

Gorsuch Opinion in Epic Systems Expresses Openness to Re-examination of Chevron

Yesterday, the Supreme Court held that the Arbitration Act allows employers to enforce mandatory arbitration clauses and bans on class actions in employment contracts. *Epic Systems Corp. v. Lewis*, 584 U.S. ____, slip op. at 2 (2018). The decision was a defeat for employee class actions, which will be closely scrutinized in the area of employment law for years to come. However, in dicta that should not be ignored, Justice Gorsuch also hinted at openness to re-examining the foundational administrative law doctrine of *Chevron* deference. *Id.* at 19-21. Currently under *Chevron*, courts defer to an agency's reasonable interpretation of the law it administers when a statute leaves a gap or ambiguity for the agency to interpret. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

"No party to these cases has asked us to reconsider *Chevron* deference," Justice Gorsuch's opinion reads. "But even under *Chevron*'s terms, no deference is due." *Id.* at 19.

Justice Gorsuch here alludes to his much-reported disdain for the *Chevron* doctrine, most notably his concurrence in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J. concurring), in which he called *Chevron* "a judge-made doctrine for the abdication of the judicial duty," which adds "prodigious new powers to an already titanic administrative state."

President Trump promised a Justice "in the mold of" Justice Scalia during the run-up to Justice Gorsuch's nomination to replace Justice Scalia on the bench. Though ideologically and jurisprudentially similar in many ways, Justice Gorsuch's views on *Chevron* diverge sharply from Justice Scalia's. Justice Scalia, no fan of the administrative state, lauded *Chevron* for its reliability. "Congress now knows that the ambiguities it creates . . . will be resolved . . . not by the courts but by a particular agency," said Justice Scalia in a 1989 lecture. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989).

However, it remains to be seen what would replace *Chevron* if Justice Gorsuch has his way. It would almost certainly mean less freedom for agency action. Without *Chevron*, courts may instead give *Skidmore* deference to all agency interpretations of law. Broad application of *Skidmore* deference would increase the role of courts in complex areas of regulation that demand technical expertise and would curtail an agency's ability to adjust policy to changed circumstances. *Skidmore* deference gives respect to agency interpretations of law proportional to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Regardless of the future of *Chevron*, Justice Gorsuch writes that the 2012 NLRB opinion is not owed *Chevron* deference for at least four reasons: (1) the NLRB was not solely interpreting the law that it administers, *Epic Systems*, 584 U.S. slip op. at 19; (2) it would be impermissible for the NLRB to "bootstrap" a new interpretation of the Arbitration Act into its interpretation of the National Labor Relations Act, the statute it administers, *id.* at 20; (3) part of the rationale of *Chevron* is that the democratically elected executive branch can be held accountable by the voters, but here the executive branch "speaks from both sides of its mouth" by filing two briefs on opposite sides of the issue: one from the NLRB and the other from the Solicitor General's office, *id.* at 20-21; (4) regardless, the traditional tools of statutory interpretation resolve the issue at *Chevron* Step One, so there is no ambiguity for the agency to resolve in the first place and therefore no deference is due,

id. at 21.

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