

## Note

### Administrative Regulation of Arbitration

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*In Epic Systems v. Lewis, a case on arbitration agreements and class action waivers, the U.S. Supreme Court tangentially addressed the intersection of arbitration and agency deference. The Court’s opinion highlighted a gap in legal scholarship: very little has been written on administrative regulation of arbitration. By cataloging for the first time the instances in which agencies have regulated arbitration over the last four decades, this Note strives to jumpstart the scholarly debate around administrative regulation of arbitration. In the face of decades-old agency rules, this Note shows why Epic Systems should not be interpreted to preempt regulations of arbitration pursuant to general delegations of rulemaking authority. Such an interpretation, which assumes the incompatibility of the agency-deference case law and the arbitration jurisprudence, clashes with longstanding Supreme Court precedent.*

Introduction.....	854
I. The Supreme Court’s Federal Arbitration Act .....	857
A. The Federal Arbitration Act of 1925.....	857
B. A Liberal Federal Policy Favoring Arbitration: From Sub-Contracts to Super-Contracts .....	859
II. Administrative Rules on Arbitration.....	862
A. Regulations Promulgated Under Specific Delegated Authority.....	863
B. Regulations Promulgated Under General Delegated Authority.....	864
1. Pre-2016 Regulations.....	864
2. 2016 Regulations .....	867
III. Chevron Meets McMahon.....	870
A. Challenges to Administrative Rules on Arbitration .....	871
B. How Not to Interpret Epic Systems .....	873
Conclusion .....	877

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## Introduction

In May 2018, under the caption of *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court heard three consolidated cases at the intersection of mandatory arbitration and employee class actions.<sup>1</sup> On its face, *Epic Systems* concerned whether employment contracts containing class-action waivers are enforceable under the Federal Arbitration Act (FAA) or violate employees' rights to collective action under the National Labor Relations Act (NLRA).<sup>2</sup> But the case also provided the Court with an opportunity to adopt a new understanding of how the FAA interacts with agency rulemaking authority. In fact, the employers in *Epic Systems* argued that, unless the text of a federal statute includes a specific, express, textual delegation of authority to an agency over arbitration, no administrative limitation of arbitral procedures is permitted under the FAA.<sup>3</sup> The Court's opinion fell short of embracing that more sweeping line of argument. Instead, Justice Gorsuch held that the NLRA did not override the FAA and that, in any event, "even under *Chevron's* terms, no deference is due" to the National Labor Relations Board's interpretation of its statute as prohibiting arbitration.<sup>4</sup> To the Court, the absence of "any *specific* statutory discussion" of arbitration in the NLRA was an "important and telling clue."<sup>5</sup>

With its opinion in *Epic Systems*, the Court opened a line of communication between what, on their face, may appear to be competing subsets of its case law: arbitration doctrine and agency deference. In the administrative deference context, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, prescribes certain instances in which a court must defer to an agency's reasonable and permissible interpretation of an ambiguous substantive statute.<sup>6</sup> When it comes to administrative regulation of arbitration, *Chevron's* default would appear to promote regulation, absent signs of congressional intent to *mandate* arbitration. On the arbitration jurisprudence front, *Shearson/American Express, Inc. v. McMahon* sets out a test to identify whether a statute conflicts with arbitration.<sup>7</sup> In the face of a conflict between the FAA and another statute, *McMahon's* default would appear to promote arbitration: courts are directed to

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1. See *Epic Sys. Corp. v. Lewis*, 137 S. Ct. 809 (2017); *NLRB v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (2017); *Ernst & Young, LLP v. Morris*, 137 S. Ct. 809 (2017).

2. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); see also 29 U.S.C. § 157 (2018) ("Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .").

3. See Brief for Petitioner Epic Systems Corp. and Respondent Murphy Oil USA, Inc. at 11, *Epic Systems*, 138 S. Ct. 1612 (No. 16-307); Brief for Petitioner Ernst & Young at 50, *Epic Systems*, 138 S. Ct. 1612 (No. 16-307); see also Brief of the Chamber of Commerce of the United States of America as Amicus Curiae at 21, 31, *Epic Systems*, 138 S. Ct. 1612 (No. 16-307).

4. *Epic Systems*, 138 S. Ct. at 1629.

5. *Id.*

6. 467 U.S. 837, 842-43 (1984) (outlining the familiar *Chevron* two-step test).

7. 482 U.S. 220, 227 (1987) (holding that intent to limit arbitration "will be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes").

look for congressional intent to *preclude* arbitration. As this Note explains, however, *Epic Systems* did not settle the boundaries of administrative regulation of arbitration.

The absence of any clarity around how *McMahon* and its progeny interact with agency deference under *Chevron* has not gone completely unnoticed. Some judges have explicitly recognized the uncertainty surrounding the interaction of *Chevron* and *McMahon*,<sup>8</sup> and a handful of commentators have noted the conflict too.<sup>9</sup> To be sure, there is a wealth of scholarship on the historical or legislative support for the Court's arbitration jurisprudence.<sup>10</sup> And there is even more scholarly debate, especially from recent years, surrounding the wisdom of *Chevron* deference.<sup>11</sup> But scholars have generally been uninterested in the regulation of arbitration,<sup>12</sup> and agencies' power to regulate arbitral procedures had received practically no attention until last year—when the first piece squarely addressing the topic was published. Although Daniel Deacon insightfully examines the various roles that federal administrative agencies play in arbitration by considering “a set of *institutional* questions,”<sup>13</sup> he spends only a few pages on the topic of administrative regulation of arbitration.<sup>14</sup> As Deacon also recognizes, some scholars have discussed this issue before, albeit tangentially: some narrowly focused on regulations of arbitration under the

8. See, e.g., *Seney v. Rent-A-Ctr., Inc.*, 738 F. 3d 631, 635 (4th Cir. 2013) (“The way in which *Chevron* squares with *McMahon* . . . is uncertain, and courts have divided on the question.”).

9. See Daniel G. Lloyd, *The Magnuson-Moss Warranty Act v. the Federal Arbitration Act: The Quintessential Chevron Case*, 16 LOY. CONSUMER L. REV. 1, 5 (2002) (“[T]wo other federal titans will clash once the issue reaches the Supreme Court—*Chevron* and its progeny on one hand, and the ‘*McMahon*’ inquiry, which the Court systematically has used to strike down attempts to overcome the Arbitration Act, on the other.”); Jonathan D. Grossberg, Note, *The Magnuson-Moss Warranty Act, the Federal Arbitration Act, and the Future of Consumer Protection*, 93 CORNELL L. REV. 659, 667 (2008) (discussing the clash between *Chevron* and *McMahon*); Katie Wiechens, Comment, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1464 (2001) (“[C]onsideration of agency regulations under *McMahon* absent a clear congressional delegation creates an unwieldy two-step inquiry that is exacerbated by the tension between *McMahon* and *Chevron*.”).

10. See, e.g., Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 108-16 (2002); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 111-12 (2011).

11. See, e.g., Nicholas Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); Jack M. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); Lisa Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009); Michael Herz, *Chevron is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015); Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016); Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937 (2018); Cass R. Sunstein, *Chevron as Law*, 107 GEO. L.J. (forthcoming 2019).

12. Daniel T. Deacon, *Agencies and Arbitration*, 117 COLUM. L. REV. 991, 994 (2017) (noting the absence of any literature on the topic).

13. *Id.* at 994 & n.6 (noting how the “institutional-allocation questions at the heart of this Essay” are, for example, “whether agencies in particular should step into a greater regulatory role vis-à-vis courts and Congress.”).

14. *Id.* at 1014-20. A second piece, by David Noll, takes a more prescriptive approach, focusing on how arbitration affects the implementation of statutes that are enforced through private civil litigation. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1009-37 (2017).

Magnuson-Moss Warranty Act,<sup>15</sup> while a few others analyzed Equal Employment Opportunity Commission guidance documents on arbitration.<sup>16</sup> But that literature provides only a myopic view on the breadth of administrative regulation of arbitration.

The appropriate judicial treatment of agency regulation of arbitration would be solely an academic exercise were it not for two overlooked facts: (1) agencies have long invoked their general regulatory authority to promulgate rules on arbitration, and (2) the Supreme Court has long blessed those exercises of delegated authority. To date, there has been no historical account of arbitration regulations and no comprehensive catalog of the different sets of agency rules in this arena.<sup>17</sup> Instead, agencies continue to be mistakenly seen as actors that “ha[ve] begun to step in” to regulate arbitration only “[i]n recent years,”<sup>18</sup> and scholars have tended to focus on just a handful of notable and somewhat unique regulatory examples.<sup>19</sup>

In the hopes of propelling further debate on the regulation of arbitration, this Note’s main contribution is to debunk the myth that agencies are new to the arbitration game. I do so by cataloging the history of administrative regulation of arbitration. Over the last four decades, invoking their general or specific rulemaking authority, agencies have frequently stepped into the arbitration space and prescribed rules for arbitral procedures. What is more, the *McMahon* Court—just a couple of years after *Chevron*—openly embraced an agency’s “broad authority” to adopt any rules it deems necessary to ensure that “arbitration procedures adequately protect statutory rights.”<sup>20</sup>

In the wake of *Epic Systems*, the intersection of the arbitration case law and the agency-deference jurisprudence deserves more scholarly attention. Agency rules on arbitration should not be dismissed as a recent trend incompatible with longstanding arbitration precedents. To support that argument, this Note is organized as follows. Part I offers a brief background on the FAA and the Supreme Court’s arbitration jurisprudence. Part II takes stock of the degree to which, over the last forty years, various agencies have regulated arbitration

15. See Marc E. Gunter, Note, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties*, 34 GA. L. REV. 1483 (2000); Andrew P. Lamis, *The New Age of Artificial Legal Reasoning as Reflected in the Judicial Treatment of the Magnuson-Moss Act and the Federal Arbitration Act*, 15 LOY. CONSUMER L. REV. 173 (2003); Lloyd, *supra* note 9, at 5-6; Wiechens, *supra* note 9, at 1464; Jaime L. Dodge, Note, *Arbitration: Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation—Walton v. Rose Mobile Homes*, 116 HARV. L. REV. 1201 (2003); Grossberg, *supra* note 9, at 661-62.

16. See Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1 (1999); Lynne M. Longtin, Comment, *The EEOC’s Position on Mandatory Arbitration*, 67 U. CIN. L. REV. 265 (1998).

17. For the only two lists (both brief and partial) of agency regulations on arbitration, see Deacon, *supra* note 12, at 1018-20, which largely focuses on the Consumer Financial Protection Bureau; and Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POL’Y REV. 499, 501 (2017), which provides a short list of regulations promulgated “[i]n recent years.”

18. Deacon, *supra* note 12, at 993.

19. *Id.* at 1014-20; Noll, *supra* note 14, at 1037.

20. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233-34 (1987).

within their respective spheres of competence. Part III discusses the few challenges to agencies' ability to regulate arbitration, and it then rejects an interpretation of *Epic Systems* that would conjure a clash between administrative deference and arbitration doctrine. Finally, in the hope of fostering further debate on how courts should treat administrative rules on arbitration, the Conclusion gestures at one possible way to synthesize the Court's arbitration and administrative deference cases—*Chevron*'s step-two analysis could be harmonized with the *McMahon* doctrine.<sup>21</sup>

### I. The Supreme Court's Federal Arbitration Act

While the FAA was enacted to give arbitration agreements the force of law (just as any other contract), the Supreme Court slowly transformed the statute into a super-statute. Through a process that resembled “common-law constitutional adjudication [more] than statutory interpretation,”<sup>22</sup> the Court—in Justice Sandra Day O'Connor's words—started “building instead, case by case, an edifice of its own creation.”<sup>23</sup> The history of the FAA's transformation from a simple statute into a quasi-constitutional law capable of trumping any federal statute is remarkable. Because many have recounted it,<sup>24</sup> this Part only surveys that history to inform the discussions in the remainder of this Note.

#### A. *The Federal Arbitration Act*

Although arbitration has been common in the United States ever since colonial times, its popularity stalled until the 1920s.<sup>25</sup> Initially, federal and state courts refused to specifically enforce prospective agreements to arbitrate, following what had been the common law practice in England.<sup>26</sup> Courts generally saw arbitration agreements as either “oust[ing] the courts of jurisdiction” or potentially “becom[ing] the instrument of injustice.”<sup>27</sup> They

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21. Recently some scholars have been calling for a reshaping of *Chevron*'s step-two analysis. See generally Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 1259 (2018) (advocating for the incorporation of *State Farm* hard-look review into *Chevron* step two).

22. Deepak Gupta, *Symposium: For Decades, Court Has Built “An Edifice of Its Own Creation” in Arbitration Cases—It's Time to Tear It Down and Rebuild*, SCOTUSBLOG (May 24, 2018, 4:13 PM), <http://www.scotusblog.com/2018/05/symposium-for-decades-court-has-built-an-edifice-of-its-own-creation-in-arbitration-cases-its-time-to-tear-it-down-and-rebuild> [<http://perma.cc/YW5M-DRRQ>].

23. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

24. See, e.g., Resnik, *supra* note 10, at 112-18.

25. FRANCES KELLOR, *AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS, AND ACHIEVEMENTS* 4-8 (1948).

26. See *Tobey v. Cty. of Bristol*, 23 F. Cas. 1313, 1319-20 (C.C.D. Mass. 1845) (Story, J.); see also Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 425-26 (1998).

27. KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 23 (2d ed. 2010).

therefore “invented special rules, such as the ouster and revocability doctrines, to nullify contracts to arbitrate.”<sup>28</sup> During the 1920s, however, as the result of an organized movement financed by various industries,<sup>29</sup> some states adopted uniform arbitration statutes: Illinois (1917),<sup>30</sup> New York (1920),<sup>31</sup> New Jersey (1921),<sup>32</sup> Massachusetts (1925),<sup>33</sup> and Oregon (1925).<sup>34</sup> These statutes not only changed the rule on the revocability of arbitration agreements, but also sought to encourage the use of arbitration.<sup>35</sup>

Feeding off this growing momentum, more than 120 organizations led by the U.S. Chamber of Commerce and the American Bar Association lobbied for a federal arbitration bill modeled after the New York statute.<sup>36</sup> In those years, rules governing the enforcement of arbitration agreements were seen as procedural, not substantive.<sup>37</sup> Accordingly, because federal courts declined to apply state arbitration statutes, Congress’s intervention was needed to make arbitration agreements enforceable in federal court.<sup>38</sup> Reformers acting through the American Bar Association presented full drafts of their proposed legislation to Congress.<sup>39</sup>

For what the sparse legislative history of the FAA is worth, it only shows Congress’s understanding of what the American Bar Association reformers were proposing, rather than providing a window into legislative intent. These organizations’ main goal was to reverse “the hoary doctrine that agreements for arbitration are revocable at will and are unenforceable.”<sup>40</sup> In fact, the House Report identified the purpose of the bill as making “valid and enforcible [sic] agreements for arbitration.”<sup>41</sup> The Report further explained that “[a]rbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement.”<sup>42</sup> In other words, through the Act, an “arbitration agreement is placed upon the same footing as other

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28. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 444-45 (2011).
29. Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 243 (1929).
30. 1917 Ill. Laws 202.
31. 1920 N.Y. Laws 803.
32. 1923 N.J. Laws 291.
33. MASS. GEN. LAWS ch. 294, § 1 (1925).
34. 1925 Or. Laws 279.
35. W.F. Dodd, *Significant Phases of Current Legislation*, 6 AM. BAR ASSN. J. 18, 20 (1920) (discussing arbitration laws in New York and Illinois).
36. IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 56-70 (2013); see also *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 16 (1924).
37. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 286-88 (1995) (Thomas, J., dissenting).
38. Drahozal, *supra* note 10, at 126-27.
39. IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 10.2, at 10 (1999).
40. Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265 (1926).
41. H.R. REP. No. 68-96, at 1 (1924).
42. *Id.*

contracts, where it belongs.”<sup>43</sup> But few other insights may be drawn from the legislative history.<sup>44</sup>

After years of lobbying by business groups,<sup>45</sup> the FAA was enacted in 1925—practically unchanged from the draft that the American Bar Association presented.<sup>46</sup> On its face, the FAA provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>47</sup> Notably, the Act also includes an exception: “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>48</sup> Over the years, however, the Supreme Court significantly reshaped the scope of this language.

*B. A Liberal Federal Policy Favoring Arbitration: From Sub-Contracts to Super-Contracts*

After some initial skepticism, the Supreme Court proceeded to transform the FAA into a quasi-constitutional norm. At first, federal courts refrained from applying the FAA broadly. In *Wilko v. Swan*, the Supreme Court declined to enforce an arbitration agreement that waived certain substantive rights under the Securities Exchange Act.<sup>49</sup> As a result, expanding on *Wilko*’s suspicion that arbitrators might give short shrift to statutory rights, federal courts found any number of statutory claims to be nonarbitrable.<sup>50</sup> But soon things began to change. In subsequent cases, the Court made three moves, holding that the FAA (i) is a substantive law applicable to the states, (ii) establishes a liberal federal policy favoring arbitration over federal and state statutory rights, and (iii) applies beyond intermerchant contract disputes and admiralty claims.

*First*, a series of Supreme Court decisions transformed the FAA from a procedural into a substantive law applicable to the states. In *Prima Paint*, the Court concluded that the FAA could prevail in a diversity case because “it is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of control over interstate

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43. *Id.*

44. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 n.5 (2011); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119-21 (2001).

45. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 84-101 (1992).

46. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2018)).

47. 9 U.S.C. § 2 (2018).

48. *Id.* § 1.

49. 346 U.S. 427, 430 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

50. See generally Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 *CARDOZO L. REV.* 481 (1981) (surveying cases in various areas of law—including family law, antitrust law, patent law, securities, ERISA, and bankruptcy—in which federal courts declined to enforce arbitration).

commerce and over admiralty.”<sup>51</sup> A decade later, as dicta in *Moses H. Cone*, the FAA became a substantive statute that could be applied in state court.<sup>52</sup> In that same opinion, the Court created the famous “liberal federal policy favoring arbitration agreements.”<sup>53</sup>

*Second*, with the Court’s creation of the “liberal federal policy favoring arbitration agreements,”<sup>54</sup> the FAA’s power as a trump card quickly grew exponentially. The first big step came in *Mitsubishi*, where the Court concluded that the FAA also applies to issues arising out of antitrust law (and not just contract and maritime claims).<sup>55</sup> In *McMahon*, the FAA was found applicable to claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act;<sup>56</sup> in *Gilmer*, the Age Discrimination in Employment Act followed;<sup>57</sup> and in *Vimar*, the Court added the Carriage of Goods by Sea Act to the list.<sup>58</sup> Indeed, the Court wrote in 1991, “[i]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”<sup>59</sup> Another big jump occurred in *Southland*, where the Court held that the FAA was enforceable in both state and federal courts.<sup>60</sup> It was only a matter of time before the Court could conclude that, when the liberal federal policy in favor of arbitration clashes with generally applicable state laws, the FAA prevails.<sup>61</sup>

51. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

52. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Federal law in the terms of the Arbitration Act governs [arbitrability] in either state or federal court . . . . Section 2 is a Congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”).

53. *Moses H. Cone*, 460 U.S. at 24. This statement might have resulted from a misapplication of the national labor policy favoring collective bargaining agreements. Indeed, a few years after *Moses H. Cone*, the *Mitsubishi* Court cited both *Moses H. Cone* and a labor arbitration case to support that liberal federal policy. See *Mitsubishi Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 626 (1985) (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). In that labor case, the Court held that “[a]n order to arbitrate the particular grievance should not be denied unless . . . the arbitration clause is not susceptible of an interpretation that covers the asserted dispute,” and therefore doubts should be resolved in favor of coverage. *Steelworkers*, 363 U.S. at 583. But, as many commentators have pointed out, that analogy was mistaken. See, e.g., Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 124 (2006); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 43-44 (2004). Arbitration pursuant to collective bargaining agreements is part of a substantive national labor policy in the sense that it represents “a quid pro quo for a union’s giving up the right to strike,” thus promoting industrial stabilization; arbitration under the FAA, instead, is simply an alternative to litigation. Schwartz, *supra*, at 43-44.

54. *Moses H. Cone*, 460 U.S. at 24.

55. *Mitsubishi*, 473 U.S. at 637-38.

56. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 241-42 (1987).

57. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

58. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995).

59. *Gilmer*, 500 U.S. at 26.

60. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

61. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

*Third*, in addition to expanding the FAA’s ability to trump *any* conflicting statutory right, the Court also broadened the statute’s scope. Albeit scarce, the legislative history suggests that Congress, in enacting the FAA, intended to allow arbitration for a narrow set of legal claims: intermerchant contract disputes and admiralty claims.<sup>62</sup> As Rep. George Scott Graham (R-PA) noted during the congressional debate over the FAA, the Act “simply provide[d] for one thing, and that [wa]s to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts.”<sup>63</sup> Reflecting this understanding, the statutory text made clear that “nothing” in the FAA “shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>64</sup> Yet, *Circuit City* held that the FAA also applies to employment contracts—dismissing any contrary legislative history as something the Court “need not assess.”<sup>65</sup> To be sure, though, that exception for foreign or interstate workers has not been voided of any meaning: the Court has recently concluded that independent transportation contractors are exempt from the FAA.<sup>66</sup>

In sum, the law of arbitration is clear: the FAA is a quasi-constitutional law. Or, to borrow Justice Gorsuch’s language in *Epic Systems*: whenever a statute tries to “conjure conflicts” with the FAA, the Court will always rule in favor of arbitration—as it has done in “every such effort to date.”<sup>67</sup>

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62. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 307 (2015).

63. 65 CONG. REC. 1931 (1924) (remarks of Rep. Graham). Indeed, “even a cursory review of the FAA’s legislative history reveals that Congress did not want the statute to apply to contracts between parties with unequal bargaining power.” Horton, *supra* note 28, at 447. Labor unions, and in particular the seamen’s union, initially objected because the first draft facially applied to seamen and workers. *See Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923). One of the drafters of the Act, however, explained in front of the Senate Judiciary Committee that: “It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the *merchants* the right or the privilege of sitting down and agreeing *with each other* as to what their damages are, if they want to do it.” *Id.*; *see also id.* (“It was not the intention of this bill to make an industrial arbitration in any sense; and so . . . , if your honorable committee should feel that there is any danger of that, they should add to the bill the following language, ‘but nothing herein contained shall apply to seamen or any class of workers in interstate and foreign commerce.’”). Then-Secretary Herbert Hoover agreed with the drafters’ proposed solution: “If objection appears to the inclusion of workers’ contracts in the law’s scheme, it might be well amended by stating ‘but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.’” *Id.* at 14.

64. 9 U.S.C. § 1 (2018).

65. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001) (emphasis added). Resorting to a strict textualist interpretation, the Court appealed to the *ejusdem generis* canon of interpretation to conclude that the statutory language referring to “any other class of workers engaged in foreign or interstate commerce” should be limited to workers like seaman and railroad employees—namely, transportation workers. *Id.* at 114-15. As Justice Stevens noted in his dissent, however, that “[h]istory amply supports the proposition that [Section 1 of the FAA] was an uncontroversial provision that merely confirmed the fact that no one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.” *Id.* at 128 (Stevens, J., dissenting).

66. Just a few months ago, with the first ruling against arbitration in decades, the Court concluded that the FAA’s reference to “contracts of employment” does not require a formal employer-employee relationship. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019).

67. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018).

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The remainder of this Note will show how the regulatory state has interpreted this remarkable evolution of the FAA. Part II provides the first comprehensive discussion of administrative regulation of arbitral procedures: it outlines all instances in which agencies have regulated arbitration by invoking either their specific or general rulemaking authorities. Part III discusses the few challenges to agency rules on arbitration, and it then outlines why interpreting *Epic Systems* to embrace the need for an explicit congressional delegation of rulemaking authority in order to regulate arbitration would clash with the Court's own arbitration case law.

## II. Administrative Rules on Arbitration

Against the backdrop of Part I, the wealth of administrative regulations on arbitration procedures and the lack of attention to them in legal scholarship are puzzling.<sup>68</sup> Recently, one scholar has started the important conversation on agencies and arbitration by “shift[ing] the focus from the courts”—because, “[i]n recent years, a different set of actors has begun to step in and address the issues raised by arbitration: federal administrative agencies.”<sup>69</sup> Yet, as *Epic Systems* testifies, it is more important than ever to keep our eyes on the courts. And, moreover, that proposed shift away from the judiciary is founded on mistaken premises—that agencies are new to the arbitration game.<sup>70</sup> The misconception is understandable, for no one has yet provided a comprehensive account of administrative regulations on arbitration, and commentators have focused instead (almost exclusively) on the Consumer Financial Protection Bureau.<sup>71</sup> But agencies are not just beginning to regulate arbitration. Rather, they have done so for decades—for so long that, over three decades ago, the Supreme Court blessed that administrative authority despite the FAA.<sup>72</sup>

This Part, then, addresses the main shortcoming in this nascent scholarly debate, in the hope of inviting future discussions on this important topic. This Part sets out a collection of administrative rules on arbitration. Agencies have long regulated arbitration either by invoking their general authority to organize certain industries or by following Congress's specific instructions to regulate arbitration. Sometimes they have prohibited or limited arbitration; other times

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68. See *supra* note 13 and accompanying text.

69. See Deacon, *supra* note 12, at 993.

70. See also Noll, *supra* note 14, at 987 (“In recent years, policymakers in Congress and federal administrative agencies have begun to perform a fundamentally new function: regulating arbitration agreements.”); *cf.* Deacon, *supra* note 12, at 1007.

71. See Deacon, *supra* note 12, at 1014-20; Noll, *supra* note 14, at 1037. A few other pieces of scholarship have been published on the Magnuson-Moss Warranty Act. See *supra* note 15 and accompanying text.

72. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 223 (1987).

they have simply defined arbitral procedures. Section II.A focuses on those few instances in which Congress specifically instructed agencies to regulate arbitration, while Section II.B discusses the more interesting category of agency rules promulgated pursuant to an agency's general rulemaking authority. It is this latter set of regulations that will be at the center of Part III.

*A. Regulations Promulgated Under Specific Delegated Authority*

In limited cases, a lack of regulation has led Congress to mandate explicitly that agencies take active steps to regulate arbitration. For example, in 2006, Congress reacted to reports that predatory lenders were targeting military members to such an alarming degree that their activities constituted a threat to national security.<sup>73</sup> Congress's response was the Military Lending Act, banning mandatory arbitration in consumer loans to service members.<sup>74</sup> In turn, the Department of Defense exercised its authority to issue regulations expanding the scope of that ban.<sup>75</sup> Similarly, with the Food, Conservation, and Energy Act of 2008, Congress wanted to ensure that farmers could decline arbitration over disputes with livestock dealers.<sup>76</sup> The Agency considered "prohibiting the use of arbitration to resolve disputes" but found that ban at odds with "a popular method of dispute resolution in other industries."<sup>77</sup> So the Department of Agriculture regulated the ability of companies to force arbitration on livestock producers and poultry farmers by requiring that production contracts include a notice of the right to decline arbitration in bold print and an additional opt-in signature at the end of the contract.<sup>78</sup> Under that rule, the absence of a signature constitutes a rejection of the arbitration clause.<sup>79</sup> Lastly, when Congress established the Consumer Financial Protection Bureau, it required the new

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73. See *Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents*, DEP'T OF DEFENSE (Aug. 9, 2006), [http://archive.defense.gov/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf) [<http://perma.cc/UJ8Z-2SG9>]; see also Christopher Lewis Peterson & Steve Graves, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653 (2005).

74. See 10 U.S.C. § 987(e) (2018).

75. See 32 C.F.R. § 232.9(d) (2018) ("Notwithstanding 9 U.S.C. [§] 2, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit to a covered borrower pursuant to this part shall be enforceable against any covered borrower, or any person who was a covered borrower when the agreement was made.").

76. 7 U.S.C. § 197c (2018).

77. 75 Fed. Reg. 35,338, 35,345 (June 22, 2010).

78. 9 C.F.R. § 201.218(a) (2018) ("In any livestock or poultry production contract that requires the use of arbitration the following language must appear on the signature page of the contract in bold conspicuous print: 'Right to Decline Arbitration. A poultry grower, livestock producer or swine production contract grower has the right to decline to be bound by the arbitration provisions set forth in this agreement. A poultry grower, livestock producer or swine production contract grower shall indicate whether or not it desires to be bound by the arbitration provisions by signing one of the following statements; failure to choose an option will be treated as if the poultry grower, livestock producer or swine production contract grower declined to be bound by the arbitration provisions set forth in this Agreement . . . .'" ).

79. See 9 C.F.R. § 201.218(a) (2018).

agency to study the spread of mandatory arbitration and, if warranted, regulate it.<sup>80</sup>

Courts have never considered challenges to these explicit congressional delegations of rulemaking authority over arbitration. The reason why is simple: Congress certainly has the authority to instruct agencies expressly to regulate arbitration, notwithstanding the FAA. The Supreme Court has recognized just as much in a number of instances, most recently in *Epic Systems*.<sup>81</sup> The remainder of this Note, therefore, focuses on the more interesting, and much more prevalent, set of regulatory interventions: those pursuant to a general delegation of rulemaking authority.

### *B. Regulations Promulgated Under General Delegated Authority*

Over the last four decades, by relying on their general rulemaking authority, many federal agencies have regulated arbitration—even though the substantive statutes they were interpreting did not explicitly mention arbitration. This Section describes the regulations of nine agencies. It divides them chronologically into two groups.

Section II.B.1 discusses pre-2016 regulations promulgated by the Federal Trade Commission, the Securities and Exchange Commission, the Department of Labor, the Department of Agriculture, the Department of Transportation, and the Department of Treasury—all of which remain on the books today. Some, such as the Labor and Agriculture rules, stemmed from a statutory right to seek review of adverse decisions; others, such as the Transportation and Treasury regulations, relied on more general delegations; and a few, such as the FTC’s rule, were based on more narrowly arbitration-focused, but still general, rulemaking authorities.

Section II.B.2 examines regulations promulgated in 2016, including those of the Department of Labor, the Department of Education, the Department of Health and Human Services, and the Federal Communications Commission—all of which have been repealed. All of these rules, as discussed below, relied on rather broad delegations of authority.

#### 1. Pre-2016 Regulations

*Federal Trade Commission (1975)*. Over the past forty years, the Federal Trade Commission has promulgated rules restricting the use of mandatory

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80. See 12 U.S.C. § 5518 (2018) (mandating that the Agency conduct a study to assess the impact of arbitration on consumers and authorizing it to prohibit or limit arbitration if it found that doing so would be “in the public interest and for the protection of consumers”); 81 Fed. Reg. 32,830, 32,830 (May 24, 2016) (adopting a rule to “prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court” and to require companies “to submit certain records relating to arbitral proceedings to the Bureau”).

81. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1627 (2018).

## Administrative Regulation of Arbitration

predispute arbitration clauses in auto-warranty agreements.<sup>82</sup> In doing so, the FTC has invoked its statutory authority under the Magnuson-Moss Warranty Act to “prescribe rules setting forth minimum requirements for any informal dispute settlement procedure.”<sup>83</sup> In 1975, the FTC looked at “the [Act]’s language, legislative history, and purpose,” with an eye towards “ensur[ing] that consumer protections were in place in warranty disputes.”<sup>84</sup> It concluded that mandatory, binding, predispute arbitration was incompatible with the statute.<sup>85</sup> In the face of disagreement in the courts over the legality of this rule,<sup>86</sup> the FTC confirmed its position and rationale in 1999,<sup>87</sup> and again as recently as 2015.<sup>88</sup>

*Securities and Exchange Commission* (1979). One of the clearest and oldest examples of administrative regulation of arbitration comes from the Securities and Exchange Commission. Under the 1975 amendments to the Securities Exchange Act, Congress mandated that “[n]o proposed rule change shall take effect” without the SEC’s approval, and the SEC was authorized to “abrogate, add to, and delete from . . . the rules of a self-regulatory organization.”<sup>89</sup> During the 1970s, to develop uniform arbitration rules, the SEC helped form the Securities Industry Conference on Arbitration.<sup>90</sup> Its efforts resulted in the adoption of a Uniform Arbitration Code by all self-regulatory organizations.<sup>91</sup> Most recently, the SEC approved a rule change to clarify that collective actions brought by employees of member firms under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act may not be arbitrated.<sup>92</sup>

*Department of Labor* (2000). Appealing to the Employee Retirement Income Security Act, the Department of Labor has regulated arbitration for many years. Ever since 2000, the Department has required that workers who are denied benefits under plans covered by Title I not be subjected to mandatory arbitration unless they are allowed to challenge the arbitral decision.<sup>93</sup> The agency appealed

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82. See 40 Fed. Reg. 60,168 (Dec. 31, 1975) (codified at 16 C.F.R. § 703.5 (2018) (“Decisions of [any informal dispute settlement procedure] shall not be legally binding on any person.”)).

83. 15 U.S.C. § 2310(a)(2) (2018).

84. 80 Fed. Reg. 42,710, 42,718 (July 20, 2015).

85. 40 Fed. Reg. 60,168, 60,190 (Dec. 31, 1975).

86. See *infra* Section III.A.

87. 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999).

88. 80 Fed. Reg. 42,710, 42,719 (July 20, 2015).

89. 15 U.S.C. § 78s(b)(1), (c) (2018).

90. Jill I. Gross, *Historical Basis of Securities Arbitration as an Investor Protection Mechanism*, 1 J. DISPUTE RESOL. 171, 175-82 (2016); see also *White Paper on Arbitration in the Securities Industry*, SEC. INDUSTRY & FIN. MKT. ASS’N 11 (Oct. 2007), <http://www.sifma.org/wp-content/uploads/2017/05/sifma-sifmaicl-white-paper-on-arbitration-in-the-securities-industry.pdf> [<http://perma.cc/KNG8-NRWQ>].

91. See, e.g., 44 Fed. Reg. 75,255 (Dec. 19, 1979) (National Association of Securities Dealers, Inc.); 44 Fed. Reg. 43,378 (July 24, 1979) (New York Stock Exchange); 44 Fed. Reg. 43,377 (July 24, 1979) (Midwest Stock Exchange).

92. 77 Fed. Reg. 22,374 (Apr. 13, 2012).

93. 65 Fed. Reg. 70,246, 70,253 (Nov. 21, 2000) (codified at 29 C.F.R. § 2560.503-1(c)(4) (2018)).

to the Act’s provision on “full and fair review” of an adverse-benefit decision,<sup>94</sup> with the goal of setting out protections that are “essential to [ensure] procedural fairness for a claimant who is offered or pursues voluntary administrative processes as an alternative to pursuing a claim in court.”<sup>95</sup> The Department amended this rule in late 2017 and left the arbitration regulations untouched,<sup>96</sup> although at least one federal court has cast doubt on their validity.<sup>97</sup>

*Department of Agriculture* (2004). To ensure a fair and efficient insurance marketplace, the Department of Agriculture clarified that arbitration between crop insurers and farmers is subject to judicial review.<sup>98</sup> The agency relied on its general authority to interpret its substantive statute’s provision of a right to appeal the denial of a claim.<sup>99</sup> The Department was addressing “numerous complaints from producers and the insurance companies . . . that arbitration is no longer inexpensive,”<sup>100</sup> and concluded that binding “arbitration is inconsistent with section 508(j) of the [Federal Crop Insurance] Act, which gives producers the right to file judicial appeals within one year of the denial of the claim.”<sup>101</sup> There is no agreement in the courts on the scope of judicial review under this rule.<sup>102</sup> Nonetheless, since its promulgation, this arbitration regulation has been reenacted many times—including three times under the Trump Administration.<sup>103</sup>

*Department of Transportation* (2011). The Department of Transportation, relying on its broad authority to prohibit “unfair or deceptive practice[s]” in the air carrier industry,<sup>104</sup> has banned restrictions on passengers’ right to sue airlines in court.<sup>105</sup> The agency has strived to protect passengers on the belief that, “if a

94. 29 U.S.C. § 1133(2) (2018).

95. 65 Fed. Reg. 70,246, 70,254 (Nov. 21, 2000).

96. 82 Fed. Reg. 56,566 (Nov. 29, 2017).

97. See *Sanzone-Ortiz v. Aetna Health of California, Inc.*, No. 15-cv-03334, 2016 WL 7732625, at \*1 (N.D. Cal. Aug. 24, 2016) (“[E]ven if 29 C.F.R. § 2560.503-1(c)(4) could be read as plaintiff contended (prohibiting mandatory arbitration for ERISA statutory challenges), the Department of Labor regulation was not based on a ‘congressional command’ that would override the Federal Arbitration Act’s mandate favoring arbitration agreements.”).

98. 69 Fed. Reg. 48,652, 48,654 (Aug. 10, 2004) (codified at 7 C.F.R. § 457.8 (2018)) (“Any decision rendered in arbitration is binding on you and us unless judicial review is sought in accordance with section 20(b)(3). Notwithstanding any provision in the rules of [the American Arbitration Association], you and we have the right to judicial review of any decision rendered in arbitration.”).

99. 7 U.S.C. § 1508(j) (2018).

100. 67 Fed. Reg. 58,912, 58,915 (Sept. 18, 2002).

101. *Id.* at 58,916.

102. See *Campbell’s Foliage, Inc. v. Fed. Crop Ins. Corp.*, 562 F. App’x 828, 831 (11th Cir. 2014) (“We have not analyzed whether section 20(c) of the Common Provisions allows more expansive judicial review of arbitration awards than that permitted in section 10 of the FAA, and it appears that none of our sister circuits have addressed the issue. Nevertheless, we hold the district judge did not err by denying the motion to vacate the arbitration award.”).

103. See 83 Fed. Reg. 11,633 (Mar. 16, 2018); 82 Fed. Reg. 55,731 (Nov. 24, 2017); 82 Fed. Reg. 28,993 (June 27, 2017).

104. 49 U.S.C. § 41712(a) (2018).

105. 76 Fed. Reg. 23,110, 23,155 (Apr. 25, 2011) (codified at 14 C.F.R. § 253.10 (2018)).

## Administrative Regulation of Arbitration

carrier reaches out to do business in a particular jurisdiction, . . . then it is fair and reasonable to expect that the carrier can defend itself against litigation brought by a consumer who resides in that jurisdiction.”<sup>106</sup> As a result, under the unchallenged 2011 regulation, “[n]o carrier may . . . preclude a passenger . . . from bringing a claim against a carrier in any court of competent jurisdiction.”<sup>107</sup>

*Department of Treasury* (2011). Following the enactment of the Dodd-Frank Act, the Department of Treasury limited the arbitration of disputes arising out of foreign-currency, off-exchange transactions with retail customers. Congress authorized the Department to allow forex transactions only if subject to certain restrictions of the Agency’s choosing.<sup>108</sup> So, in 2011, the Federal Deposit Insurance Corporation decided to permit these transactions subject to a ban on predispute arbitration agreements between state banks and their customers.<sup>109</sup> Similarly, the Office of the Comptroller of the Currency prohibited national banks and federal branches of foreign banks from making the use of their services conditional upon a customer’s agreement to arbitrate.<sup>110</sup>

### 2. 2016 Regulations

*Department of Labor*. With the Federal Employees’ Retirement System Act, Congress gave authority to the Department of Labor to “grant a conditional or unconditional exemption of any fiduciary or transaction.”<sup>111</sup> In 2016, the Agency promulgated a regulation mandating that, in order to be eligible for an exemption from a rule regarding conflicts of interest in retirement advice, investment advisors and others covered by the rule may not limit their customers’ “right to participate in a class action in court.”<sup>112</sup> In enacting this rule, the Department of Labor concluded that the “ability to bar investors from bringing or participating” in a class action “would undermine important investor rights and incentives for Advisers to act in accordance with the Best Interest

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106. *Id.*

107. *Id.*

108. 7 U.S.C. § 2(c)(2)(E)(ii)(I) (2018).

109. 76 Fed. Reg. 40,779, 40,787 (July 12, 2011) (codified at 12 C.F.R. § 349.28(a) (2018)) (“No FDIC-supervised insured depository institution may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure.”).

110. 76 Fed. Reg. 41,375, 41,381 (July 14, 2011) (codified at 12 C.F.R. § 48.16(a)(1) (2018)) (“No national bank may enter into any agreement or understanding with a retail forex customer in which the customer agrees, prior to the time a claim or grievance arises, to submit such claim or grievance to any settlement procedure unless the following conditions are satisfied: Signing the agreement is not a condition for the customer to use the services offered by the national bank . . .”).

111. 29 U.S.C. § 1108(a) (2018).

112. *See* 81 Fed. Reg. 21,002, 21,020 (Apr. 8, 2016).

standard.”<sup>113</sup> As the Trump Administration sought to delay the implementation of the rule,<sup>114</sup> however, two federal courts enjoined this regulatory action.<sup>115</sup>

*Department of Education.* Recognizing that many unscrupulous for-profit educational institutions have drained billions of dollars in taxpayer money,<sup>116</sup> the Department of Education strived to streamline its borrower-defense rules. Invoking the authority to define defenses against loan repayments,<sup>117</sup> the Agency prohibited schools participating in its direct loan program from entering into predispute agreements that mandate arbitration or waive students’ right to participate in class actions.<sup>118</sup> The Agency’s goal was “to protect student loan borrowers from misleading, deceitful, and predatory practices of . . . institutions participating in the Department’s student aid programs.”<sup>119</sup> And the Department felt that, since “the use of predispute agreements to arbitrate will [not] result in well-informed choices,” “predispute arbitration agreements, whether voluntary or mandatory, and whether or not they contain opt-out clauses, [] frustrate achievement of the goal of the regulation—to ensure that students who choose to enter into an agreement to arbitrate their borrower defense type claims do so freely and knowingly.”<sup>120</sup> In 2018, however, the Department reversed course and “decided that the 2016 final regulations’ provisions on class action waivers and pre-dispute arbitration should not be included in [its new] proposed regulations.”<sup>121</sup>

*Department of Health and Human Services.* Some agencies, instead, have taken a lighter-touch approach, striving to limit arbitration through conditional rules. For example, the Department of Health and Human Services issued regulations designed to help the families of those who suffered from neglect in nursing homes. In acting to limit arbitration, the Department invoked its general delegated authority to require that a facility “meets” certain “requirements” in

113. *Id.* at 21,043.

114. 82 Fed. Reg. 31,278 (July 6, 2017) (seeking public input on whether to delay the January 1, 2018 applicability date of the Department of Labor fiduciary rule).

115. *Chamber of Commerce v. U.S. Dep’t of Labor*, 885 F.3d 360, 385 (5th Cir. 2018) (holding that the arbitration provision of this regulation impermissibly conflicted with the Federal Arbitration Act); *Thrivent Fin. for Lutherans v. Acosta*, No. 16-cv-03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting an injunction against enforcement of the arbitration regulation).

116. *See For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success*, U.S. SENATE HEALTH, EDUC., LABOR & PENSIONS COMMITTEE (July 30, 2012), [http://www.help.senate.gov/imo/media/for\\_profit\\_report/PartI-PartIII-SelectedAppendixes.pdf](http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf) [<http://perma.cc/4PY2-9HTZ>].

117. 20 U.S.C. § 1087e(h) (2018).

118. *See* 81 Fed. Reg. 75,926, 76,028 (Nov. 1, 2016) (to be codified at 34 C.F.R. § 685.300(e)-(f)) (“The school will not seek to rely in any way on a predispute arbitration agreement or on any other predispute agreement with a student who has obtained or benefited from a Direct Loan, with respect to any aspect of a class action that is related to a borrower defense claim . . . . The school will not enter into a predispute agreement to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim.”).

119. *Id.* at 75,926.

120. *Id.* at 76,028.

121. 83 Fed. Reg. 37,242, 37,245 (July 31, 2018).

## Administrative Regulation of Arbitration

order to receive federal Medicare or Medicaid funds.<sup>122</sup> Indeed, under the Nursing Home Reform Act, a nursing facility receiving federal funds “must” agree to “protect and promote the rights of each resident” by complying with a list of substantive and procedural “Residents’ Rights.”<sup>123</sup> The Agency decided that, to qualify for federal funds, a nursing facility could not enter into a predispute arbitration agreement with residents.<sup>124</sup> Just before the rule came into effect, however, a district court in Mississippi enjoined it.<sup>125</sup> In turn, the Department has recently proposed revisions to the rule, “remov[ing] provisions prohibiting binding pre-dispute arbitration and strengthen[ing] requirements regarding the transparency of arbitration agreements in [nursing home] facilities.”<sup>126</sup>

*Federal Communications Commission.* The Federal Communications Commission sought comments on a rule that would prohibit broadband-internet service providers from compelling arbitration in their contracts with customers.<sup>127</sup> The agency had “serious concerns about the impact on consumers from the inclusion of mandatory arbitration requirements as a standard part of many contracts for communications services.”<sup>128</sup> But there has been no action on those comments, and it is therefore likely that this regulation will never see the light of day.

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Pursuant to their general rulemaking authority, agencies have continued to regulate arbitration notwithstanding Supreme Court opinions expanding the scope of the FAA. There are two possibilities that might explain this state of affairs: either dozens of agencies are openly defying the courts (and have successfully gotten away with it for decades), or the Supreme Court has not completely preempted agencies’ ability to invoke their general rulemaking authority to regulate arbitral procedures. Part II addressed the extent of the former possibility; below, Part III focuses on the latter, arguing that existing precedent does not fully negate agencies’ authority to regulate arbitration.

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122. 42 U.S.C. § 1396r(a)(3) (2018).

123. *Id.* at § 1396r(c)(1)(A) (2018).

124. 81 Fed. Reg. 68,688 (Oct. 4, 2016) (codified at 42 C.F.R. § 483.70(n)(1) (2018)) (“A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident’s representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.”).

125. *Am. Health Care Ass’n v. Burwell*, 217 F. Supp. 3d 921, 931 (N.D. Miss. 2016) (reasoning that, although the judge could not “say with any high degree of confidence that the Rule will fall victim to a particular legal maxim, the overall state of authority in this context makes it seem unlikely that [the agency] will prevail”).

126. 82 Fed. Reg. 26,649, 26,649 (June 8, 2017).

127. *See* 81 Fed. Reg. 87,274, 87,318 (Dec. 2, 2016); *see also* 81 Fed. Reg. 23,360, 23,393 (Apr. 20, 2016).

128. 81 Fed. Reg. 87,274, 87,318 (Dec. 2, 2016).

III. *Chevron* Meets *McMahon*

Federal agencies have promulgated rules on arbitration for decades. In the background, two parallel lines of jurisprudence evolved: *Chevron* deference and the *McMahon* arbitration doctrine.

*Chevron*'s two-step test is familiar to most. *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."<sup>129</sup> *Second*, "if the court determines Congress has not directly addressed the precise question at issue, . . . [and] 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."<sup>130</sup> If the substantive statute is ambiguous and the agency's interpretation is permissible and reasonable, courts must defer to the agency.

A few years after *Chevron*, Eugene and Julia McMahon brought tort, securities fraud, and racketeering claims against their brokerage firm, Shearson. The broker moved to compel arbitration pursuant to their customer agreement.<sup>131</sup> Notwithstanding the fact that *Wilko v. Swan* had declined to enforce an arbitration agreement that waived certain substantive rights under the Securities Exchange Act,<sup>132</sup> the Supreme Court in *McMahon* upheld the validity of Shearson's arbitration agreement. In doing so, the Court articulated the *McMahon* doctrine: "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent will be deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes."<sup>133</sup> Over the years, the Court has consistently relied on this doctrine.<sup>134</sup>

Even though *Chevron* predates *McMahon* by a couple of years, there is little clarity as to how the Court's arbitration jurisprudence (in particular *McMahon*) interacts with its agency-deference case law (under *Chevron*). In a nutshell, while *Chevron* outlines those instances in which a court may defer to an agency's interpretation of its substantive statute,<sup>135</sup> *McMahon* sets out a test to identify whether a statute conflicts with arbitration.<sup>136</sup> In the face of a conflict between

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

130. *Id.* at 843.

131. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 222-23 (1987).

132. *Wilko v. Swan*, 346 U.S. 427, 430 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989).

133. *McMahon*, 482 U.S. at 227.

134. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) ("If such an intention exists, it will be discoverable in the text of the [Age Discrimination in Employment Act], its legislative history, or an inherent conflict between arbitration and the [Act]'s underlying purpose.") (citing *McMahon*, 482 U.S. at 227).

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

136. *McMahon*, 482 U.S. at 227.

the FAA and another statute, the *McMahon* doctrine requires courts to look for any congressional intent to *preclude* arbitration. In the presence of an administrative regulation of arbitration, instead, *Chevron* asks whether there is any congressional intent to *mandate* arbitration. That is, *Chevron*'s presumption appears to be in favor of agency deference; *McMahon*'s presumption seems to be proarbitration.<sup>137</sup> Courts have explicitly recognized the uncertainty surrounding the interaction of *Chevron* and *McMahon*.<sup>138</sup> And the Supreme Court has yet to clarify it, even though the *McMahon* Court—while mandating arbitration—recognized the Securities and Exchange Commission's authority to adopt "rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights."<sup>139</sup>

This Part makes a first attempt at bringing some clarity to the debate, without offering a definitive answer. Section III.A discusses the few appellate decisions that have scrutinized an agency's authority to regulate arbitration. It shows how the outcomes in those cases largely depended on whether the court relied exclusively on *Chevron* or also considered *McMahon*. Section III.B explains why *Epic Systems* should not be read as adopting the mistaken view that *Chevron* and *McMahon* are inexorably at odds.

#### A. Challenges to Administrative Rules on Arbitration

Interestingly, very few administrative rules on arbitration have been challenged. Recently, two Obama-era regulations have been enjoined in federal court—both on very fact-specific grounds. The Northern District of Mississippi blocked the Department of Health and Human Services' rule that prohibited predispute arbitration agreements between nursing homes and residents.<sup>140</sup> The district court couched its injunction on the finding that the Agency "presented insufficient justification for banning nursing home arbitration."<sup>141</sup> The Fifth Circuit's ruling on the Department of Labor's fiduciary rule was similarly narrow.<sup>142</sup> The Department chose to permit arbitration as long as it did not preclude retirees' right to participate in a class action in court.<sup>143</sup> But the Fifth Circuit concluded that the rule conflicted with ERISA and, in any event, was

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137. Wiechens, *supra* note 15, at 1481.

138. *See, e.g.,* Seney v. Rent-A-Ctr., Inc., 738 F.3d 631, 635 (4th Cir. 2013) ("The way in which *Chevron* squares with *McMahon* . . . is uncertain, and courts have divided on the question.")

139. *McMahon*, 482 U.S. at 233-34.

140. Am. Health Care Ass'n v. Burwell, 217 F. Supp. 3d 921, 931 (N.D. Miss. 2016).

141. *Id.* at 934; *see also id.* at 936-37.

142. Chamber of Commerce v. U.S. Dep't of Labor, 885 F.3d 360, 385 (5th Cir. 2018) (holding that the antiarbitration provision of this regulation impermissibly conflicted with the Federal Arbitration Act); Thrivent Fin. for Lutherans v. Acosta, No. 16-cv-03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting injunction against enforcement of the arbitration regulation).

143. *See supra* notes 111-115 and accompanying text.

arbitrary and capricious.<sup>144</sup> Neither court addressed the tension between *Chevron* and *McMahon*.

But the challenges to the FTC's restrictions on the use of mandatory predispute arbitration clauses in auto-warranty agreements did.<sup>145</sup> And state and federal courts have split on whether the Commission may regulate arbitral procedures even though its substantive statute does not expressly mention arbitration. On the federal side, several district courts upheld the FTC's interpretation of the Magnuson-Moss Warranty Act as providing the authority to restrict arbitration of warranty claims.<sup>146</sup> The Ninth Circuit temporarily joined that crowd, before the panel *sua sponte* withdrew its opinion pending a related decision by the California Supreme Court.<sup>147</sup> Instead, other federal courts—including the Fifth and Eleventh Circuits—refused to defer to the FTC.<sup>148</sup> On the state front, at least three state supreme courts sided with the FTC rule,<sup>149</sup> and five ruled against it.<sup>150</sup>

From the judicial treatment of the Magnuson-Moss Warranty Act, one conclusion can be drawn: courts erroneously believe that *McMahon* and *Chevron* are incompatible. Therefore, outcomes generally turn on whether *Chevron* is taken to be the primary test, or whether *McMahon* is also part of the picture. An approach exclusively grounded on *Chevron* will most likely result in a decision against arbitration. Instead, analyzing agency regulations under both *Chevron* and *McMahon* will likely lead to a ruling in favor of arbitration—because, all too often, *McMahon* swallows *Chevron*.

Let me explain further. On one side of the debate, the argument is a straightforward application of administrative law principles. Under *Chevron*, courts will defer to the FTC's interpretation of the Magnuson-Moss Warranty Act unless (i) Congress has “directly spoken to the precise question at issue” or (ii) the FTC's construction of the statute is unreasonable.<sup>151</sup> Finding that the

144. *Chamber of Commerce*, 885 F.3d at 379, 388.

145. *See supra* notes 82-83 and accompanying text.

146. *See Breniser v. W. Recreational Vehicles, Inc.*, No. cv-07-1418, 2008 WL 5234528, at \*6 (D. Or. 2008); *Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300, 307 (E.D. Mich. 2004); *Rickard v. Teynor's Homes, Inc.*, 279 F. Supp. 2d 910, 921 (N.D. Ohio 2003); *Browne v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827, 831 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 964 (W.D. Va. 2000).

147. *Kolev v. Euromotors W.*, 658 F.3d 1024, 1029 (9th Cir. 2011), *withdrawn*, 676 F.3d 867 (9th Cir. 2012).

148. *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1279-80 (11th Cir. 2002); *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 479 (5th Cir. 2002); *Jones v. Gen. Motors Corp.*, 640 F. Supp. 2d 1124, 1137 (D. Ariz. 2009).

149. *See, e.g., Koons Ford of Balt. v. Lobach*, 919 A.2d 722, 737 (Md. 2007); *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 673 (S.C. 2007); *Parkerson v. Smith*, 817 So. 2d 529, 535 (Miss. 2002).

150. *Borowiec v. Gateway 2000, Inc.*, 808 N.E.2d 957 (Ill. 2004); *Abela v. Gen. Motors Corp.*, 677 N.W.2d 325 (Mich. 2004); *Crawford v. Results Oriented, Inc.*, 548 S.E.2d 342 (Ga. 2001); *In re Am. Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 491-92 (Tex. 2001); *Energy Homes, Inc. v. Ard*, 772 So. 2d 1131, 1135 (Ala. 2000).

151. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

statute is silent on mandatory arbitration, some courts have moved on to an assessment of the reasonableness of the FTC's interpretation—and found it reasonable.<sup>152</sup> Others simply concluded that Congress expressed an intent to preclude binding arbitration under the Magnuson-Moss Warranty Act.<sup>153</sup>

On the other side of the debate, the argument is equally simple: the FAA is a super-statute, and thus it swallows *Chevron* deference. For example, in striking down the FTC's rule, the Eleventh Circuit made two moves. *First*, it concluded (under *McMahon*) that no intent to limit arbitration was “deducible from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purposes.”<sup>154</sup> So, moving to *Chevron* step one, the panel found that, because “Congress failed to *directly* address binding arbitration in the text or legislative history,” the Magnuson-Moss Warranty Act was ambiguous.<sup>155</sup> *Second*, the court held that the FTC's interpretation of its substantive act was unreasonable—because any such limit on arbitration is unreasonable—and therefore no deference was warranted.<sup>156</sup> The Fifth Circuit, instead, reached the same conclusion much quicker. In light of the FAA's pro-arbitration policy, the Magnuson-Moss Warranty Act was *not* ambiguous, that is, it did not allow for restrictions on mandatory arbitration; therefore, the FTC's interpretation failed under the first step of *Chevron*.<sup>157</sup>

That the application of a judge-made test will be outcome determinative is hardly surprising. But this bipolar take on administrative regulation of arbitration risks confusing much of the Court's administrative law and arbitration jurisprudence. Under either approach, *Chevron* or *McMahon*, courts are giving short shrift to one line of precedents. The existence of *Chevron* deference and the *McMahon* doctrine in two parallel (and seemingly incompatible) universes is puzzling—because, as I discuss below, they do (and ought to) overlap.

### B. How Not to Interpret Epic Systems

This Section will show how, to the extent that *Epic Systems* addressed the *Chevron-McMahon* murky waters, it has not done so in a way that oversimplifies the Court's arbitration jurisprudence. As I will argue, the Court's arbitration decisions are not consistent with a requirement that agencies regulate arbitration only pursuant to specific delegated rulemaking authority. Many rules based on general delegations, such as those discussed in Section II.B.1, would likely survive judicial review even after *Epic Systems*.

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152. See, e.g., *Kolev*, 658 F.3d at 1026.  
 153. See, e.g., *Lobach*, 919 A.2d at 735.  
 154. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (alternations omitted).  
 155. *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1278 (11th Cir. 2002) (emphasis added).  
 156. *Id.* at 1277-80.  
 157. *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 475-78 (5th Cir. 2002).

The three consolidated cases in *Epic Systems* concerned whether employment contracts containing class-action waivers are enforceable under the FAA or, instead, violate the employees' rights to collective action under the NLRA.<sup>158</sup> Epic Systems, a Wisconsin healthcare software company, required all employees to sign a policy containing a mandatory, individual arbitration clause for any labor dispute. The multinational accounting firm Ernst & Young and the petrochemical company Murphy Oil had similar policies.<sup>159</sup> In each case, the employees sought to litigate Fair Labor Standards Act and related state law claims through collective actions in federal court.

Federal courts of appeals are split. The Fifth Circuit mandated individual arbitration: in light of the federal policy favoring arbitration and the absence of any contrary evidence in the NLRA's text, the court held that employers do not violate the text of the Act by requiring employees to sign an arbitration agreement containing collective-action waivers.<sup>160</sup> By contrast, the Seventh Circuit<sup>161</sup> and the Ninth Circuit<sup>162</sup> upheld the employees' rights to pursue class actions. Their reasoning was that Section 8 of the NLRA prohibits an employer from interfering with an employee's right to engage in concerted activity, so the NLRA renders the waiver of class and collective proceedings illegal. Because the FAA's own saving clause forecloses arbitration "upon such grounds as exist at law or in equity for the revocation of any contract," and because illegality is one of those grounds, a mandatory arbitration contract that strips away employees' statutory rights to engage in concerted activity is unlawful and thus unenforceable.<sup>163</sup>

In a 5-4 decision, the Supreme Court held that arbitration agreements providing for individualized proceedings must be enforced—and that neither the FAA's saving clause nor the NLRA suggests otherwise. The reasoning of the majority opinion is as follows. *First*, "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes," and therefore does not fall under the FAA's saving clause.<sup>164</sup> *Second*, the NLRA does not override the FAA's requirement that employment arbitration contracts be enforced because, in the NLRA, there is no "clear and manifest" congressional intention to displace the FAA.<sup>165</sup> Class and collective actions are not "concerted activities" protected by Section 7 of the NLRA, because that statute does not mention class action procedures or even hint at a wish to displace the FAA.<sup>166</sup> What is more, Justice

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

159. *Id.* at 1619-21.

160. Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015).

161. Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).

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

163. *See Epic Systems*, 823 F.3d at 1157-61; *Ernst & Young*, 834 F.3d at 980-84.

164. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622 (2018).

165. *Id.* at 1624.

166. *Id.* at 1625-26.

## Administrative Regulation of Arbitration

Gorsuch noted, the Court has rejected every effort to “conjure conflicts” between the FAA and other federal statutes.<sup>167</sup>

Tangentially, Justice Gorsuch’s opinion states that, “even under *Chevron*’s terms, no deference is due” to the National Labor Relations Board’s interpretation because there is no “unresolved ambiguity” in the NLRA.<sup>168</sup> The Court found that the Agency “has sought to interpret [its] statute in a way that limits the work of a second statute, the Arbitration Act.”<sup>169</sup> But, according to the majority, “the absence of any *specific* statutory discussion of arbitration or class actions in the NLRA is an important and telling clue that Congress has not displaced the Arbitration Act.”<sup>170</sup> Indeed, Justice Gorsuch wrote, Congress “knows how to override the Federal Arbitration Act when it wishes.”<sup>171</sup> The majority then cites four recent statutory provisions that include explicit language limiting arbitration.<sup>172</sup> It concludes that “Congress has instructed that arbitration agreements like those before us must be enforced as written . . . [and] it [has not] manifested a *clear intention* to displace the Arbitration Act.”<sup>173</sup> Where there is no ambiguity, “*Chevron* leaves the stage.”<sup>174</sup>

When it comes to administrative rules on arbitration, some might be tempted to claim that *Epic Systems* supports the conclusion that, unless Congress has delegated rulemaking authority over arbitration with *explicit language*, agencies are *not* authorized to regulate arbitration. Indeed, this position emerged from various briefs filed in *Epic Systems*.<sup>175</sup> But there is no reason—short of engaging in Supreme Court forecasting<sup>176</sup>—to read *Epic Systems* as exempting

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167. *Id.* at 1627.

168. *Id.* at 1629.

169. *Id.*

170. *Id.* at 1627 (emphasis added).

171. *Id.*

172. *See id.* at 1626 (first citing 15 U.S.C. § 1226(a)(2) (2018); then citing 7 U.S.C. § 26(n)(2) (2018); then citing 12 U.S.C. § 5567(d)(2) (2018); and then citing 10 U.S.C. § 987(e)(3) (2018)).

173. *Id.* at 1632 (emphasis added).

174. *Id.* at 1630 (citing *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393, 417 (6th Cir. 2017)).

175. *Epic Systems* and *Murphy Oil* claimed that, “when displacing the FAA in other statutes, Congress has spoken with much more specificity than it has in the NLRA.” Brief for Petitioner *Epic Systems Corp.* and Respondent *Murphy Oil USA, Inc.*, *supra* note 3, at 11. The other employer, *Ernst & Young*, argued that a “‘clearly’ observable” command is required to regulate arbitration, including an “express[] prohibit[ion].” Brief for Petitioner *Ernst & Young*, *supra* note 3, at 21-22. According to the Chamber of Commerce, “when Congress wants to override the FAA in a particular context, it does so with ‘clarity’ by mentioning arbitration expressly in the text of the statute.” Brief of the Chamber of Commerce of the United States of America as Amicus Curiae, *supra* note 3, at 8-9. Similarly, the United States stressed the “requisite clarity” necessary to find a “specific command from Congress precluding bilateral arbitration.” Brief of the United States as Amicus Curiae at 23, *Epic Systems*, 138 S. Ct. 1612 (No. 16-307).

176. To be sure, the fate of *Chevron* deference is uncertain. *See, e.g.*, *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (“[W]hether *Chevron* should remain is a question we may leave for another day”); *see also* *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (“*Chevron* seems no less than a judge-made doctrine for the abdication of the judicial duty.”); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015) (Gorsuch, J.) (“[O]ne might question whether *Chevron* step two muddles the separation of powers by delegating to the Executive the power to

arbitration regulations from any kind of agency deference. Not only would that reading put an end to longstanding regulations of arbitration—for Congress has tended to include specific language on arbitration only recently, and only in the face of grave concerns over inadequate agency action.<sup>177</sup> But, most importantly, requiring an explicit statutory directive to regulate arbitration would distort the Supreme Court’s arbitration jurisprudence on which *Epic Systems* relies.

Take *CompuCredit Corp. v. Greenwood*.<sup>178</sup> In that case, the Court held that the Credit Repair Organization Act (CROA) does not preclude the arbitration of consumer suits.<sup>179</sup> Justice Scalia’s reasoning was nuanced: statutes enacted at a time in which Congress was on notice about the Supreme Court’s post-1980s interpretation of the FAA would likely contain explicit language derogating from the FAA if Congress had any intent to preclude arbitration.<sup>180</sup> “At the time of the CROA’s enactment in 1996, arbitration clauses in contracts of the type at issue here were no rarity.”<sup>181</sup> In other words, because “[t]he CROA itself followed a series of this Court’s seminal decisions compelling arbitration,” including *McMahon*, “Congress had been ‘alerted’ much before these post-CROA statutes were passed.”<sup>182</sup> And because the CROA included no mention of arbitration and only prohibited the waiver of “any right of the consumer under this subchapter,”<sup>183</sup> the Court found no conflict with the FAA. *CompuCredit* thus says little concerning statutes enacted at a time in which Congress was *not* on notice about the Court’s proarbitration jurisprudence.

And considering statutes that predate the FAA case law leads to another arbitration precedent: *Shearson/Am. Express, Inc. v. McMahon*. In examining the claims brought by the McMahons under the Securities Exchange Act, the Court acknowledged that it was dealing with “arbitration procedures subject to the SEC’s oversight authority.”<sup>184</sup> In particular, the Court limited the applicability of its 1953 *Wilko* decision in light of “intervening regulatory developments.”<sup>185</sup> In 1975, in fact, the Securities Exchange Act was amended to mandate that “[n]o proposed rule change shall take effect” without the SEC’s approval and to authorize the SEC to “abrogate, add to, and delete from . . . the rules of a self-regulatory organization.”<sup>186</sup> The Court embraced these amendments, recognizing

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legislate generally applicable rules of private conduct. . . . And whether the combination of *Chevron* and *Brand X* further muddles the muddle by intruding on the judicial function too. . . . Still, as but a court of appeals *Chevron* and *Brand X* bind us.”)

177. See *supra* note 73 and accompanying text (discussing the few instances in which Congress has explicitly directed agencies to regulate arbitration).

178. 565 U.S. 95 (2012).

179. *Id.* at 103.

180. *Id.* (citing three post-2000 examples).

181. *Id.*

182. *Id.* at 113 n.4.

183. 15 U.S.C. § 1679f(a) (2018).

184. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 233 (1987).

185. *Id.* at 234.

186. 15 U.S.C. § 78s(b)(1), (c) (2018).

how they gave the Commission “expansive power to ensure the adequacy of the arbitration procedures employed by the [self-regulatory organizations], . . . including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights.”<sup>187</sup> The majority positively weighted how, “[i]n the exercise of its regulatory authority, the SEC has specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the [National Association of Securities Dealers], the organizations mentioned in the arbitration agreement at issue in this case.”<sup>188</sup> Against this backdrop, the Court held that “where, as in this case, the prescribed procedures are subject to the Commission’s [oversight] authority, an arbitration agreement does not effect a [impermissible] waiver of the protections of the Act.”<sup>189</sup>

In conclusion, *McMahon* and *CompuCredit* appear to stand for the proposition that the analysis for statutes enacted before “arbitration clauses . . . [became] no rarity”<sup>190</sup> only begins with the text. Rather than adopting a “plain text” requirement when assessing if a statute permits any regulation of arbitration, the Court recognized that intent to limit arbitration “will be *deducible* from the statute’s *text* or *legislative history*, or from an inherent conflict between arbitration and the statute’s *underlying purposes*.”<sup>191</sup> In those cases, even in the absence of specific delegations of rulemaking authority, regulations of arbitration would seem to be compatible with *McMahon*, *CompuCredit*, and *Epic Systems*.

## Conclusion

Thus far *Chevron* and *McMahon* have been applied in parallel and siloed universes (with occasional tendencies to swallow each other). But, as this Note has shown, there is no historical or doctrinal reason for this to be the case. In closing, then, I gesture at one possible solution. Just as some scholars have recently called for a reshaping of *Chevron*’s step-two analysis,<sup>192</sup> I suggest that, in the arbitration context, *Chevron* step two could be harmonized with the *McMahon* doctrine. The test could be something like this: an agency may regulate arbitration procedures as long as, based on the “traditional tools of statutory construction,” the statute is ambiguous,<sup>193</sup> and so long as the agency’s interpretation of its substantive statute is reasonable and permissible under

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187. *McMahon*, 482 U.S. at 233.

188. *Id.* at 234.

189. *Id.*

190. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 103 (2012).

191. *McMahon*, 482 U.S. at 227 (alternations omitted) (emphases added).

192. See generally Sharkey, *supra* note 21 (advocating for the incorporation of *State Farm* hard-look review into *Chevron* step two).

193. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

*McMahon*. In other words, under the *Chevron-McMahon* step two, an administrative rule on arbitration would be permissible if some intent to allow for the regulation of arbitration is “deducible from the statute’s text or legislative history, or from an inherent conflict between arbitration and the statute’s underlying purposes.”<sup>194</sup> Any consideration of the policy favoring arbitration would not swallow *Chevron* deference and would be limited to step two.<sup>195</sup>

In sum, when a statute unambiguously forecloses the agency’s ability to regulate arbitration, that is the end of the analysis. Similarly, when a statute unambiguously delegates to the agency specific rulemaking authority over arbitration (as discussed in Section II.A), that is the end of the analysis too. But when the statute is ambiguous, the analysis then turns on *Chevron* step two. And the question becomes whether the administrative regulation is permissible because of some intent to regulate arbitration that is deducible from the statute’s text, legislative history, or underlying purposes.<sup>196</sup> Although courts have found agency rules unreasonable due to impermissible considerations adduced during the notice-and-comment process—such as reliance on now-overruled precedents disfavoring arbitration<sup>197</sup>—“it is rare for a court to set aside an agency interpretation in step two.”<sup>198</sup> Incorporating *McMahon* into *Chevron* step two could add further bite to what otherwise often is an “anemic” analysis.<sup>199</sup> And it could be one potential way of harmonizing the agency-deference and arbitration jurisprudences, without making every regulation of arbitration pursuant to an agency’s general rulemaking authority unreasonable or impermissible.

But my proposed *Chevron-McMahon* step two is just one brief suggestion. This Note’s central contribution is simply to point out that the agency-deference jurisprudence and the arbitration case law are far from incompatible. Not only did *McMahon* rely on an agency’s ability to regulate arbitration in reaching its holding,<sup>200</sup> but it is also the case that many agencies have been openly regulating arbitration for decades—though both facts have seemingly gone unnoticed. This Note thus shows the need to open a rigorous conversation around the intersection of agency deference and arbitration. Although the Court has not yet clarified the test that should apply to administrative regulations of arbitration pursuant to general delegations of rulemaking authority, those agency rules—permitting,

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194. *McMahon*, 482 U.S. at 241-42.

195. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

196. *McMahon*, 482 U.S. at 241-42.

197. *See, e.g., Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1278-79 (11th Cir. 2002) (holding that the FTC’s rationale for not allowing binding arbitration was unreasonable because the agency relied on *Wilko*’s distrust in arbitration, now overruled).

198. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 319 (8th ed. 2017); *see also* Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 34 (2017) (reporting a 6.2 percent reversal rate in circuit court decisions that were resolved at *Chevron* step two).

199. Sharkey, *supra* note 21, at 2368.

200. *McMahon*, 482 U.S. at 233-34.

## Administrative Regulation of Arbitration

defining, limiting, or prohibiting arbitration—are longstanding and important features of our administrative state.