretations of ambiguous statutes,<sup>6</sup> *Auer* deference, as this flavor of deference has come to be known, obliges courts to give controlling

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<sup>81</sup> *Prometheus*, 132 S. Ct. at 1304.

<sup>82</sup> Concededly, this fascination is not an unqualified evil. See John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771, 810 (2003) (“As we assess the court’s movement into adjudicative rules formalism, we would do well to remember that the goals of certainty and predictability rank high among the list of legal aspirations.”).

<sup>83</sup> See, e.g., *Prometheus*, 132 S. Ct. at 1296; *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006) (rejecting the Federal Circuit’s de facto policy of granting injunctions upon request rather than applying the traditional four-factor test established in equity, as the test applies “with equal force to disputes arising under the Patent Act”).

<sup>1</sup> 467 U.S. 837 (1984).

<sup>2</sup> *Id.* at 843.

<sup>3</sup> 325 U.S. 410 (1945).

<sup>4</sup> *Id.* at 414.

<sup>5</sup> 519 U.S. 452, 461 (1997).

<sup>6</sup> See *Chevron*, 467 U.S. at 843.

weight to an agency interpretation of its own regulation “unless it is plainly erroneous or inconsistent with the regulation.”<sup>7</sup>

*Auer* deference has been relatively uncontroversial for most of its history, but it has recently come under increasing scrutiny in both the academy and the Supreme Court.<sup>8</sup> Last Term, in *Christopher v. SmithKline Beecham Corp.*,<sup>9</sup> the Court endorsed much of the recent criticism of *Auer* deference by refusing to defer to an agency’s interpretation of a regulation when that interpretation changed over the course of litigation.<sup>10</sup> The extent to which the Court cut back on *Auer* is not entirely clear, but the *Christopher* decision is best read as endorsing a strong commitment to fair notice for regulated entities, and thus as withholding *Auer* deference in cases of retroactive application.

*Christopher* arose under the Fair Labor Standards Act of 1938<sup>11</sup> (FLSA), which requires employers to pay overtime wages at a rate of one and a half times normal wages for time employees work in excess of forty hours a week.<sup>12</sup> Not all employees, however, are protected by this requirement. One exception is that a worker “employed . . . in the capacity of outside salesman” is not entitled to overtime pay.<sup>13</sup> The FLSA does not define “outside salesman,” instead leaving it to be “defined and delimited from time to time by regulations of the Secretary [of Labor].”<sup>14</sup>

The Department of Labor (DOL) issued three regulations relevant to the definition of “outside salesman.” First, it defined the term to mean “any employee . . . [w]hose primary duty is . . . making sales within the meaning of [29 U.S.C. § 203(k)]” and who is “customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.”<sup>15</sup> Section 203(k), in turn, defines a sale as “any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.”<sup>16</sup> Second, the DOL issued a regulation to clarify that “[s]ales within the meaning of [29 U.S.C. § 203(k)] include the transfer of title to tangible property.”<sup>17</sup> Third, the DOL clarified that “[p]romotion work . . . may or may not be exempt

<sup>7</sup> *Seminole Rock*, 325 U.S. at 414.

<sup>8</sup> See John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 614 (1996) (describing *Auer* deference as “one of the least worried-about principles of administrative law” but noting recent criticism).

<sup>9</sup> 132 S. Ct. 2156 (2012).

<sup>10</sup> *Id.* at 2169.

<sup>11</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>12</sup> *Id.* § 207(a)(1).

<sup>13</sup> *Id.* § 213(a)(1).

<sup>14</sup> *Id.*

<sup>15</sup> 29 C.F.R. § 541.500 (2011).

<sup>16</sup> 29 U.S.C. § 203(k).

<sup>17</sup> 29 C.F.R. § 541.501.

outside sales work, depending upon the circumstances under which it is performed.”<sup>18</sup> If promotion work is performed “incidental to and in conjunction with an employee’s own outside sales or solicitations,” it is exempt from the overtime pay requirement; if it is “incidental to sales made, or to be made, by someone else,” it is not exempt.<sup>19</sup>

The DOL further clarified its position in the preamble to the most recent set of regulations, which explained that a “sale” takes place whenever an employee has “in some sense” made a sale.<sup>20</sup> Exemption from the overtime requirement “should not depend” on formalities, such as “whether it is the sales employee or the customer who types the order into a computer system and hits the return button.”<sup>21</sup>

Michael Christopher started working for SmithKline Beecham (SKB) in 2003 as a pharmaceutical sales representative (PSR).<sup>22</sup> His job was to visit physicians in an assigned region to discuss the “features, benefits, and risks” of an assigned portfolio of SKB’s prescription drugs.<sup>23</sup> The goal of those visits was to secure nonbinding commitments from physicians to prescribe SKB’s drugs when appropriate.<sup>24</sup> Visits to physicians occupied roughly forty hours of Christopher’s time each week; he spent an additional ten to twenty hours every week reviewing product information, attending events, and performing miscellaneous administrative tasks.<sup>25</sup> He was not paid at the overtime rate for those additional hours.<sup>26</sup> Apart from a base salary, PSRs like Christopher also received incentive pay tied to the sales volume or market share of their assigned drugs in their assigned regions.<sup>27</sup>

In 2008, Christopher brought suit against SKB in the United States District Court for the District of Arizona, claiming that SKB’s refusal to pay overtime wages violated the FLSA.<sup>28</sup> The district court granted summary judgment for SKB on the grounds that PSRs counted as outside salesmen and were thus exempt from the overtime pay requirement.<sup>29</sup> Christopher then filed a motion urging the district court to amend or alter its judgment, arguing that the court should have de-

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<sup>18</sup> *Id.* § 541.503.

<sup>19</sup> *Id.*

<sup>20</sup> 69 Fed. Reg. 22,121, 22,162 (Apr. 23, 2004).

<sup>21</sup> *Id.* at 22,163.

<sup>22</sup> *Christopher*, 132 S. Ct. at 2164.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Christopher v. SmithKlein Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075, at \*1 (D. Ariz. Nov. 20, 2009). Frank Buchanan, another PSR, was also a plaintiff in the suit. *Id.*

<sup>29</sup> *Id.* at \*5.

ferred to the DOL's interpretation of the regulations,<sup>30</sup> which the DOL had announced in an amicus brief filed in a similar case then pending before the Second Circuit.<sup>31</sup> In that brief, the DOL concluded that PSRs did not count as outside salesmen, because "a 'sale' . . . requires a consummated transaction directly involving the employee for whom the exemption is sought."<sup>32</sup> The district court denied Christopher's motion, holding that the DOL's interpretation was "inconsistent with the statutory language and [the DOL's] prior pronouncements, [and] it also def[ie]d common sense."<sup>33</sup>

The Ninth Circuit affirmed.<sup>34</sup> Writing for a unanimous panel, Judge Smith first held that the DOL's interpretation did not deserve deference.<sup>35</sup> The regulations, Judge Smith determined, merely paraphrased the language of the statute and so ran afoul of the "antiparrotting" exception to *Auer* deference announced by the Supreme Court in *Gonzales v. Oregon*.<sup>36</sup> In so holding, Judge Smith explicitly disagreed with the Second Circuit's determination in *In re Novartis Wage & Hour Litigation*<sup>37</sup> that the DOL's interpretation did more than repeat the statutory language.<sup>38</sup> Independently interpreting the statute, Judge Smith held that, in light of the "structure and realities of the heavily regulated pharmaceutical industry,"<sup>39</sup> PSRs' activities could be described as making sales "in some sense."<sup>40</sup> Christopher and his co-plaintiffs were hired for their sales experience, trained in sales methods, and awarded incentive pay based on volume of sales; accordingly, Judge Smith concluded that the plaintiffs were salesmen in spite of the absence of any direct exchange of goods for money.<sup>41</sup>

The Supreme Court affirmed.<sup>42</sup> Writing for the Court, Justice Alito<sup>43</sup> first considered whether the DOL's position merited deference. He began by noting that the reasoning behind the DOL's position had

<sup>30</sup> *Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2010 WL 396300, at \*1 (D. Ariz. Feb. 1, 2010).

<sup>31</sup> See Brief for the Sec'y of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010) (No. 09-0437), 2009 WL 3405861.

<sup>32</sup> *Id.* at 11.

<sup>33</sup> *Christopher*, 2010 WL 396300, at \*2.

<sup>34</sup> *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 401 (9th Cir. 2011).

<sup>35</sup> *Id.* at 395.

<sup>36</sup> 546 U.S. 243, 257 (2006).

<sup>37</sup> 611 F.3d 141 (2d Cir. 2010).

<sup>38</sup> *Christopher*, 635 F.3d at 392-94.

<sup>39</sup> *Id.* at 396.

<sup>40</sup> *Id.* (internal quotation marks omitted).

<sup>41</sup> See *id.*

<sup>42</sup> *Christopher*, 132 S. Ct. at 2174.

<sup>43</sup> Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas.

changed over the course of the litigation.<sup>44</sup> In both the Second and Ninth Circuits, the DOL had argued that a sale required a “consummated transaction”;<sup>45</sup> before the Supreme Court, the DOL instead argued that a sale required actual transfer of title.<sup>46</sup> Deferring to the agency’s shifting litigation position would “seriously undermine the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’”<sup>47</sup> The pharmaceutical industry had “little reason to suspect” that denying overtime pay to PSRs might violate the FLSA since the language in the regulations and the DOL’s guidance documents could reasonably be read as exempting PSRs from overtime pay, and since the DOL had never conducted any enforcement action to secure overtime pay for PSRs.<sup>48</sup> Because the basic nature of PSR work had remained unchanged for decades and was well known to the DOL, the Court concluded that “[o]ther than acquiescence, no explanation for the DOL’s inaction is plausible.”<sup>49</sup>

Once the Court concluded it did not owe *Auer* deference to the agency’s understanding of the regulation, it instead employed the much lower standard of deference announced in *Skidmore v. Swift & Co.*,<sup>50</sup> based on the “thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”<sup>51</sup> Under that standard, the Court found the DOL’s position that transfer of title was necessary for a sale to take place “flatly inconsistent with the FLSA”<sup>52</sup> because the statute included “consignment for sale” in its definition of the term, which does not require transfer of title.<sup>53</sup>

The DOL’s position thus neither merited deference nor persuaded the Court in its own right, leaving the Court to interpret the regulations by itself. The Court first noted that the language of the statute — exempting those employed “in the capacity of outside sales-

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<sup>44</sup> *Christopher*, 132 S. Ct. at 2165–66.

<sup>45</sup> *Id.* at 2166 (quoting Brief for the Sec’y of Labor as *Amicus Curiae* in Support of Plaintiffs-Appellants, *supra* note 31, at 11).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 2167 (alteration in original) (quoting *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986)).

<sup>48</sup> *Id.* at 2167–68.

<sup>49</sup> *Id.* at 2168.

<sup>50</sup> 323 U.S. 134 (1944).

<sup>51</sup> *Christopher*, 132 S. Ct. at 2169 (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (quoting *Skidmore*, 323 U.S. at 140)) (internal quotation marks omitted).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (quoting 29 U.S.C. § 203(k) (2006)) (internal quotation marks omitted).

m[en]”<sup>54</sup> — suggested a functional rather than a formal definition of the position.<sup>55</sup> And the statutory definition of “sale” included the catch-all term “other disposition,”<sup>56</sup> which the Court read as an effort to “accommodate industry-by-industry variations in methods of selling commodities.”<sup>57</sup> The Court concluded that obtaining a nonbinding commitment from a physician qualified as a sale because it was “the most that [PSRs] were able to do to ensure the eventual disposition” of the goods.<sup>58</sup> Finally, the Court’s interpretation also “comport[ed] with the apparent purpose” of the outside salesman exemption.<sup>59</sup> Outside salesmen typically earn much more than minimum wage and perform work that is difficult to standardize and spread to other workers, frustrating the job-expansion goals of the overtime requirement.<sup>60</sup>

Justice Breyer dissented.<sup>61</sup> He agreed with the majority that “[i]n light of important, near-contemporaneous differences in the Justice Department’s views as to the meaning of relevant Labor Department regulations,” the DOL’s position did not deserve deference.<sup>62</sup> Nevertheless, he concluded that PSRs did not qualify as outside salesmen, because securing a nonbinding commitment from a physician did not amount to selling a drug.<sup>63</sup> A PSR might persuade a physician to prescribe a drug in appropriate circumstances; the patient might take the prescription to a pharmacy (but might not); and the pharmacist might fill the prescription with the manufacturer’s drug (but might substitute a generic version).<sup>64</sup> In Justice Breyer’s view, the pharmacist, not the PSR, sells the drug.<sup>65</sup>

A requirement that regulated entities have fair notice before an interpretation of a regulation receives *Auer* deference is a sensible limitation on the power of agencies. Just as *United States v. Mead Corp.*<sup>66</sup> limited *Chevron* deference to cases in which the agency interpretation of a statute was sufficiently formal, *Christopher* appears to have imposed a similar threshold inquiry into adequacy of notice before affording an agency *Auer* deference. In doing so, *Christopher* placed a reasonable limitation on *Auer* that preserves the most important bene-

<sup>54</sup> 29 U.S.C. § 213(a)(1).

<sup>55</sup> *Christopher*, 132 S. Ct. at 2170.

<sup>56</sup> *Id.* at 2171 (quoting 29 U.S.C. § 203(k)) (internal quotation marks omitted).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2172.

<sup>59</sup> *Id.* at 2173.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2174 (Breyer, J., dissenting). Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

<sup>62</sup> *Id.* at 2175.

<sup>63</sup> *Id.* at 2176.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 533 U.S. 218 (2001).

fits of deference while cutting back on its most serious potential problems.

“Fair notice” can include a wide variety of factors, but the Court in *Christopher* was most concerned with the retroactive effect of the agency’s interpretation. The Court, for example, noted that the DOL’s interpretation applied to “conduct that occurred well before that interpretation was announced” and that the pharmaceutical industry “had little reason to suspect that its longstanding practice of treating [PSRs] as exempt outside salesmen transgressed the FLSA.”<sup>67</sup> Justice Alito closed his discussion of deference by arguing that deferring to the agency in this case would “require regulated parties to divine the agency’s interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding.”<sup>68</sup>

The Court also mentioned several other factors in its discussion of deference, but those factors were not central pillars of the Court’s analysis. For example, the Court noted that the agency’s interpretation was “preceded by a very lengthy period of conspicuous inaction”<sup>69</sup> and that the agency had “changed course” in its interpretation of the regulation over the course of the *Christopher* litigation.<sup>70</sup> A long history of “conspicuous inaction” and changed interpretations over the course of litigation, however, fit comfortably under the banner of retroactive application. Treating retroactivity as the single gateway test for *Auer* deference would produce a reasonable and administrable limitation on agency power.

Fair warning that a regulation imposes a particular legal obligation can come in one of two ways: First, a regulated party can be on notice of a given interpretation because the interpretation predates the party’s conduct.<sup>71</sup> Alternatively, a party can have fair notice of the meaning of a regulation because the regulation’s meaning is clear on its face, even if an agency only specifically announces that interpretation in the course of enforcement litigation.<sup>72</sup> To take Professor H.L.A.

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<sup>67</sup> *Christopher*, 132 S. Ct. at 2167.

<sup>68</sup> *Id.* at 2168.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 2166.

<sup>71</sup> See, e.g., *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007) (deferring to a new interpretation that “create[d] no unfair surprise,” *id.* at 170, when the agency had previously proposed its new interpretation in notice and comment rulemaking).

<sup>72</sup> See, e.g., *Gen. Elec. Co. v. U.S. Envtl. Prot. Agency*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“If . . . a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform, then the agency has fairly notified a petitioner of the agency’s interpretation.”).

Hart's famous example of a regulation banning vehicles in a park<sup>73</sup>: A woman riding a bicycle through the park might only have fair warning if she has reason to know that the ordinance has been enforced against cyclists in the past. A man driving a car through the park has fair warning of his delinquency, even if he is the first against whom the park police enforce the ordinance.

Of these two modes of fair warning, only one — prospective application — makes sense as a gateway to *Auer*. The other — fair warning by reasonable interpretation — merely duplicates the reasonableness test from the deference stage. But when one reasonableness test stands as a threshold for another, only the more restrictive test actually applies. For example, if a statutory interpretation were required to pass *Skidmore* review before receiving *Chevron* deference, or vice versa, only the *Skidmore* test would ultimately matter; any interpretation capable of passing *Skidmore* would easily pass *Chevron*, and any interpretation failing to pass *Skidmore* would not receive *Chevron* deference.

At least one passage in Justice Alito's opinion appears to start down this path of imposing one reasonableness test as a gateway to another. Discussing the relevant regulatory language, he argues that the terms "sale" and "other disposition" can "reasonably be construed to encompass a nonbinding commitment from a physician to prescribe a particular drug, and nothing in the statutory or regulatory text or the DOL's prior guidance plainly requires a contrary reading."<sup>74</sup> Taking this logic at face value would impose a reasonableness test even more stringent than *Skidmore* as a prerequisite for *Auer* deference, tantamount to an antideferential presumption that could be overcome only if "plainly required" (rather than, for example, "plainly allowed") by past agency practice or the text of the regulation. If such were the holding of *Christopher*, *Auer* would be reduced to a shell of its former self. But the Court did not go so far. It applied *Skidmore* deference to the agency's position — not *Auer* deference, but also not an antideferential presumption — and it did so because the DOL attempted to apply its new interpretation to past conduct.

Reading *Christopher* to impose a retroactivity-based limitation on *Auer* deference has notable virtues. First, it is fair. It holds regulated entities responsible for conforming with the most obvious implications of a regulation, but not with every plausible reading. Even if formally announced for the first time in enforcement litigation, an interpretation squarely in the core of a regulatory command would survive *Skidmore*

<sup>73</sup> H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958).

<sup>74</sup> *Christopher*, 132 S. Ct. at 2167.



review. But regulated entities would not be on the hook for the compliance costs of every conceivable implication of the regulatory text.

Second, this reading of *Christopher* addresses the most substantial problems with *Auer* deference. Like *Chevron*, *Auer* substitutes the judgment of an agency for that of a court and so is susceptible to many of the same criticisms that have been leveled at the *Chevron* doctrine.<sup>75</sup> But *Auer* also raises another thorny issue: unlike *Chevron*, *Auer* applies when an agency not only interprets but also authors the relevant text.<sup>76</sup> This merging of interpretive and legislative functions raises separation of powers concerns that are unique to *Auer*.<sup>77</sup> But the concern that “agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit”<sup>78</sup> loses much of its force when retroactive application merits only *Skidmore* rather than *Auer* deference.<sup>79</sup> The potential for abuse inherent in combining legislative and adjudicative functions is at its apogee in cases of retroactive application, in which the regulated entity does not even have the opportunity to comment on or object to the new interpretation or to prospectively alter its conduct to avoid liability. By limiting *Auer* in this way, the *Christopher* Court cut back on the most egregious potential harms of *Auer*, even if it did not overturn the doctrine altogether.

Third, this reading preserves the many substantial benefits of *Auer* deference, most notably expert judgment and political accountability. Agencies are almost always better placed than courts are to make technical judgments in their fields: agencies are staffed by experts who devote all of their time to a given area, while courts are staffed by generalists who hear a wide variety of issues.<sup>80</sup> Decision costs are thus higher for courts than for agencies, and errors of technical judgment are also more likely.<sup>81</sup> Beyond having superior technical expertise,

<sup>75</sup> See generally Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449 (2011).

<sup>76</sup> See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (“It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”).

<sup>77</sup> See Manning, *supra* note 8, at 638.

<sup>78</sup> *Christopher*, 132 S. Ct. at 2168.

<sup>79</sup> A separate concern with *Auer* deference is that it seems to leave open the possibility that an agency might transpose statutory language directly into regulations, and then secure binding deference for interpretations of regulatory text that would not receive deference under *Mead* as interpretations of the statutory text. See *Gonzales v. Oregon*, 546 U.S. 243, 258 (2006). This concern was largely blunted by the Court’s decision in *Gonzales* not to afford deference to an interpretation of a regulation that repeated the statutory language, under the “antiparroted canon.” *Id.* at 278 (Scalia, J., dissenting).

<sup>80</sup> See, e.g., *Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 151 (1991) (“[A]pplying an agency’s regulation to complex or changing circumstances calls upon the agency’s unique expertise and policymaking prerogatives.”).

<sup>81</sup> See generally Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review*, 26 J. LEGAL STUD. 347 (1997).

however, agencies are also better placed than courts to make policy judgments.<sup>82</sup> Agencies are subject to political accountability in regular presidential elections; federal judges enjoy life tenure and salary protections precisely to insulate them from political pressures.<sup>83</sup> The Court has thus recognized that agencies deserve wide latitude in making policy as well as technical judgments.<sup>84</sup>

*Christopher* preserves those benefits in their entirety, with the one exception in cases of retroactive application. But that exception creates a fourth distinct benefit: limiting *Auer* to prospective application gives agencies strong incentive to write clearer regulations up front, making subsequent interpretations easier to anticipate and more likely to survive *Skidmore* review. By making policy innovation more difficult at the enforcement stage, *Christopher* will help to channel such innovation into the rulemaking stage, with all of the procedural protections that stage entails for regulated entities.<sup>85</sup> In addition, *Christopher* will reduce agency incentives to press plausible but non-obvious interpretations of their regulations in litigation, which should help to reduce regulatory uncertainty for regulated entities and save judicial resources as agencies choose not to bring enforcement actions that risk failure under *Skidmore*.

Two difficulties remain. First, how should courts approach an interpretation that fails *Skidmore* review when applied retroactively, but that the agency subsequently applies prospectively in later litigation? Perhaps the easiest course would be to adopt the Court's approach to a closely related difficulty in *Chevron*'s domain. Under *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>86</sup> an agency's views can displace a court's earlier interpretation of a statute, as long as the court did not find the statute to be unambiguous.<sup>87</sup> By analogy, this approach would allow *Auer* deference for an interpretation that previously failed *Skidmore* deference under *Christopher*, so long as the earlier court did not find the regulation unambiguous. Just as *Brand X* allows agencies to "overrule" prior inconsistent judicial

<sup>82</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331-39 (2001).

<sup>83</sup> See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 987 (2007) ("[T]enure and salary protections promote Article III judges' independence, from both the political branches and popular opinion.").

<sup>84</sup> See, e.g., *Martin*, 499 U.S. at 151; see also *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, C.J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations.").

<sup>85</sup> See, e.g., *Heckler v. Campbell*, 461 U.S. 458, 470 (1983) (discussing the procedural protections of notice-and-comment rulemaking).

<sup>86</sup> 545 U.S. 967 (2005).

<sup>87</sup> *Id.* at 982.

statutory interpretations if the statute is ambiguous, a *Brand X* analogy in the *Christopher* context would allow an agency to return to court with an interpretation that had previously failed *Skidmore* deference and still receive *Auer* deference so long as it had applied its interpretation prospectively.

A second difficulty may arise in determining when an interpretation is truly new. A great deal may turn on this question: if an interpretation came before the conduct at issue, it would receive *Auer* deference; otherwise, *Skidmore*. Agencies may frequently argue that their current position falls within the scope of an earlier interpretation, with those opposing the agencies arguing that the agency's position is a novel interpretation. But this difficulty is not new in administrative law — agencies are obliged to announce when they have changed their policy, or else they risk having the new policy voided as arbitrary and capricious; courts, in turn, must determine when that obligation has been triggered.<sup>88</sup> That task may be difficult, but it is no more so after *Christopher* than before.

The Court in *Christopher* appeared to be almost openly hostile to *Auer* deference, devoting five pages of analysis to explaining the doctrine's various shortcomings and determining that it did not apply<sup>89</sup> — a point the dissent conceded in a single sentence.<sup>90</sup> But beneath the rhetoric, the Court crafted a modest exception to *Auer* that should make the doctrine fairer while preserving its many benefits.

### C. Internal Revenue Code § 6501(a)

*Chevron Deference*. — Home Concrete & Supply, LLC, probably never imagined it would need to know *Chevron* as anything other than an oil company. Yet by filing its tax return, Home Concrete stepped into one of the thorniest areas of administrative law. Last Term, in *United States v. Home Concrete & Supply, LLC*,<sup>1</sup> the Supreme Court held that the government is subject to a three-year, rather than a six-year, statute of limitations on assessing a deficiency when a taxpayer overstates costs on a tax return. In doing so, a plurality of the Court held that it did not need to defer to Treasury Department regulations that ran contrary to earlier Supreme Court precedent in *Colony, Inc. v. Commissioner*.<sup>2</sup> *Home Concrete* therefore limited the reach of the Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,<sup>3</sup> which held that precedent forecloses fu-

<sup>88</sup> See *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009).

<sup>89</sup> *Christopher*, 132 S. Ct. at 2165–69.

<sup>90</sup> *Id.* at 2175 (Breyer, J., dissenting).

<sup>1</sup> 132 S. Ct. 1836 (2012).

<sup>2</sup> 357 U.S. 28 (1958).

<sup>3</sup> 545 U.S. 967 (2005).