An Epic Change to Employment Law

Brooke V. Brady

I. INTRODUCTION

With a primarily conservative Supreme Court, the importance of *Chevron* deference rings stronger than ever. This Note argues that the Court's holding in *Epic Systems Corporation v. Lewis*, decided on May 21, 2018,[1] will arguably be one of the most important administrative agency cases for the next decade. Part II will discuss the history and importance of *Chevron* deference and introduce the current debate regarding the doctrine in the court system.

Part III of this Note will explore the impact that the *Epic Systems* decision will have on the *Chevron* deference doctrine, administrative law, and, more particularly, employment law. Part III will also discuss what effect the *Epic Systems* decision will have in the future when the Executive Branch disagrees with an independent agency's interpretation of an ambiguous statute. Part IV recommends that because *Epic Systems* undermines *Chevron* deference, Congress should reconsider the doctrine through regulatory reform that encompasses both rules and statutes in cases where a statute heeds ambiguity.

1. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

II. *CHEVRON* DEFERENCE HISTORY, CRITICISM, AND ITS POLITICS

A. Chevron *Deference History*

As a long-standing principle of administrative law, critics have questioned the constitutionality of *Chevron* deference repeatedly over the last decade.[2] Judges, Congress, and several of the United States Supreme Court justices have heavily critiqued *Chevron*.[3] Utilizing a two-step approach for evaluating an administrative agency's interpretation of a statute, *Chevron* set a foundation for interpretative malleability in the case of ambiguous statutes.

1. The Floodgate of Chevron*—Administrative Agency's Broadened Power*

Initially a case "over the proper interpretation of the Clean Air Act (CAA)," *Chevron* quickly became a fixture within the court systems with respect to deference to administrative agencies.[4] Under the implementation of Congress, the CAA required states to establish permit programs to monitor national air quality standards.[5] The Environmental Protection Agency (EPA) established these standards.[6] Under the EPA's regulation, states that did not meet the national standard were considered "nonattainment" states and the EPA required them "to establish a permit program."[7] This program assisted in the regulation of "new or modified major stationary sources."[8] The regulation included "all pollution-emitting activities within a single 'industrial grouping,'" and allowed States to group the sources emitting pollution in one plant during assessment.[9]

The impact of this decision was monumental, and completely changed the way facilities evaluated its pollution-emitting sources.[10] This plant-wide definition prompted the Natural Resources Defense Council (NRDC) to file for judicial review of the correct definition of "stationary source."[11] Initially, the court found that Congress was unclear in its definition, and the issue was not addressed further in its legislative history.[12] With this contradictory conundrum in mind, the Supreme Court took on this issue subsequent to the Court of Appeals setting aside this regulation.[13] After a unanimous decision disagreeing with the Court of Appeals, the Supreme Court held that "[t]he EPA's plantwide definition

---

2. Jonathan H. Adler, *Shunting Aside Chevron Deference*, REG. REV. (Aug. 7, 2018), https://www.theregreview.org/2018/08/07/adler-shunting-aside-Chevron-deference/.

3. *Id.*; *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing deference to an agency's reasonable construction of an ambiguous or silent statute).

4. VALERIE C. BRANNON & JARED P. COLE, CONGRESSIONAL RESEARCH SERV., R44954, CHEVRON DEFERENCE: A PRIMER 1 (2017).

5. *Chevron*, 467 U.S. at 837.

6. *Id.* at 840.

7. *Id.*

8. *Id.* New or modified major stationary sources includes sources of air pollution, such as manufacturing plants.

9. BRANNON & COLE, *supra* note 4, at 2.

10. *Id.* ("This allowed a facility to construct new pollution-emitting structures so long as the facility as a whole . . . did not increase its emissions.").

11. *Chevron*, 467 U.S. at 840. The Court of Appeals held that under the "bubble concept," reconstruction facilities were considered new sources and vacated agency's "incidental deletion of the reconstruction rule." Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 728 (D.C. Cir. 1982).

12. *Nat. Res. Def. Council, Inc.*, 685 F.2d at 723.

13. *Id.* at 720.

is a permissible construction of the statutory term 'stationary source.'"[14] Subsequently, the Court set up a system for courts to follow when reviewing an administrative agency's interpretation of a statute.[15] When reviewing statutes, the court must answer two questions:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[16]

Through a two-step analysis, the Court gives great "deference to administrative interpretations," and, therefore, respects the executive department by allowing necessary formulation of policy in the presence of contradictory statutory language.[17]

First, in examining the statutory language, the Court held that when a statute's language is broad, the administrative agency has ample "power to regulate."[18] Second, the Court examined the statute's ambiguity through its legislative history.[19] Importantly, if the history shows to be silent on the "*precise* issue before [the court]," the administrative agency is, again, given broad discretion.[20] This helps courts address potential policy concerns of Congress.[21]

The Court's two-step deference scheme allowed administrative agencies the expanded, and often more lenient, ability to interpret congressional statutes for the agency's benefit. Under *Chevron*, the Court permitted an agency to change its interpretation of a statute so long as the interpretation is a "reasonable explanation."[22] In describing *Chevron* deference, Justice Antonin Scalia pointed out that once an interpretation is permitted, "there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference."[23] This premise recognizes that "there may not be a single correct interpretation of a statute."[24] Therefore, the decision in *Chevron* did not simply set a two-step process for interpretation but broadened the power of

14. *Chevron*, 467 U.S. at 837.

15. *See id.* at 861, 864, 866 (holding that the actual verbiage of the statute does not reveal the intent of Congress, rather, the Court must look to whether it is a "reasonable choice within a gap left open by Congress").

16. *Id.* at 842–43.

17. *Id.* at 843–44.

18. *Id.* at 862 (holding that in a broad reading of the statute, the EPA was to have significant power "in order to effectuate the policies of the Act"); BRANNON & COLE, *supra* note 4, at 2.

19. *Chevron*, 467 U.S. at 862.

20. *Id.* (emphasis added) (The Court held that "the legislative history as a whole is silent." Therefore, they gave great deference to the EPA's decisions in "implementing the policies of the 1977 Amendments.").

21. *Id.* at 863 (The Court found that the "the plantwide definition is fully consistent with one of those concerns—the allowance of reasonable economic growth . . . ." They also pointed out this was a "reasonable explanation.").

22. *Id.*; Phillip Dane Warren, Note, *The Impact of Weakening* Chevron *Deference on Environmental Deregulation*, 118 COLUM. L. REV. ONLINE 62, 65 (2018).

23. Barnhart v. Walton, 535 U.S. 212, 226 (2002) (Scalia, J., concurring).

24. Warren, *supra* note 22, at 65.

administrative agencies as a whole.

The Court later expressed a limitation of *Chevron* deference in *United States v. Mead Corporation*.[25] Through a limiting principle, the Court held that *Chevron* deference applies "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."[26] In *Mead*, the Court ultimately determined that Congress had not indicated an intention to grant the agency deference.[27] The question of whether Congress intended to grant an agency interpretive authority added a third prong to the *Chevron* deference analysis,[28] which ultimately, for the *Mead* Court, assisted the Court in forming "its own independent judgment of how to interpret the statute."[29] This complication to the *Chevron* deference doctrine further exemplifies the complexity of interactions between the Judicial, Legislative, and Executive Branches.

2. Criticism of Chevron *Deference*

Following these critical cases, both proponents and opponents of *Chevron* deference have expressed their stances on the issue. Most notably, Justice Neil Gorsuch, a staunch opponent of *Chevron* deference, describes the practice as "a judge-made doctrine for the abdication of the judicial duty."[30] Like many other critics of *Chevron* deference, Justice Gorsuch believes that allowing administrative agencies to adopt their own reasonable interpretations of statutes directly takes away from the judicial branch's primary role of interpreting the law.[31] Ultimately, the resulting increased agency power leads to an intrusion between the political branches.[32] According to Justice Gorsuch, this increased power raises "due process and equal protection problems."[33] This tension has led to unreliable precedent within the law, as courts fluctuate in examining agency's interpretations of statutes.

In addition, scholars have noted that "an increasing number of judges, policymakers, and scholars" have expressed dissatisfaction with the current core doctrine of administrative law.[34] Similar to Justice Gorsuch, many of these opponents cite "constitutional skepticism" over the administrative agency's power to determine what is legal.[35]

---

25. *See generally* United States v. Mead Corp., 533 U.S. 218 (2001) (holding that administrative implementation of a particular statutory provision qualifies under a limiting principle).

26. *Id.* at 226–27.

27. *Id.* at 221.

28. This paper concurs with scholars that there is a third prong of *Chevron* Deference which allows courts another way to analyze the accuracy of an agency's interpretation of statutory ambiguity. *See, e.g.*, Dan Farber, *Everything You Always Wanted to Know About* Chevron *Doctrine*, LEGAL PLANET (Oct. 23, 2017), http://legal-planet.org/2017/10/23/everything-you-always-wanted-to-know-about-the-Chevron-doctrine/.

29. *Id.*

30. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring).

31. *Id.* at 1155.

32. *Id.*

33. *Id.*

34. Alison Frankel, *The (Other) Attack on* Chevron *Deference*, REUTERS (Dec. 8, 2017) https://www.reuters.com/article/frankel-Chevron-otc/the-attack-on-Chevron-deference-idUSKBN1E22SM. *See also* Kent H. Barnett & Christopher J. Walker, Chevron *Step Two's Domain*, 93 NOTRE DAME L. REV. 1441 (2018) (evaluating the application of *Chevron* step two by circuit courts).

35. Frankel, *supra* note 34.

Not exclusively limited to party lines, *Chevron* deference has faced opposition from both corners of the political sphere. In *SAS Institute, Inc. v. Iancu*, Justice Sotomayor and Justice Ginsburg joined Part III-A of Justice Breyer's dissent by expressing hesitation in the widespread use of the *Chevron* deference practice.[36] Specifically, the dissent does not encourage a "rigid, black-letter rule of law" that allows an agency to fill an ambiguous statutory gap with its own interpretation.[37] Rather, Justice Breyer refines his idea of deference to "a rule of thumb, guiding courts in an effort to respect that leeway which Congress intended the agencies to have."[38] Although this does not equate to Justice Gorsuch's staunch criticism, the Court has shown a steady impending and constant weariness of the doctrine. The Court's weariness typically rests on its hesitation to replace Congress' statutory intentions with the everchanging, and often gap-filling, interpretations of administrative agencies.[39]

In the face of these critics, many proponents of the doctrine still adamantly advocate for the use of *Chevron* deference in the court systems. The system instituted under *Chevron* has nonetheless stood unwavering for nearly 30 years. Along with the Supreme Court, many proponents of *Chevron* deference believe that the agency's power to interpret ambiguous statutes has a place in society because agencies are perceived to have more democratic accountability and, moreover, that Congress gave them the ability to interpret ambiguous statutes.[40] Importantly, "the majority of Supreme Court Justices appear comfortable applying the doctrine," even when they seem to critique it.[41] To proponents, a court's application of *Chevron* deference appears rational when they consider democratic values and the need for a functional governmental system.

Another reason that advocates inside and outside of the court system believe in the principle of *Chevron* deference is the expertise of the administrative agencies.[42] As Justice Scalia said himself, "[t]he cases, old and new, that accept administrative interpretations, often refer to the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes."[43]

Although Justice Scalia did not believe this to be a full justification and defense for deference, he did go on to further provide insight into the argument for the practice:

> When, in a statute to be implemented by an executive agency, Congress leaves an ambiguity that cannot be resolved by text or legislative history, the "traditional tools of statutory construction," the resolution of that ambiguity necessarily involves policy judgment. Under our democratic system, policy judgments are not for the courts but for the political branches; Congress having left the policy question open, it must be answered by the Executive.[44]

---

36. SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1360 (2018) (Ginsburg, J., dissenting); *Id.* at 1360–65 (Breyer, J., dissenting).

37. *Id.* at 1364 (although Justice Kagan joined the dissent, she did not join Part III-A).

38. *Id.*

39. Adler, *supra* note 2.

40. Farber, *supra* note 28.

41. BRANNON & COLE, *supra* note 4, at 24; *see supra* Part II.

42. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989).

43. *Id.*

44. *Id.* at 515.

Ultimately, Justice Scalia settled on his personal belief that *Chevron* deference created a much-needed system for evaluating administrative agencies' laws pertaining to ambiguous statutes.[45] In particular, Justice Scalia believed that Congress created a set principle that it can either comply with or change—and it chose to keep the current system intact even after *Chevron*.[46] In this system, the "legislative process becomes less of a sporting event when those supporting and opposing a particular disposition do not have to gamble upon whether . . . the ultimate answer will be provided by the courts or rather by the Department of Labor."[47] Although opponents would staunchly disagree, Justice Scalia ultimately believed that *Chevron* deference created a system of reliability and predictability within the court system.

B. Is There a Political Battle Over Chevron *Deference?*

Although it seems Justice Scalia's support of deference significantly subdued opposition within the Court, the last decade has demonstrated a shift in the Court's opinion of deference towards administrative agencies. Even with his support, Justice Scalia often "assailed and narrowed the doctrine in published opinions, concurrences, and dissents."[48] Although this led to confusion within the court system in interpreting the two-step process, the system as a whole has nonetheless felt the effect of the democratic and conservative battle in the political sphere.

As the role of *Chevron* deference has grown and shrunk with each administration, the Court's understanding of the practice has significantly shifted as well. In its own form of irony, Justice Gorsuch, a persistent critic of the practice, replaced reputably the "greatest champion" of *Chevron* deference within the conservative realm, ultimately filling Justice Scalia's seat in the Supreme Court.[49]

Despite the seemingly growing hesitation in applying *Chevron* deference from conservative courts, in reviewing the decisions of lower courts, studies show that "liberal judges are the ones who are less likely to invoke *Chevron* deference."[50] This shocking conclusion, detailed through a study of circuit court decisions between 2003 and 2013, found that "[w]hen courts review liberal agency interpretations, all panels—liberal, moderate, and conservative—are nearly equally likely to apply *Chevron*, as opposed to some lesser deference standard or no deference at all, but when reviewing conservative interpretations, liberal panels apply *Chevron* significantly less frequently than conservative panels."[51] Although contrary to societal conception of the practice, political preferences

45. *See id.* at 517 (believing that *Chevron* is "unquestionably better than what preceded it").

46. *See id.* ("Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known.").

47. Scalia, *supra* note 42, at 517.

48. Joshua Matz, *The Imminent Demise of* Chevron *Deference?*, TAKE CARE (June 21, 2018), https://takecareblog.com/blog/the-imminent-demise-of-Chevron-deference. Similarly, Chief Justice Roberts and Justices Thomas, Alito, and Kagan have expressed disapproval and suggested limiting principles in the realm of *Chevron* deference.

49. Suzanna Sherry et al., *Why Scalia Was Wrong About* Chevron, FEDERALIST SOC'Y (Mar. 23, 2017), https://fedsoc.org/commentary/blog-posts/why-scalia-was-wrong-about-Chevron.

50. Kent Barnett et al., *The Politics of Selecting* Chevron *Deference*, 15 J. EMPIRICAL LEGAL STUD. 597, 599 (2018).

51. *Id.*

are typically shielded in *Chevron* related decisions.[52] In theory, studies on court decisions by political preferences show that the purpose of *Chevron* deference "renders it more likely that judicial panels of differing political and judicial ideologies across the country will reach uniform results."[53] This result seems surprising when viewed in the context of the prior hesitation to apply the doctrine.

The political and structural challenges typically arise when a judge is deciding between different deference schemes and has a strong position towards the doctrine. First, judges have options when choosing how much deference to apply. For example, in choosing between a more deferential framework and a less deferential framework, a conservative judge may elect to apply a more deferential framework to a "conservative agency statutory interpretation[]."[54] The ability for a judge to choose between multiple deferential frameworks can lead to skewed results in studies on the issue of political influence on deferential decisions because policy preferences and actual outcomes are not weighed on a straight *Chevron* deferential platform.

Second, the public's perception of the role of politics in these decisions is typically swayed by individual judges with very strong opinions. For example, Justice Gorsuch's staunch resistance of *Chevron* deference as a typically unconstitutional practice—due to its overreach of the Executive Branch—has started to form strong party lines in the public eye. With these changes and growing opposition, the importance of this conversation is more pertinent than ever.

C. The Purpose of Chevron *Deference*

Despite many critiques of *Chevron* deference over the years, the doctrine still has major advantages. *Chevron* deference gives administrative agencies much-needed certainty in their decision-making and allows agencies with presumable expertise in an area to make efficient decisions.[55] Additionally, "Congress now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known."[56] This certainty provides businesses with a desired predictability in the market. Ultimately, *Chevron* recognizes, and accepts, the reality that agencies will change laws in reflection of social perceptions.[57]

III. THE FUTURE OF *CHEVRON* DEFERENCE AND EMPLOYMENT LAW

With impending changes in the realm of *Chevron* deference, the importance of *Chevron*-related decisions is higher than ever. As the political dynamic shifts and the public grows increasingly aware of the impact of these decisions, *Epic Systems v. Lewis* had

52. *Id.*

53. *Id.* at 600.

54. *Id.* at 601. This study highlights that the less deferential framework—*Skidmore v. Swift*—is a likely alternative when a judge reviews a statutory provision. Skidmore v. Swift & Co., 323 U.S. 134 (1944). By choosing between deferential frameworks (e.g., more, less, or no deference), the judge can increase their "likelihood of aligning their policy preferences with the outcome of the decision and do so within a framework that conspicuously limits the appearance of judicial interference." Barnett et al., *supra* note 50, at 601.

55. Scalia, *supra* note 42, at 516.

56. *Id.* at 517.

57. *Id.* at 518–19.

enormous impact.[58] Besides changing the landscape of class-action lawsuits, *Epic Systems*' dismissal of *Chevron* deference is the beginning of monumental change for administrative law and the area of labor and employment.[59] The *Epic Systems* decision created a new vehicle for the Executive Branch and independent agencies to have ambiguous laws reinterpreted by courts.

A. Class Action and Arbitration—Epic Systems

Originally a circuit split, *Epic Systems* was the product of the consolidation of three previous cases.[60] The Court's consolidation of these cases resolved to fix issues within both the Federal Arbitration Act (FAA) and the National Labor Relations Act of 1935 (NLRA).[61] Although all three cases address the same substantive issues, this Note will solely address facts related to *Epic Systems* and *Ernst & Young LLP*.

In April 2014, Epic Systems, a Wisconsin-based health care company, notified numerous employees through email that changes to the employee policy were impending.[62] This email contained an arbitration provision "mandating that wage-and-hour claims could be brought only through individual arbitration and that the employees waived 'the right to participate in or receive money or any other relief from any class, collective, or representative proceeding.'"[63] Further, the agreement mandated that employees who chose to continue their employment at Epic Systems effectively consented to the new arbitration provision.[64] After receiving this email, Jacob Lewis, a "technical writer," agreed to the arbitration provision.[65] Later, when a dispute arose between Lewis and Epic Systems, instead of following the mandatory arbitration agreement he had agreed to, Lewis filed suit in federal court.[66]

Stephen Morris and Kelly McDaniel entered into a startlingly similar agreement with Ernst & Young.[67] Even after agreeing they would not sue in court, Morris, later joined by McDaniel, sued Ernst & Young in federal court in New York.[68] In both *Epic Systems* and *Ernst & Young*, the companies moved to compel arbitration pursuant to the agreement made with their employees.[69]

A central point of issue for both the *Ernst & Young* and *Epic Systems* cases was the

58. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

59. *Id.* at 1616.

60. *Id.*; Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015); Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016). All three cases were consolidations of previous cases and complaints from the Northern District of California, Western District of Wisconsin, and within the National Labor Relations Board itself.

61. *Epic Sys.*, 138 S. Ct. at 1619.

62. *Lewis*, 823 F.3d at 1151.

63. *Id.*

64. *Id.* (holding that "employees were 'deemed to have accepted this [a]greement' if they 'continue[d] to work at Epic'").

65. *Id.*

66. *See id.* (contending that the arbitration clause violated the Fair Labor Standards Act (FLSA) and Wisconsin law. His main cause of action under 29 U.S.C. § 201 (and other provisions) alleged that the technical writers had been misclassified and were deprived of overtime pay).

67. Morris v. Ernst & Young, LLP, 834 F.3d 975, 979 (9th Cir. 2016).

68. *Id.*

69. *Id.*; Lewis v. Epic Sys. Corp., 823 F.3d 1147, 1151 (7th Cir. 2016).

conflict between the FAA and the NLRA.[70] These two statutes have always co-existed, but the increased adherence to arbitration agreements has created this new conflict.[71] First, Congress adopted the FAA in 1925.[72] In this act, Congress "directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'"[73] This act further enforced that the courts should not only uphold arbitration agreements, but also uphold the procedures to which the parties agreed.[74] In *Epic*, under the FAA, the arbitration agreement's language made clear that the parties were subject to arbitration.[75] Within this agreement, they specified the procedural rules that the arbitration would follow including "their intention to use individualized rather than class or collective action procedures."[76] Since Congress had created an absolute favor to arbitration agreements, overcoming challenges to the FAA was difficult.[77]

However, the FAA allots for certain issues under a savings clause.[78] In limited circumstances, the courts may have the ability to refuse enforcement "upon such grounds as exist at law or in equity for the revocation of any contract."[79] The employees in *Epic Systems* and *Ernst & Young* alleged that the savings clause in the FAA created an exception that renders the employment contracts in their cases unenforceable.[80]

Specifically, a provision in the NLRA would "render[] their particular class and collective action waiver[] illegal."[81] The conflict begins here. According to the employees, this provision of the NLRA stands as a "ground" that "exists at law . . . for the revocation" of the contractual agreement.[82] The National Labor Relations Board (NLRB) further complicated this by ruling in favor of the employees.[83] The NLRB held that "such waivers limit employees' rights under the NLRA to engage in concerted activities."[84] However, the Court did not uphold the NLRB's ruling, stating that "the law is clear: Congress has instructed that arbitration agreements . . . must be enforced as written."[85] Further, the Court reasoned that since the employees were disputing the arbitration agreement itself, the disagreement does not fall under the protection of the FAA's savings clause.[86] The court

70. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018); *Morris*, 834 F.3d at 979.

71. *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ (exploring expansion of use of mandatory arbitration agreements by American employers).

72. *Epic Sys.*, 138 S. Ct. at 1621.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id*.

77. *Epic Sys.*, 138 S. Ct. at 1621–22.

78. 9 U.S.C. § 2 (2018).

79. *Id.*

80. *Epic Sys.*, 138 S. Ct. at 1622.

81. *Id.*

82. *Id.* (referencing the arbitration agreement "at least to the extent those agreements prohibit class or collective action proceedings").

83. *D.R. Horton*, 357 N.L.R.B. No. 184 (2012).

84. Ron Chapman, Jr. & Christopher C. Murray, *Supreme Court Issues Pro-Employer Ruling on Class Action Waiver Issue*, OGLETREE DEAKINS (May 21, 2018), https://ogletree.com/shared-content/content/blog/2018/may/supreme-court-issues-pro-employer-ruling-on-class-action-waiver-issue.

85. *Epic Sys.*, 138 S. Ct. at 1632.

86. *Id.* at 1622.

is only permitted to disregard an arbitration agreement in the presence of objections to general contractual defenses, such as an act of fraud, duress, or unconscionability.[87]

Even without enforceability of the FAA's savings clause, the employees contended that "the NLRA overrides [the] guidance in these cases and commands [the Court] to hold [the employees] agreements unlawful."[88] However, the Court held that because the NLRB did not administer the FAA, and the NLRA did not expressly grant the NRLB the authority to overrule the FAA, neither the NLRA or NRLB were given preference over the FAA.[89] The employees then turned to *Chevron* deference.[90]

In considering the employees reasons, the Court emphasized that utilization of the *Chevron* doctrine should only apply after it has found statutory ambiguity. The employees offered three reasons why the Court should award deference, each of which the Court dismissed.[91] First, the employees alleged that the ambiguity in the NLRA presented the court with the ability to limit its meaning.[92] However, as the Court pointed out, "the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act."[93] The Court then explained that allowing agencies to interpret other federal statutes "is a matter for the courts" and not the administrative agencies.[94] This explanation threatened the intentions of Congress by displacing the balance struck between statutes in the legislative process.[95] Again, the decision stressed that courts should only utilize *Chevron* deference in cases where they find ambiguity, even after applying the traditional tools of statutory construction.[96]

Second, the employees argued that the Executive Branch should make policy decisions as they are "directly accountable to the people."[97] However, as the Court pointed out, the Executive Branch had very differing opinions in this case.[98] Since the accountability aspect of *Chevron* deference is arguably the most important part of the doctrine, the Executive Branch filing competing briefs yields that the agency cannot fully take ownership of their policy choices in this particular case.[99] The NLRB, an independent administrative agency, did not interpret the statute in concurrence with the Solicitor General's interpretation, leading to judicial confusion on the correct administrative interpretation.[100]

Finally, the Court argues that "the canon against reading conflicts into statutes is a traditional tool of statutory construction and it . . . is more than up to the job of solving

87. *Id.* That is, their objection to the individualized arbitration proceedings was not upheld.
88. *Id.* at 1624.
89. *Id.* at 1622.
90. *Epic Sys.*, 138 S. Ct. at 1629; *D.R. Horton*, 357 N.L.R.B. No. 184 (2012).
91. *Epic Sys.*, 138 S. Ct. at 1629–30.
92. *Id.* at 1629.
93. *Id.*
94. *Id.* (citing Gordon v. NYSE, 422 U.S. 659, 685–86 (1975)).
95. *Epic Sys*., 138 S. Ct. at 1629 (holding that *Chevron* here would "threaten [] to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgement.").
96. *Id.*
97. *Id.* (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc. 467 U.S. 837, 865 (1984)).
98. *Id.* at 1630 ("[C]ompeting briefs from the Board and from the United States . . . disputing the meaning of the NLRA" were filed).
99. *Id.*
100. *Epic Sys.*, 138 S. Ct. at 1630.

today's interpretive puzzle."[101] Utilizing canons, the Court ultimately dismissed the application of *Chevron* deference in this case.[102] After *Epic Systems*, *Chevron* does not apply when two federal agencies disagree over the meaning of a statute.[103] The Court also vaguely stated that "[n]o party to these cases has asked us to reconsider *Chevron* deference."[104] This suggested that the Court would seriously consider such a request.

The most impactful precedent comes from one sentence in this case. *Epic Systems* states, "[t]he Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive Branch might be held 'accountable to the people.'"[105] The Court references this as a reason why the employees "cannot expect deference."[106] This will have a significant impact on the realm of administrative law. Following this decision, anytime the Executive disagrees with an independent agency, parties cannot expect deference. After *Epic Systems*, the Executive only needs the Solicitor General to file a competing brief to have the statute interpreted by courts de novo. This directly undermines *Chevron* deference. According to *Epic Systems*, when the Executive has competing opinions on a given statute, the Court "will not defer."[107] This will have an incredible impact on employment law and district courts utilizing *Epic Systems* as precedent.

The holding in *Epic Systems* changes the way arbitration agreements are drafted, but additionally changes the way that administrative agencies interact with the court system. Now, an agency will no longer receive deference when its interpretation of a statute limits a different statute that it does not administer. Additionally, and more importantly, when the Executive Branch disagrees with an independent agency's interpretation of a statute, the Solicitor General simply needs to file a brief with a competing interpretation. This will have longstanding effect within the field of employment law (and administrative law at large).

In this way, *Epic System*'s holding undermines a key feature of independent agencies' power. Congress designed independent agencies[108] to be insulated from the Executive's will, while still an appendage of the Executive Branch.[109] Scholars differ on the exact definition of independent agencies, but most agree that insulation from presidential removal is a key distinction between independent and general executive agencies.[110] Insulation from presidential removal restricts the President from removing an independent

101. *Id.*

102. *Id.* at 1629.

103. Arthur G. Sapper, *The Supreme Court's Decision in* Epic Systems*: Holding and Hints on* Chevron *Deference*, OGLETREE DEAKINS (May 23, 2018), https://ogletree.com/shared-content/content/blog/2018/may/supreme-courts-decision-in-epic-systems-holdings-and-hints-on-chevron-deference.

104. *Epic Sys.*, 138 S. Ct. at 1629.

105. *Id.* at 1618.

106. *Id.*

107. *Id.* at 1630.

108. *Independent Agencies*, USA.GOV, https://www.usa.gov/branches-of-government (last visited Feb. 14, 2019) (listing the independent agencies).

109. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 486 (2010) (explaining the Sarbanes-Oxley Act of 2002 placed the Board under the SEC but insulated its members from the Commission's control).

110. *See* Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1740–41 (2013) (explaining how for-cause removal protections reflects view that independent agencies are "congressional adjuncts").

agency member without cause, giving independent agencies relief from the political whims of the Executive Branch.[111] Although the President cannot restructure an independent agency by removing pollical adversaries, the executive can now undermine an independent agency's interpretation of the law by filing a conflicting brief through the Solicitor General.[112]

B. Epic Systems' *Fallout*

After the *Epic Systems* decision, courts will no longer defer when an independent administrative agency disagrees with the Solicitor General over the meaning of an act, but will decide the issue de novo.[113] For example, when the Occupational Safety and Health Administration (OSHA) has a disagreement with the Occupational Safety and Health Review Commission (OSHRC), the *Epic Systems* holding will have a tremendous impact on the future of employment law.[114] Specifically, the agency's recent disagreement over the General Duty Clause will impact the way that reviewing court's deal with this issue in employment law because the reviewing courts will now address the issue de novo.[115] To have a district court review an administrative agency's interpretation of a statute, OSHRC can file a competing brief to have a court review the statute. While it may not always want to do this, it provides competing agencies with a vehicle to have an interpretation it dislikes reviewed by the court de novo.

Additionally, with no limitations set forth in *Epic Systems*, if the Executive Branch determines that it does not agree with OSHRC's—an independent agency—interpretation of a law, it can simply have the Solicitor General file a competing brief against the interpretation of an administrative agency. This will allow the Executive Branch to potentially further its political agenda by increasing the possibility of de novo review. This directly conflicts with the purpose of *Chevron* deference, which allows for a greater deference towards the expertise of independent agencies.

C. An Epic *Look Forward*

The decision in *Epic Systems* will impact other areas of employment law involving ambiguous statutes. In *Woods v. START Treatment & Recovery Centers, Inc.*, the Second Circuit vacated a jury verdict related to appropriate causation standards under the Family and Medical Leave Act (FMLA).[116] The FMLA "provides broad protections to employees who need to take time away from work to deal with serious health conditions of the

111. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 787 (2013) (stating that insulation from presidential removal increases the political costs and is subject to judicial challenge).

112. *See infra* Part III.B (stating that the Executive Branch can file a competing brief through the Solicitor General "against the interpretation of an administrative agency").

113. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612,1630 (2018) (stating that the court will not defer when the Board and the United States dispute the meaning of the NLRA). This analysis is not just limited to the Solicitor General, if any two authorities of the Executive Branch disagree over a statute's interpretation, *Epic*'s language assumedly precludes a court from using *Chevron* because there would not be a "single position on which the Executive Branch might be held 'accountable to the people.'" *Id.* at 1618.

114. Sapper, *supra* note 103 (stating that a reviewing court would decide the issue *de novo* when OSHRC and OSHA has a disagreement).

115. *Id.*

116. Woods v. START Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 169–70 (2d Cir. 2017).

employee or her family."[117] In this case, the plaintiff, Woods, was a substance abuse counselor, but was placed on probation after receiving several poor performance warning memos in 2011.[118] However, Woods was hospitalized for anemia later in August 2011.[119] The district court utilized a heightened "'but-for' causation standard in determining whether START was liable for . . . retaliation."[120]

Disagreeing on the standard utilized in retaliation claims, the Second Circuit reversed and remanded the District Court's causation standard.[121] Regarding *Chevron* deference, the court held, "[t]he Labor Department's interpretation is reasonable as a matter of [public] policy . . . [t]he rule is neither arbitrary nor capricious. Instead, it reflects the well-reasoned judgment of the executive officer charged with enforcing the rights granted to this country's employees."[122] The court then reinforced deference "to the Labor Department's regulation implementing a 'negative factor' causation standard for FMLA retaliation claims."[123] The negative factor causation standard enforces that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies."[124]

This holding created a circuit split on the correct application of a "but for" cause requirement. In implementing a "motivating factor causation standard" for FMLA claims, the Second Circuit joined the Third Circuit in lowering the causation standard for FMLA claims.[125] This makes it easier for employees "to prevail on claims alleging FMLA violations by their employers if they can demonstrate that their exercise of their FMLA rights was only *one* reason why their employers took the adverse employment actions against them."[126] Alternatively, regarding the "but-for" causation standard, a plaintiff needs to "demonstrate that [a plaintiff's] FMLA leave was the 'but for' cause of [the plaintiff's] termination—and not a 'motivating factor.'"[127]

After *Epic Systems*, if the Supreme Court granted writ of certiorari, *Woods* may come out completely different. In this regime, to have influence over the decision, the Executive Branch or another independent agency would need to demonstrate that they "seem[] of two minds."[128] Therefore, if the Executive Branch strongly believed that a "but-for" causation standard was the proper way to interpret FMLA retaliation cases and knew that an influential court would find the same, it could file an opposing brief. This would grant the

117. *Id.* at 165–66.

118. *Id.* at 163.

119. *Id.*

120. *Id.* at 168.

121. *Woods*, 864 F.3d at 167–68.

122. *Id.* at 169.

123. *See id.* at 168–69 ("The regulation provides . . . 'employers cannot use the taking of FMLA leave as a negative factor in employment actions.'").

124. *Id.* at 168.

125. *Id.* at 166; Egan v. Del. River Port Auth., 851 F.3d 263, 274 (3d. Cir. 2017) (holding that causation standard in FMLA retaliation cases were lessened).

126. Amy J. Traub & Saima Sheikh, *Second Circuit Lowers Causation Standard for Employees Alleging FMLA Violations*, BAKER HOSTETLER (July 26, 2017), https://www.employmentlawspotlight.com/2017/07/second-circuit-lowers-causation-standard-for-employees-alleging-fmla-violations/.

127. *Id.*

128. *Epic Sys.*, 138 S. Ct. at 1630.

Court the ability to review the case de novo and ultimately affect the policy related to FMLA retaliation claims.

D. The Epic *Impact*

Epic Systems will have a tremendous impact in employment and administrative law because it directly undermines *Chevron* deference. Conservative courts and the Executive Branch could use this as a vehicle to control the doctrine within the court system. With courts reviewing cases de novo, the President can now have any other board with jurisdiction disagree to the meaning of a statute to have the statute relooked at by a court, directly undermining the role of *Chevron* deference. This essentially gives courts the ability to interpret any statute when the "Executive seems of two minds."[129] This determination shows not only that *Epic Systems* undermines *Chevron* deference, but also could serve as a political manipulation tactic.

IV. SOME *EPIC* RECOMMENDATIONS

Since the beginning of the United States, a tri-partite system of government was a core attribute. In *Marbury v. Madison*, Chief Justice John Marshall laid out the role of the judicial branch.[130] He stated that, "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[131] *Chevron* deference threatens the integrity of a tri-partite system and introduces a risk of unpredictability to the market. This unpredictability has caused disrupting effects on corporation law and employees. Congress should take legislative action to overturn *Chevron* in order to regain balance of these disruptions, or at least fix the language in *Epic* that allows the President to undermine independent agencies' statutory interpretation.

A. Chevron *Deference Threatens the Integrity of a Tri-partite System*

Chevron deference undermines checks and balances and threatens a strong tripartite system. As a portion of the Supreme Court has recently taken a harsh stance on the *Chevron* deference doctrine, Justice Clarence Thomas echoed Justice Marshall's *Marbury* opinion by enforcing the importance of the Court's "independent judgment in interpreting and expounding upon the laws."[132] The portion of the Court consistently disagreeing with broad application of *Chevron* deference typically argues that the doctrine violates the text of the Constitution. Specifically, these judges heed warning to the fact that the Constitution does not grant federal judges the power to delegate their authority to the Executive Branch.[133]

By using administrative agencies, *Chevron* deference grants the Executive Branch an

129. *Id.*

130. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (providing the Court with the power of judicial review).

131. *Id.* at 177 (establishing the principle of judicial review, i.e., the power to declare a law unconstitutional).

132. *Id.*; Michigan v. EPA, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring).

133. Again, *Chevron* deference gives administrative agencies the judicial power to interpret and enforce statutes, unless such interpretations are unreasonable.

unprecedented amount of authority to interpret and enforce statutes. As the case law shows, this has become a process of *making* law more than *interpreting* the law.[134] As Chief Justice Marshall said in 1803, "[i]f two laws conflict with each other, the courts must decide on the operation of each."[135] The Constitution granted this authority to the Judicial Branch, and this has been a reinforced precedent for centuries. After *Epic Systems*, the Executive Branch need only disagree with an independent administrative agency by filing a competing brief, allowing a primarily conservative court to review the statute.

This will allow the Executive to have influential control over administrative interpretation promulgated by independent agencies—which should be somewhat insulated from executive interest—that it does not agree with. By asking the Solicitor General to file a competing brief, as was the case in *Epic Systems*, the Executive can effectively disregard the purposes of *Chevron* deference and have the court overrule an administrative agency's discretion.[136] Clearly, the purpose of *Chevron* deference no longer works in the realm of administrative law, because the expertise that the independent administrative agencies hold no longer takes precedence when the Executive Branch disagrees with the agency's interpretation.[137] This disagreement should serve as a vehicle for Congress to review the way that the Court handles statutory ambiguities.

B. Unpredictability in the Work-Force

The application of *Chevron* deference has never been consistent among the courts, which creates unpredictability among business leaders, employees, and counsel. The Court has demonstrated erratic treatment of the doctrine, which has led to confusion—a problem our courts are designed to solve, *not complicate further*. *Epic Systems* demonstrated the confusion between the different branches regarding the reliability of administrative agencies' statutory interpretations and the impact this confusion has on employment law.

Predictability is important, and *Chevron* deference has only made employment law more confusing for both small and large businesses. In court, the unpredictability also frustrates the purpose of employees and counsel. The law should encourage stability. As the Court shifts, it also confronts an ideological shift. This adds confusion for lower courts as they seek clarity in the law. Additionally, this makes litigation costlier and less timely for both the plaintiff and the defendant. Congress can easily fix the current state of disarray.

C. Congressional Solution

As the Court struggles to find stability and balance the court system, Congress can review the application of *Chevron* deference to fix the unpredictability in employment law. In 2016, there was an attempt to fundamentally alter this cornerstone of administrative

134. *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2445 (2014) (holding "[the Court] conclude[s] that EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions"); Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1212 (2015) (Scalia, J., concurring) (holding "[a]gencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.").

135. *Marbury*, 5 U.S. at 137.

136. *See supra* Part III.B.

137. *See id.*

law.[138] The Separation of Powers Restoration Act of 2016 was one of the first attempts to reverse the idea that agencies, not courts, are the best interpreters of the law when it relates to complex regulatory schemes.[139] Similar to what the Separation of Powers Restoration Act of 2016 suggests, Congress should revisit the Administrative Procedure Act (APA).[140]

In revisiting the APA, Congress could amend the APA to require the courts to decide "*de novo* all relevant questions of law, including the interpretation of constitutional and statutory provisions and rules."[141] By allowing Congress to revisit the way that the court examines laws related to the interpretation of statutes, the amendment will "restore accountability to the regulatory process."[142] This will reduce the power given to the administrative agencies and restore the tripartite balance the founders envisioned in the Constitution.

Additionally, since following *Epic Systems*, the Executive Branch, or another independent agency, need only disagree with a different administrative agency's interpretation of a statute to have the statute reviewed by a court de novo; this has caused hesitation in lower courts. Currently, though lower courts have the power to review these disagreements under *Epic Systems*, there are still inconsistencies and hesitations in the system under the *Chevron* deference doctrine. Through regulatory reform, Congress can clarify the confusion that has stemmed in employment law. Amending the APA revives the market and employers with predictability and consistency when determining ambiguities.

Through regained trust in the judicial system, businesses can know with absolute certainty that courts will interpret ambiguous statutes de novo. The proposal eliminates one step of analysis for outside interested parties. After this amendment, instead of first predicting whether *Chevron* will be used, *then* predicting how *Chevron* will be used, interested parties will rest assured that the case will be reviewed de novo. This will encourage Congress to more carefully consider the effects of ambiguous statutes and will encourage legislative change in areas of ambiguity.[143] Additionally, this will restore confidence in the lower courts.

If Congress unwisely chooses to retain the structure of *Chevron* deference, they must at least eliminate the President's ability to undermine an independent agency's interpretation of the law. In the event that Congress does not amend the APA to eliminate *Chevron* deference, Congress should immediately enact legislation directing federal courts to defer to the relevant independent agency's interpretation of the law instead of the Solicitor General's interpretation. If Congress does not make this change, the language in *Epic Systems* concerning conflicting executive interpretations of a law destroys independent agencies' ability to promulgate regulations insulated from the whims of presidential politics.[144]

---

138. Brent Owen, *US Congress Considers Law that Would Overturn* Chevron *Deference*, SQUIRE PATTON BOGGS (Aug. 11, 2016), https://www.freshlawblog.com/2016/08/11/us-congress-considers-law-that-would-overturn-chevron-deference/.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* (quoting Sen. Mike Lee (R-Utah)).

143. Congressional clarification additionally gives citizens more direct influence over policy and holds elected congressional officials responsible—as opposed to unelected bureaucrats.

144. *See supra* Part III.A.

V. CONCLUSION

While *Epic Systems* impacts the future of *Chevron* deference, the need for change in the realm of *Chevron* deference was taking place long before the courts even realized it. As courts became more and more polarized on the use of *Chevron* deference, a movement towards clarity and predictability was essential in administrative law and the field of labor and employment. After *Epic Systems*, the Court created a way for the Executive Branch, and other independent agencies, to disagree with an interpretation of a statute, allowing a court to review the interpretation of the statute de novo.[145]

This will have long-term effects on the politics of administrative agencies, as the Executive Branch can now have a statute revisited by a court anytime it disagrees with an independent agency's interpretation of an ambiguity. This creates confusion and potentially problematic precedent because it directly undermines the doctrine of *Chevron* deference.

For these reasons, Congress needs to restore stability and trust in the tri-partite system by revisiting the APA.[146] Through regulatory reform, the legislative branch can restore predictability in the market so that businesses can confidently make decisions related to employment law.

145. *See supra* Part II.B.
146. *See supra* Part IV.C.