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By Serje Havandjian*

I. INTRODUCTION

The administrative state is a fraud—seemingly stemming from nowhere. It occupies a place in society, the validity of which constitutional scholars are unable to determine entirely. Yet, it contributes to the daily lives of all Americans in immeasurable ways—it provides us surety that our food is safe to eat, planes are safe to travel in, laws are enforced, and ensures that our society remains functioning. How can such a vast and expansive system of rule-making authorities possess the ability to promulgate rules and regulate the American people without ever having been clearly established? To what degree do we allow the Food and Drug Administration (FDA) to determine which drugs, medical advances, and other products reach the American people? Where and how does the Federal Communications Commission (FCC) derive its ability to apportion wireless broadband to telecommunication companies or the ability to regulate and enforce its usage? It is undeniable that regulatory agencies have the authority to promulgate rules and regulations—the United States government would otherwise be too burdened to function. However, the ultimate issue facing the legitimacy and the powers granted to the administrative state is when can the legislative or executive bodies of the government step in to say what a regulatory agency can or cannot do?

The administrative state's source of power is an unresolved issue. Congress has the ability to delegate its tasks to state and administrative agencies, which means Congress has the ability to authorize agencies to act on its behalf.[1] This delegation of power begs a number of questions that are not apparent at first, but upon closer inspection, implicate issues dealing with the administrative state's ability to regulate. For example, what happens when a state or administrative agency acts in accordance with its delegated powers in a way that Congress did not expressly approve? What happens if a court—in determining the agency's source of power—finds that Congress had *acted* in an implicit or explicit way to override that agency's decision? Essentially, what are the outer bounds of a

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[1] See U.S. CONST. art. 1 § 8, cl. 18.

regulatory agency's powers, and when does the U.S. government or court system have the authority to limit an agency's delegated powers?

When it comes to administrative law, regulatory agencies, and the administrative state, it's not all fun and games. In fact, the late Justice Antonin Scalia has stated that "[a]dministrative law is not for sissies—so you should have lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture."[2] Although the administrative state might not be the hottest topic of discussion (that is, it might not be for sissies), what this article will explore and uncover is that there are subtle, easily overlooked, aspects of the administrative state that have the potential to fundamentally change the way the law treats state agencies.

Article 1, section 1 of the United States Constitution states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[3] Article 1, section 8, clause 18 states that Congress will have the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[4] As a result of the burgeoning growth and resulting demands of the population and of the United States government, the Supreme Court eventually held that Congress has the ability to delineate its rule making authority onto administrative agencies so long as it provides proper guidelines and structure to the use of such authority.[5] This allowed

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[2] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (1989).

[3] U.S. CONST. art. I, § 1.

[4] U.S. CONST. art. I, § 8, cl. 18.

[5] In Whitman v. American Trucking Associations, 531 U.S. 457, 472 (2001), the U.S. Supreme Court emphasized the need for Congress to lay down clear standards when it delegates powers:

> In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency. Article 1, § 1, of the Constitution vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States . . ." and so we repeatedly have said that when Congress confers decision making authority upon agencies *Congress* must "lay down by legislative

Congress to create agencies to autonomously carry out Congress's original duties under its purview.

However, the administrative state, including federal regulatory agencies, was not initially conceived as part of the United States government. Rather, the administrative state was created (in constitutionally murky waters) as a response to the growing needs of the United States government. The Federal Government grew to rely on regulatory agencies in order to fulfill its duties. Thus, an inherent inconsistency with the administrative state arises. How much power does the administrative state possess, and when is it the role of Congress, the judiciary, or the executive to intervene and limit the power and duties conferred to regulatory and state agencies?

As important as it is to allow the FDA or FCC, for example, along with other regulatory agencies, to promulgate regulations in order alleviate pressure on an already constrained and overworked government, it is just as important to understand when and how the legislature, executive branch, or the United States judiciary can interfere and decide when a regulatory agency has abused or misused its authority. As such, this note will use the Supreme Court case, *Department of Homeland Security v. MacLean*,[6] to explore what the outer bounds of any given agencies powers are, and when Congress or the judiciary is able to intervene.

In *MacLean,* the Supreme Court grappled with the Transportation Security Administration (TSA) establishing a regulation that banned "the unauthorized disclosure of 'sensitive security information'" (SSI).[7] The *MacLean* Court went through a long, winded, if not convoluted, discussion to determine whether a rule or regulation that a regulatory or state agency passes is considered law or has the force

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> act an intelligible principle to which the person or body authorized to [act] is directed to conform."

Whitman, 531 U.S. at 472 (citing J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). Congress was given the power to create state agencies to carry out its duty; however, it was also required to establish a set of guidelines by which the agency would have to conform. Issues arise, however, when an agency acts within its given parameters, and yet, Congress has in some implicit manner (or a court has determined that Congress has acted in some implicit manner) contrary to the agencies actions.

[6] 135 S. Ct. 913 (2015).

[7] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 914 (2015).

and effect of law.[8] Ultimately, the court found that rules and regulations passed by agencies are not, at least in some instances, considered law.[9] Unfortunately, the Supreme Court's decision established precedent, creating opportunity for a slippery slope that could retract from the administrative state's ability to promulgate rules and regulations. It is just as unfortunate for the future of the administrative state and regulatory agencies that the Supreme Court's holding was misguided and lacked consideration of modern and practical guideposts for determining congressional intent and statutory interpretation.

After analyzing Congress's intentions and the history of case law controlling statutory interpretation and congressional intent (which arguably doesn't support the Supreme Court's reasoning), the *MacLean* Court held that, at least in some cases, laws do not encompass rules or regulations.[10] In other words, rules and regulations do not have the same force and effect as law. Thus, by necessity, the Supreme Court required courts to retroactively reconsider other provisions of law similarly situated. Moreover, by holding that rules and regulations are not encompassed in laws, the Supreme Court called into question the established notion that rules and regulations do generally have the force and effect of law, thus undermining the rule making authority of regulatory agencies.[11] As a result, the entire administrative state, regulatory agencies included, now are facing an existential crisis. What sort of force and effect do regulations have, and when can an agency's rule-making authority be diminished?

While reading this article, two questions should be kept in mind: (1) why the Court held that the TSA promulgated whistleblowing regulation was not considered to have the force and effect of law, and how that effects other regulations, and (2) how should the Supreme Court respond if a conflict of congressional intent and statutory interpretation arises within another regulatory or administrative agency's internal scheme for regulating such issues?

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[8] *Id.* at 919.

[9] *Id.*

[10] *Id.*

[11] *See infra* note 142–43 and accompanying text.

With a careful analysis of statutory interpretation and determining congressional intent, and some luck, this article will try to answer these questions. Ultimately, what we will find is that although Congress attempted to establish an efficient system to delegate its responsibilities, here, the judiciary robbed Congress and the administrative state of their ability to self-regulate and promulgate duties.

II. A SUMMARY AND CRITIQUE OF DEPARTMENT OF HOMELAND SECURITY V. MACLEAN

The Homeland Security Act, passed in 2002, gave the TSA the authority to pass regulations that place limits on what information a whistleblower is prohibited from revealing.[12] In passing the Homeland Security Act, Congress delegated some of its duties and responsibilities to the TSA.[13] In 2002, the TSA then enacted a regulation that prevented the disclosure of "sensitive security information" (SSI)—information related to the security of transportation.[14] The information barred from disclosure included "18 categories of sensitive security information, including '[s]pecific details of aviation security measures. . . [such as] information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods involved in such operations."[15] The conflict in *MacLean* arose because of the discrepancy between *regulations* that prohibited such disclosure, and the fact that there are some disclosures that are "specifically prohibited by *law*."[16]

In 2003, the Department of Homeland Security sent out a warning stating that there was a potential threat that Al Qeada was planning a hijacking.[17] The warning stated that Al Queada was likely to attack passenger flights, hijack airplanes, and use those hijacked

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[12] *Maclean*, 135 S. Ct. at 914. The TSA's ability to pass such regulation is contingent on the Under Secretary deciding that the particular information would compromise secure transportation. *Id. See also* 49 U.S.C. 114(r)(1)(C) (2012).

[13] *Maclean*, 135 S. Ct. at 914.

[14] *Maclean*, 135 S. Ct. at 916 (citing 67 Fed. Reg. 8351 (2002)).

[15] *MacLean*, 135 S. Ct. 913, 916 (2015) (citing 49 CFR § 1520.7(j) (2002).

[16] *Id.* at 918 (citing 116 M.S.P.R. 562, 569–72 (2011)) (emphasis added).

[17] *Id.* at 917.

flights for suicide bombings.[18] The TSA believed that members of Al Queada would attempt to gain access to flights that did not require screening, fly into the United States while smuggling weapons, overthrow a flight, and terrorize targets on the East Coast.[19]

Robert J. MacLean (MacLean), an air marshal, blew the whistle when he reported that the TSA had cancelled all missions occurring overnight from Las Vegas.[20] The National Whistleblowers Center states that whistleblowing, and laws protecting whistleblowing, "allow employees to stop, report, or testify about employer actions that are illegal, unhealthy, or violate specific public policies."[21] MacLean's actions were in response to the TSA informing MacLean and the Federal Air Marshal Service about possible hijacking threats and plans.[22] The TSA initially set out the warning because of the potential plane hijacking.[23] Shortly after being informed about the potential threats, the TSA cancelled all overnight missions from Las Vegas.[24] Thus, Maclean decided to blow the whistle on the TSA because he "believed that cancelling those missions during a hijacking alert was dangerous and illegal."[25]

The TSA responded by firing him because MacLean did not possess authorization to disclose such SSI.[26] MacLean challenged his termination with the Merit Systems Protection Board, a body protecting whistleblowers, which held that MacLean's actions "did not qualify for protection… because his disclosure was 'specifically prohibited by law,' § 2302(b)(8)(A)—namely, by 49 U.S.C. § 114(r)(1)."[27] Section 114(r)(1) was the regulation that the TSA

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[18] *Id*.

[19] *Id*.

[20] *Id*. at 914.

[21] *Know Your Rights FAQ*, NATIONAL WHISTLEBLOWERS CENTER (Dec. 5, 2015, 3:15 PM), http://www.whistleblowers.org/index.php?option=com_content&task=view&id=34&Itemid=63.

[22] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 914 (2015).

[23] *Id*. at 917.

[24] *Id.*

[25] *Id.*

[26] *Id*. at 914.

[27] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 914 (2015).

passed that prohibited the disclosure of SSI.[28] On appeal, the Court of Appeals for the Federal Circuit vacated the Merit System Protection Board's holding and found that "[s]ection 114(r)(1) was not a prohibition."[29] The Supreme Court then granted a writ of certiorari, and affirmed the court of appeals. [30]

The particular federal law that is called into question in *MacLean* states that,

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of . . . any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences . . . any violation of any law, rule or regulation, or . . . gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety . . . if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs . . . . [31]

Thus, protection is provided for employees "who disclose[] information revealing 'any violation of any law, rule, or regulation,' or 'a substantial and specific danger to public health or safety.'"[32]

That being said, "[a]n exception exists however, for disclosures that are 'specifically prohibited by law.'"[33] The discrepancy between

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[28] *Id.* at 918.

[29] *Id*. at 914.

[30] *Id.* at 915.

[31] 5 U.S.C. § 2302(b) (2012).

[32] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 916 (2015).

[33] *Id. See also* Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. Maclean: What Law Is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1068 (2015).

> The WPA protects a federal employee from any "personnel action" against him or her for the disclosure of any information that the employee "reasonably believes evidences—(i) any

the whistleblowing prevented by regulation and the disclosures prohibited by law become immediately apparent, and the issue arises: are the TSA's prohibitions of the regulation considered to be prohibited by law? However, the effects of *MacLean* are not made obvious by this subtle and seemingly harmless inconsistency—one must look deeper into how the Court approaches statutory interpretation and legislative intent to fully uncover what sort of repercussions result.

In relevant part, the distinction that *MacLean* turned on was whether a disclosure prohibited by a regulation means it is prohibited by law?[34] The government argued that the law prohibited MacLean's SSI disclosure in two ways: (1) The disclosure was barred because of the TSA's regulation on disclosures regarding SSI, and (2) The TSA had the authority to promulgate regulations regarding disclosures.[35] Therefore, the disclosure was prohibited.[36] The Supreme Court heard, and ultimately decided against both of the TSA's arguments based on a convenient, often used, and occasionally flawed methodology.[37]

Although it is debatable whether it is good practice or not, it is not uncommon for the Supreme Court to act as clairvoyants, to read into the mind of Congress.[38] However, one can argue that when the Court attempts to determine what Congress's intent was, it might lack both the foresight and insight to do so. Thus, this practice can lead to establishing unclear and ill-founded case law.

Ultimately, the Supreme Court held that by including the phrase "law, rule, or regulation" in certain portions of § 2302, and by only including the phrase "specifically prohibited by law" in §

> violation of any law, rule, or regulation, (ii) or . . . a substantial and specific danger to public health or safety." The same provision, however, also includes an exception: an employee is not shielded from a personnel action if disclosure of that information is "specifically prohibited by law."

Id. (footnotes omitted).

[34] 135 S. Ct. at 916.

[35] *Id.* at 919.

[36] *Id.*

[37] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 924 (2015).

[38] *See* Chevron, U.S.A., Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) for a concise discussion of the Supreme Court's role in statutory interpretation and congressional intent.

2302(b)(8)(A), Congress intended only to allow laws, and not rules or regulations to create exceptions to whistleblower protection provided in § 2302(b)(8)(A).[39] Moreover, the fact that Congress used the term "law, rule, or regulation" nine times and deliberately mentioned a prohibition *by law* in [§] 2302(b)(8)(A) is more proof of their ultimate intention.[40]

In short, although federal law protects whistleblowers when reporting violations of laws, rules, or regulations, there are exceptions to that protection that are made expressly prohibited only by law because the statute, within itself, differentiates the phrase "laws, rules, or regulations" from "law".[41] Thus, the TSA promulgating a regulation that prevented the disclosure of certain SSI did not qualify as a disclosure specifically prohibited by law because the TSA's prohibition on disclosure was a regulation, and the statute only made exceptions for disclosures "specifically prohibited by law."[42]

The Court explained "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."[43] Moreover, the Supreme Court stated that when "a statute that referred to 'laws' in one section and 'law, rule, or regulation' in

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[39] *Maclean,* 135 S. Ct. at 919–20. For example, the Court cited to section 2302 of the United States Code to state that section 2302 "prohibits a federal agency from discriminating against an employee 'on the basis of marital status or political affiliation, *as prohibited under any law, rule or regulation*.'" *Id* at 919. (citing 5 U.S.C. § 2302(b)(1)(E)) (2012) (emphasis added). But, the statute goes on to say that,

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority . . . take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of . . . any violation of any law, rule, or regulation . . . if such disclosure *is not specifically prohibited by law* . . . .

5 U.S.C. § 2302(b)(8)(A) (2012) (emphasis added). Thus, because of this, and other similarly situated discrepancies, the Court reasoned that Congress aimed to only allow prohibitions of law, and not "law, rule, or regulation" to effect the disclosure of information by whistleblowers. *Maclean*, 135 S. Ct. at 919.

[40] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 919 (2015).

[41] *Id.* at 916.

[42] *Id.* at 919.

[43] *Id.* (citing Russello v. United States, 464 U.S. 16, 23 (1983)).

another 'cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.'"[44] Through this judicial interpretation and attempt to decipher the legislature's intent, the Court invalidated the government's argument, and set into effect precedent that forces an analysis of prior legislation and the potential invalidation of many more laws.

The Court reasoned the fact that the two phrases appear within the same sentence is even greater evidence that Congress intended to distinguish the two and provide only an exception or prohibition found in law as opposed to one found in rule or regulation.[45] Furthermore, the Court reasoned that if the term "law" was read in a broader manner to include rules and regulations as well, it "could defeat the purpose of the whistleblower statute [because] . . . an agency could insulate itself from the scope of § 2302(b)(8)(A) merely by promulgating a regulation that 'specifically prohibited' whistleblowing."[46] Therefore, the Court found that "it is unlikely that Congress meant to include rules and regulations within the word 'law.'"[47]

Congress expressed, by including only "law," instead of " law, rule or regulation," that section 114(r)(1) of the Transportation Security Administration does not empower the TSA to enforce an exception to an employee's ability to whistle-blow.[48] The Court reasoned that Congress used the term "law" only and not "law, rule, or regulation" in determining what protections there are against whistleblowing—not intending to extend whistleblowing protections set by rules or regulations.[49] Thus, "when Congress used the phrase 'specifically prohibited by law' instead of 'specifically prohibited by law, rule, or regulation,' it meant to exclude rules and regulations," and therefore, "the TSA's regulations do not qualify as 'law.'"[50] The

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[44] *Id*. at 920 (quoting Dep't of Treasury, IRS v. FLRA, 110 S. Ct. 1623 (1990)).

[45] *Id*.

[46] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 920 (2015).

[47] *Id*.

[48] *Id.* at 919.

[49] *Id.*

[50] *Id.* at 921.

Court then considered whether a prohibition set by a regulation was the same as a prohibition set by law.[51] The Court held that it was not.[52]

MacLean was ultimately fired for revealing information about the TSA's marshal program on the basis that his actions were not protected from whistleblowing because it was "specifically prohibited by law."[53] Although the argument of legislative intent and interpretation is not a novel one, the omissions and oversights that the Court did not consider leave a vague holding that calls for more analysis and leaves the condition of the administrative state wanting for more.[54]

Thus, the regulations that government agencies pass do not have the same effect as law when interpreting the language in section 2302(b)(8)(A), and statutes similar to it—those that mention an exemption or prohibition with language discussing laws and "law[s], rule[s] or regulation[s]" independently of each other within the same clause or subsection.[55] Moreover, the Supreme Court's logic and reasoning can be applied to similar situations that call the court to interpret what the legislature intended—the language in question does not necessarily have to involve laws and "laws, rules or regulations."[56]

This means that rules or regulations that purport to prohibit whistleblowing do not actually do so because the language of the statute is interpreted to only allow laws to establish those exceptions, when found within the same clause or subsection that creates an exception for only laws. This holding is confusing at best, and devastating at worst, on the power that regulatory agencies have in terms of protecting information being disseminated.[57] Moreover, it creates confusion as to how much power a regulatory agency has to promulgate rules and regulations, if the Supreme Court can potentially read an implied intent on Congress's behalf onto a

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[51] *Id.* at 919.
[52] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 919 (2015).
[53] *Id.* at 918.
[54] *Id.*
[55] *Id.* at 919.
[56] *Id.* at 921.
[57] *Id.*

regulation. If the Supreme Court needed to decipher the legislative intent behind omitting "law, rule, or regulation" in some aspects of the statute, then greater clarification is required as to what the inclusion or exclusion of "law, rule, or regulation" means if found in different sections or clauses within a statute. For example, if the language of a statute creates an exception for "law, rule, or regulation" in one section, and creates an exception only for "law" in another section, does the inclusion or exclusion of either term have any determination on whether the lacking term has any effect on that particular section?

The long term scope and effects of *MacLean* implicate that any regulation passed by any federal agency that is read against a provision that creates modifications for law and not "laws, rules, or regulations," or any similar relationship of phrases, must be retroactively altered, reinterpreted, or redrafted. This is a crippling and devastating reality that government agencies such as the TSA, the FDA, the Department of Homeland Security, the FCC, and so on, are going to have to face. Moreover, it has been noted that the government has gone to great lengths to protect whistleblowers, but it has left the topic worse off—"Courts . . . consistently rule in favor of whistleblowers . . . . As a result, all employers—public and private—should be particularly cautious if disciplinary action is or must be taken . . . . "[58]

Furthermore, by ruling that regulations do not hold the same force and effect as law, concerning exceptions for disclosing information as a whistleblower, and similarly worded statutes, the entire administrative state must reconsider where and how it receives its powers to make laws. The Necessary and Proper Clause of the Constitution give Congress the right to delegate its powers in order to regulate the nation.[59] The ability to delegate its responsibilities led to the creation and massive expansion of the administrative state. The administrative state, in turn, creates laws, rules, and regulations on behalf the United States Government, for nearly all aspects of government. This process, however, is called into question and may even be crippled by the *MacLean* Court's ruling, as the

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[58] *Supreme Court Says Federal Regs Not 'Law' Under Whistleblower Statute*, MASS EMP. L. LETTER (Scoller, Abbot, Presser, P.C., Mass.), May 2015.

[59] U.S. CONST. art. I, § 8.

administrative state, and regulatory agencies may have just lost their powers to regulate and pass meaningful law.[60]

III. CRITIQUING THE MACLEAN COURT'S READING OF REGULATION VERSUS LAW

Although the Court in *MacLean* held that regulations do not have the same force or effect as law when read against the exceptions that *MacLean* was concerned with,[61] it is important to keep in mind what force and effect regulations passed by agencies have. As Cassie Suttle, discussing *MacLean*, states:

> Congress, through the ATSA, directed the TSA to promulgate rules prohibiting disclosure, and the TSA comported with the express directive. When Congress directs an agency to make law on its behalf, it should have the same force of law as statutes themselves. Administrative law is not an agency rulemaking free-for-all. While agencies do enjoy a certain amount of discretionary power, legislative directives severely constrain administrative action. Traditionally, agencies are required to act only within boundaries specified by a legislative directive. These legislative directives are essentially a call for backup when Congress lacks sufficient resources and knowledge to draft a statute. Indeed, the whole purpose of administrative agencies' rulemaking authority is to add an extra layer of expertise that Congress is unable to provide.[62]

Thus, the zone of power that regulations occupy is considered law only so far as Congress allows it to be—congruent to the holding in *MacLean* that exceptions of "law, rule, or regulation" are junior to

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[60] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 921 (2015).

[61] 135 S. Ct. at 920. "[L]egislative regulations generally fall within the meaning of the word 'law,' and that it would take a 'clear showing of contrary legislative intent' before we concluded otherwise." *Id.* (*quoting* Chrysler Corp. v. Brown, 441 U.S. 281, 296 (1979)).

[62] Cassie Suttle, *The Aviation and Transportation Safety Act and Whistleblowers-How* Maclean *and The Federal Circuit Sent National Security Into a Nose Dive*, 79 J. AIR L. & COM. 183, 186–87 (2014).

exceptions made simply by "law."[63] However, a slight discrepancy, or even contradiction, arises when reading Suttle's discussion. We must look into the legislative directive by which the TSA promulgated its rules and regulations in order to understand the discrepancy.

In 2001, the TSA was established by Congress and was "allowed . . . to promulgate regulations to define the scope of, and restrict the release of, 'sensitive security information.'"[64] Based on Suttle's analysis, a reasonable reading may mean that the "legislative directive" that the TSA received determined what sorts of information can and cannot be released—a broad directive.[65] Thus, when Congress gave the TSA the power and responsibility to pass regulations to that effect, it directed the TSA to make a law on Congress's behalf.[66] Therefore, using Suttle's analysis, that regulations determining what sort of SSI is restricted, should have the same force and effect of law passed by statute.[67] Thus, the Supreme Court holding that a regulation does not have the same force and effect of law, in the manner the *MacLean* Court did, shows us an almost irreconcilable contradiction.[68] This point is further expanded upon in later pages.

However, if prohibition against disclosure of information by regulation is not the same as prohibition set by law, then what power, if any, does a regulatory or governmental agency have in preventing or establishing rules for disclosure? More importantly, what will interpretation of similar provisions found in *MacLean* look like? The Supreme Court overlooked two considerations: (1) What effect *MacLean* will have on disclosure of information that regulations allow, for which exceptions based on law are expressly made, and (2) What its holding does to already existing regulations that prohibit disclosures. [69] The Supreme Court carved out too great of a

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[63] Dep't of Homeland Sec., 135 S. Ct. at 919.

[64] Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. MacLean: What Law Is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1068–69 (2015).

[65] Suttle, *supra* note 62.

[66] Suttle, *supra* note 62.

[67] Suttle, *supra* note 62.

[68] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 921 (2015).

[69] *See generally id.*

difference between regulations passed by governmental agencies as opposed to law concerning protection given to prohibited disclosures and whistle-blowing.

A simpler solution would have been to rule on what disclosures could have been supported, rather than allowing legislative intent and judicial interpretation to create a blanket rule overriding agency autonomy. Instead, now when reading any given agency's statutes or regulations, one must stop and think: If a particular portion of a statute has created an exception made by law, did Congress also intend that an exception for rules and regulations exist—given that regulations typically have the force and effect of law? As a result, every time a similar issue within a statute arises, more stress will be put on courts to parse out congressional intent, further burdening a system that is stretched to its limits. Moreover, it leaves the opportunity for inconsistencies to develop in this area of case law, as different courts may read statutes or determine Congress's intent differently.

Alternative solutions to a broad ruling overriding regulatory power when exceptions made by law and those made by law, rule, or regulation are mentioned in the same regulation should have been explored by the Supreme Court. Moreover, when similar matters arise, they should be dealt with on a case-by-case basis because it is neither the intent nor the practice of U.S. courts to undermine the government's own agencies with blanket rulings like the Supreme Court made in *MacLean*. For example, when a statute or regulation mentions law and law, rule or regulation in a single statute, it is crucial to determine whether one law preempts law, rule or regulation if they are not both mentioned within the same clause or subsection. It is a reasonable inference to make that it would not, but *MacLean* was void of any comment regarding just how far the existence of an exemption of law overrides an exemption of law, rule or regulation.

This broad sweeping ruling undermines and invalidates the intent behind establishing the modern administrative state. For example, the FCC allows for disclosure of information to other governmental agencies, so long as "[d]isclosure is not prohibited by . . . other provisions of law."[70] What this means is that an FCC employee can reveal authorized information to other agencies, so long as another

[70] 47 C.F.R. § 0.442(b)(4).

law does not override that agencies' ability to do so. However, regulations, the vast majority of the time, are considered to have the same effect as law.[71] Thus, is it possible that the FCC's disclosure rule allows for other regulations to prohibit disclosure, and still be congruent with disclosure that is prohibited by another provision of law? Or, is it the case that because Congress mentioned only "other provisions of law," that it did not intend for other rules or regulations to prohibit such disclosures?[72] Or, must the statute be parsed out and searched for how many times an express prohibition based on laws is written compared to how many times prohibitions based on rules or regulations are, as the Court in *MacLean* did?[73] It becomes abundantly clear that it would be a monumental process to read into Congress's intent with each statute that poses a similar issue that *MacLean* and the TSA regulation did.

Although that particular FCC provision does not govern whistle-blowing, its scope and authority is called into question, particularly when read against *Chrysler Corp.,*[74] because it is a regulation authorizing law to create exceptions.[75] The holding in *MacLean* stated that the exemptions of "law" excluded exemptions created by "rule or regulation,"[76] but did not give an explanation of what the legislature intended when it mentioned "other provisions of law."[77] Is it only the fact that the statute in question in *MacLean* mentioned both exemptions of law and law, rule, or regulation that allowed the court to identify and analyze the discrepancy between the two? By holding a government agency to a standard that overrules its own ability to regulate its operations with a blanket holding like that in *MacLean*, it is rendered void of its own powers, and is an indication of the beginning of the end for the modern administrative state. [78] Similarly, when a regulatory agency has carved for itself exceptions that account for other laws or regulations, they must be dealt with on

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[71] *See infra* notes 142–43.

[72] 47 C.F.R. § .0442(b)(4).

[73] *See* Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913 (2015).

[74] *See supra* note 55.

[75] 47 C.F.R. § 0.442(b)(4).

[76] *See MacLean*, 135 S. Ct. at 920–21.

[77] *See generally id*. at 913.

[78] *Id.* at 920–21.

a case-by-case basis, because a blanket rule, like the one made in *MacLean*, undermines the administrative state. [79]

However, the Supreme Court in *MacLean* did briefly address what it would mean if law did encompass rule or regulation,[80] justifying why an agencies' actions may have to be overridden: for the sake of preventing an agency from developing the power of self-regulation.[81] Although the overall holding is no better off, credence must be given to the court's argument. The Supreme Court stated that if "law," as used in § 2302(b)(8)(A) were to include regulations and rules passed by agencies, then, concerning whistle-blowing, the TSA could have protected itself by using the regulation banning the disclosure of SSI.[82] Therefore, the Court held, this was evidence that Congress did not intend, and the Court did not interpret, the term law to include rules or regulations.[83] Although the Court's concerns are legitimate, a self-regulating agency is the antithesis of the American way of life, nay, democracy itself! The Supreme Court, nevertheless, erred in the opposite direction by creating such a far sweeping rule, while potentially contradicting itself.[84]

IV. ALTERNATIVE SOLUTIONS TO THE SUPREME COURT'S BROAD SWEEPING HOLDING: ALLOWING STATES TO ACT AS INCUBATORS FOR CREATING A FORMALIZED METHODOLOGY FOR INTERPRETING STATUTES AND DETERMINING CONGRESSIONAL INTENT

The *MacLean* Court held that regulations do not carry the same weight as laws in the context of regulation of information and whistle-blowing.[85] This led the Court to establish precedence that

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[79] *Id.*

[80] *MacLean*, 135 S. Ct. at 920.

[81] *Id.*

[82] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 920 (2015). The *MacLean* Court went on to state that, "[i]f 'law' included agency rules and regulations, then an agency could insulate itself from the scope of [§] 2302(b)(8)(A) merely by promulgating a regulation that 'specifically prohibited' whistle-blowing." *Id.*

[83] *Id.*

[84] *MacLean*, 135 S. Ct. at 921.

[85] *MacLean*, 135 S. Ct. at 915. However, a vast majority of the time, rules and regulations are considered to have the same force and effect as law, as is discussed

undermines other agency regulations by overriding laws, rules, or regulations that might concern issues of statutory interpretation and legislative intent with a rule that does not allow regulations to have the same force and effect as laws.[86] Additionally, the holding did not consider the fact that it is not uncommon that regulations do have the same force and effect of law elsewhere.[87] Furthermore, the *MacLean* Court did not consider any alternative solutions.[88] Nor did it consider, even if no other plausible solution in *MacLean* existed, to give credence or consideration to alternative methods of statutory interpretation, like establishing a systematic methodology to approaching statutory interpretation.[89] Thus, the next question to be answered is: What sort of solutions did the *MacLean* Court overlook that could have provided for a better resolution? Or alternatively, what sort of steps could the *MacLean* Court have taken in order to establish precedence that followed a more decisive path to reading the minds of Congress and determining legislative intent? Abbe R. Gluck (Gluck) highlights a number of solutions that have been considered and explored, focusing on the Supreme Court's interpretative methods, along with a number of other models that state courts have developed.[90]

Gluck explored a number of methods that state courts took concerning statutory interpretation that the Supreme Court could have considered, adopted, or even modified, in order to establish a methodology that considers a number of steps prior to relying on the court to become the arbiter of Congress's intent.[91] Gluck writes that there is an inherent inconsistency with how judicial bodies have dealt

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in this article. Rules and regulations do not have the same force and effect as law, concerning *MacLean*, so long as there is a clear showing that the term "law" is not meant to encompass rules, or regulations. *Id.* at 915. However, without the requisite showing of intent otherwise, rules and regulations passed by governmental agencies do, in fact, carry the same force and effect as law. *Id.*

[86] *Id.*

[87] *Id.*

[88] *See generally MacLean*, 135 S. Ct. 913 (2015).

[89] *Id.*

[90] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

[91] *See id.*

with "[m]ethodological stare decisis."[92] Moreover, he addresses the stark reality that is the system by which legislative and congressional intent are deciphered by the U.S. court system; only two percent of matters are litigated in the U.S. court system, one percent of which occurs in the Supreme Court, which determines how and why the judiciary interprets and determines congressional intent and statutory interpretation.[93] Thus, in reality, a much smaller number of cases than the two percent Gluck states the Supreme Court hears, actually focus on the matters of statutory interpretation and determining congressional intent. Surely, with such a small percentage of cases to work with, the opportunity for the Supreme Court, including the *MacLean* Court, to establish a better system of determining congressional intent and statutory interpretation must be utilized, rather than allowing a discorded culmination of appointed judges to determine Congress's intent.[94]

Gluck claims that "[m]ethodological stare decisis – the practice of giving precedential effect to judicial statements about methodology—is generally absent from the jurisprudence of mainstream federal statutory interpretation . . . ."[95] What is more, the same theory that Gluck advocates for, establishing a methodological stare decisis for statutory interpretation, and as I posit, for determining congressional intent, is found throughout other areas of

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[92] *See id.*

[93] *Id.* at 1753.

[94] *Id.* at 1757. Gluck, commenting on the refusal of the Supreme Court to adopting a formalized method of statutory interpretation and reading into congressional intent, states that the U.S. Supreme Court is divided in itself, and stubborn to adopting a methodology to establish a "interpretative consensus." *Id.* at 1757. Whether it would have changed the *MacLean* Court's holding or not, a methodology for the court to follow would have at least resulted in a conclusion that was not found in some vague and tenuous interpretation of how to establish a showing of intent otherwise in order to determine whether law encompasses rule, or regulation. Otherwise, we find ourselves in a situation that requires an analysis of other statutes that are similarly worded or situated, to determine whether one clause of a statute is rendered moot or is contradicted by another clause in that same statute.

[95] *Id.* at 1754.

the law that the judiciary hears.[96] There are state courts in which judges are able to "bind" other judges' statements and opinions into case law.[97] As Gluck states, "[i]n these states, it is possible for one judge to bind another judge's methodological choice. And in fact, federal judges, too, readily assent to this conception of methodology in other areas of law, like contract interpretation."[98] However, unlike the Supreme Court, and unlike in the case of statutory interpretation in the federal system, state courts have constructed a number of methods to tackle this issue. These states have been able to deal with a lack of guidelines and the overwhelming amount of authority the judiciary has on dictating interpretative methods by establishing "formalistic . . . frameworks that govern all statutory questions."[99] Effectively, what Gluck found is that there is a lack of a framework in the federal system, for the methods by which courts can determine how to approach statutory interpretation and determining congressional intent. However, a number of state courts have established a system, if adopted or followed by the federal system, might have led to a much different analysis and holding in *MacLean*—although there is no knowing exactly how the court would have ruled, there would at the very least be a system by which the best possible determination was reached.

Gluck advocates for a position that allows for states to act as incubators for new approaches and alternatives to solve the problems associated with the judiciary maintaining the sole authority to determine what a law says,[100] even if the legislature would have intended to convey a different interpretation. Some state courts and legislatures may have developed methods that could be used to reimagine how the federal government approaches legislative intent

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[96] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1757 (2010).

[97] *Id.*

[98] *Id.* at 1757.

[99] *Id.* at 1754.

[100] It is undeniable that the judiciary has the sole and unequivocal authority to interpret and determine what the law is. *See generally* Marbury v. Madison, 5 U.S. 137, 177 (1803). Nevertheless, it would be wise to give a certain amount of deference, however little it might be, to what Congress would have intended, through committee hearings, and other sources of legislative history and intent.

and judicial interpretation.[101] Gluck points out that "[t]hinking about statutory interpretation in the world beyond the U.S. Supreme Court is long overdue," and "[s]o, too, is the recognition that state court methodological developments may be used to inform and change federal statutory theory and practice."[102]

In fact, Gluck argues that "[t]he state courts studied . . . have taken advantage of their exposure to federally oriented thinking about statutory interpretation," and "deploy (but do not copy) federal interpretive theory as they elaborate their own, unique methodological rules—rules that are intended to improve upon the federal experience."[103] For example, a number of state supreme courts have adopted a methodological "framework" that is deemed to be controlling in all cases concerning statutory interpretation, both for the respective supreme and lower courts.[104]

Although some state courts have attempted to establish guidelines or frameworks for courts to follow when faced with the task of interpreting statutes and deciphering legislative intent, a number of questions arise; (1) Whose role is it to decide what framework to follow, or; (2) Which branch of government ultimately holds the power to dictate what legislative interpretation will look like?[105] This grey-zone matter of constitutional power between the judiciary and legislature is an important one to address, and a relevant issue to keep in mind, but one that will not be discussed in this note. Gluck mentions that despite state legislatures establishing tools for interpretation, state courts have passed on using them, opting to claim themselves as the arbiters of the rule and meaning of the law.[106] As he states,

> Many state legislatures, too, have enacted statues that explicitly direct the state courts' interpretive processes. But many state courts are resisting or even ignoring those legislative directions. In so doing,

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[101] Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1755 (2010).

[102] *Id.*

[103] *Id.*

[104] *Id.* at 1757.

[105] *Id.*

[106] *Id.* at 1771.

> these cases advance a vision of courts, not legislatures, as the institutional actor with dominant authority over interpretation—and in one which legislatively enacted "Rules of Statutory Interpretation" are likely to be of little utility.[107]

In his own case study, Gluck has found a number of seemingly plausible solutions based on State Supreme Court holdings.[108] A potential solution would have Congress and other legislative bodies develop guidelines or rules for statutory interpretation in order to provide clarification when courts are faced with ambiguity, vagueness, or other hurdles when attempting to decipher the legislature's intent in order to uphold the spirit of the law.[109] However, as Gluck points out, even though some state legislative bodies have established similar guidelines and rules, many courts have rejected them, advancing a message that the courts consider themselves the final arbitrators of the spirit and effect of the law.[110]

Nevertheless, there are alternative decisions and schools of thought the Supreme Court could have adopted in order to avoid blanket rule statements that will, ex post facto, alter the meaning and force of legislation.[111] For example, as Gluck points out, the supreme court of Oregon established a three-step workable framework that the United States Supreme Court might want to consider.[112] The three-step analysis is as follows:

> [1] [i]n this first level of analysis, the text of the statutory provision itself is the starting point for interpretation . . . . In trying to ascertain the meaning

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[107] *Id.*

[108] *Id*. at 1750.

[109] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

[110] *See id.* at 1771.

[111] For example, Gluck's "modified textualism" would establish a hierarchy where "textual analysis" would be ranked first, then "legislative history", and lastly "default presumptions," regarding statutory interpretation, and as I posit, even deciphering congressional intent. *Id.* at 1758.

[112] *Id.* at 1775. In fact, it found such great success that for sixteen years after its creation, there was not one dissenting opinion regarding the application of the three-step framework. *Id.*

> of a statutory provision . . . the court considers rules of construction of the statutory text that bear directly on how to read the text . . . for example, the statutory enjoinder "not to insert what has been omitted, or to omit what has been inserted." . . . . [2] if, but only if, the intent of the legislature is not clear from the text and the context inquiry, the court will then move to the second level, which is to consider legislative history . . . . if the legislative intent is clear, then the court's inquiry into legislative intent . . . is at an end . . . . [3] If, after consideration of text, context, and legislative history, the intent of the legislature remains unclear, then the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.[113]

This three-step approach would, at the very least, put a number of barriers before blanket rule statements are made, like in *MacLean*, by establishing rules to follow when faced with directions in statutes. As Gluck notes, it is important to keep in mind that at least one school of thought believes that rule making often times involves compromising, convincing, argumentation, and much more thought than just the letter of the law, which are all important in considering what the legislature truly intended.[114]

That being said, the Supreme Court in *MacLean* believed that Congress has its own tools to outline what its intentions are:

> But Congress's use of the word "law," in close connection with the phrase "law, rule, or regulation," provides the necessary "clear showing" that "law" does not include regulations. Indeed, using "law" and "law, rule, or regulation" in the same sentence would be a very obscure way of drawing the Government's nuanced distinction between different types of regulations. Had Congress wanted to draw that distinction, there were far easier and clearer ways to do so. For example, at the time Congress passed Section 2302(b)(8)(A), another federal statute defined

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[113] *Id.* at 1777.

[114] *Id.* at 1762.

> the words "regulatory order" to include a "rule or regulation, if it has the force and effect of law." 7 U.S.C. § 450c(a).[115]

In summary, the Supreme Court believed that it was not attempting to interpret the legislatures intent. Rather, it was clear to them that the legislature meant to create a distinction between the two phrases, and that Congress could have passed further legislation, or could have made it clear in another manner, if it wanted "law" to include "law, rule, or regulation." Moreover, the Supreme Court went on to say that other statutes "defined the words 'State law' to include 'all laws, decisions, rules regulations, or other State action having the effect of law.'"[116] Effectively, if the legislature wanted to, it could have made its intentions with phrasing clearer, if it intended "law" to encompass "law, rule or regulation."

This analysis is not at odds with that of Gluck's, but it overlooks the fact that the Supreme Court could have, in a precedent setting manner, worked a more specific, clearer, and less devastating holding for the administrative state, by following Oregon's three-step process, and in the process establishing its own "methodological stare decisis."[117] Instead, the Supreme Court rests on an assumption that the legislature will take care to express their immediate purpose, and if it indiscernible, the courts will interpret ambiguity and read their own interpretations of the statute to their liking.[118] Moreover, the Supreme Court, along with Justice Scalia and Bryan Garner prescribe to a manner of interpretation that produces very narrow, almost shortsighted results.[119] This manner of thought and precedent has led

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[115] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 920–21 (2015).

[116] *Id.* at 921 (quoting 29 U.S.C. § 1144(c)(1) (1976)).

[117] *See supra* note 113.

[118] *See* Pilgrim's Pride Corp. v. Comm'r of Internal Revenue, 779 F.3d 311, 315 (5th Cir. 2015) ("Instead, we assume that 'the ordinary meaning of [statutory] language accurately expresses the legislative purpose.'") (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 175 (2009)).

[119] "We are obliged to give effect, if possible, to every word Congress used." 799 F.3d at 316 (citing Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979)). Furthermore, Justice Scalia and Bryan Garner have stated "[i]f possible, every word and every provision is to be given effect . . . . None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence." 779 F.3d. at 316 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)).

to the unfortunate series of events that resulted in the blanket rule developed from *MacLean*.

Yet, another solution was devised to the *MacLean* Court's issue. The District of Columbia Circuit (D.C. Circuit) shed greater light, if not developed an answer, to the *MacLean* Court's oversight. In *National Federation of Blind v. United States Department of Transportation*, the D.C. Circuit found a balance between the ability to read a term or phrase broadly while narrowly construing its application within a given statute.[120] At issue in *National Federation of Blind*, was a Department of Transportation (DOT) proposition, called the "Final Rule," that would require twenty-five per cent of kiosk orders made thirty-six months after the rule went into effect to be accessible.[121] The DOT argued to dismiss the case because "Congress vested courts of appeals with exclusive jurisdiction to review DOT orders, including the Final Rule, under 49 U.S.C. § 46110."[122] The statute in question states, in relevant part,

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation… may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.[123]

In particular, the DOT's argument was based on the definition and interpretation of what an "order" is and "whether rules and regulations (like the Final Rule) qualify as orders under § 46110."[124] Although this particular statute differs from the *National Federation of Blind*, the manner in which the court determined how to interpret and construe the term "order" is more definite, clear, and narrower than the approach the *MacLean* Court took.[125]

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[120] *See* Nat'l Fed'n of Blind v. U.S. Dep't of Transp., 78 F. Supp. 3d 407, 413 (D.D.C. 2015).

[121] *Id.* at 409.

[122] *Id*.

[123] *Id.* at 410 (quoting 49 U.S.C. § 46110(a) (2012)).

[124] *Id.* at 411.

[125] *See Dep't of Homeland Sec. v. MacLean,* 135 S. Ct. 913, 919–21 (2015).

In one line of reasoning used in the D.C. Circuit, courts have stated that "where a direct-review statute does not contain a definition of order (§ 46110 does not), '[w]e therefore look to the Administrative Procedure Act, as we have done before when an agency's direct-review statute did not define 'order.'"[126] Thus, the court, when faced with ambiguity, vagueness, or lack of a standard definition of "order" would look to an agreed upon source in order to guide its decision making process.[127] This sort of analysis is not unlike what Gluck has found in his research, and is a solution that Gluck would advocate for, rather than the over-broad rule the court in *MacLean* decided.[128] That being said, the court rejected the argument that the Administrative Procedure Act defines "order" in the proper manner for the issue it faced.[129] In doing so, the *National Federation of Blind* court highlighted an interesting, and crucial piece of the judicial rulemaking process by stating, "In fact, the D.C. Circuit has specifically explained that "courts sometimes have construed 'order' for purposes of special review statutes more expansively than its definition in the APA, notably to permit direct review of regulations promulgated through informal notice-and-comment rulemaking.'"[130] This highlights the fact that courts have the discretion to read statutes and phrases broadly or narrowly to produce more specific, arguably more accurate, and less broad-sweeping rules.

Instead, the court found its answer in a different line of reasoning. The court agreed that the plaintiff was able to point out a discrepancy in the language of § 46110, by identifying the difference between

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[126] Nat'l Fed'n of Blind v. U.S. Dep't of Transp., 78 F. Supp. 3d 407, 412 (D.D.C. 2015) (quoting Watts v. SEC, 482 F.3d 501, 505 (D.C. Cir. 2007)).

[127] *Id.* It is important to note that what an "order" is or how "order" is defined is irrelevant to the court's analysis. Rather, it is important to understand the court's analysis, and the tools it used in order to interpret the statute, and to determine the definition of "order."

[128] *See generally* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

[129] Nat'l Fed'n of Blind v. U.S. Dep't of Transp., 78 F. Supp. 3d 407, 412 (D.D.C. 2015).

[130] *Id.* at 413.

"orders" and "regulations"[131] The plaintiff pointed out a discrepancy, similar to what the *MacLean* Court faced, by showing that the Administrator of the FAA is given power under 49 U.S.C. § 46105(c) to "prescribe regulations and issue orders" in emergency situations.[132] But, § 46106 allows the Secretary of Transportation to enforce "this part or a requirement or regulation prescribed, or an order or any term of a certification or permit issued, under this part."[133] The plaintiff argued, therefore, that "order" is used in different capacities, stating

> [T]hat "order" cannot include regulations because statutory terms are "clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes [their] meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[134]

In a manner that completely, and yet simply, resolved the issue, the *National Federation of Blind* court held that the term "order" is read broadly for its function within the statute, and thus held "that 'order' in section 461100(a) 'should be read expansively' but limited [its] construction to '*this provision*'—referring to section 46110(a) only."[135]

It seems clear then, that the Supreme Court should have taken notice of *National Federation of Blind v. U.S. Department of*

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[131] *Id.* The court stated:

> Plaintiffs point out that interpreting section 46110 as covering rules and regulations would create an additional contradiction. Plaintiffs correctly identify a distinction between 'orders' and 'regulations' in the statutory scheme surrounding section 46110 (Chapter 461 of Title 49 of the U.S. Code), which repeatedly differentiates between orders and regulations, suggesting they cannot be the same thing.

Id.

[132] 49 U.S.C. § 46105(c) (2012).

[133] *Nat'l Fed'n of Blind*, 78 F. Supp. 3d at 413 (quoting 49 U.S.C. § 46106 (2012)).

[134] *Id.* at 413.

[135] Nat'l Fed'n of Blind v. U.S. Dep't of Transp., 78 F. Supp. 3d 407, 413 (D.D.C. 2015) (citing Avia Dynamics, Inc. v. FAA, 641 F.3d 515, 520 (D.C. Cir. 2011) (emphasis in original).

Transportation, and used one of the two different modes of interpretation that court used in order to develop a more tailored rule. Or, at the very least, it could have carved out an exception for the definition or coverage of the term "law, rule, or regulation," when read against the term "law" itself, in order to work out the discrepancy without creating a rule that will inevitably cause ex ante anarchy in the administrative state.

Yet, there exists a more glaring flaw with the court's holding in *MacLean*. Justice Scalia points out that in *Chevron, U.S.A., Inc., v. NRDC*, the Supreme Court held a state agency's interpretation of vague terms in a statute is acceptable if the interpretation is one that is reasonable and it is a statute administered by that agency.[136] Importantly, the court in *Chevron* established a two-step approach to tackling issues of vagueness and ambiguity within a particular statute: (1) If Congress has "spoken to" or otherwise addressed the vagueness or ambiguity at hand, then the regulatory agency must defer to Congress's intent and judgment, but (2) If Congress has not addressed the vagueness or ambiguity at hand, then "the court does not simply impose its own construction on the statute," instead, the court must address whether that regulatory agency's interpretation is "based on a permissible construction of the statute."[137] However, The Supreme Court has stated that

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. [citing cases.] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.[138]

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[136] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511 (1989).

[137] *Id.* at 511–12 (quoting Chevron, U.S.A. Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

[138] Immgr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 447–48 (1987) (quoting *Chevron U.S.A. Inc.,* 467 U.S. 837, 842–43 n.9, (1984)).

Thus similar to *MacLean*, if Congress has spoken to the issue,[139] then the regulatory agencies interpretation is moot, and Congress's intentions must be deferred to.[140] However, this sort of deference to judicial interpretation can sometimes lead to undesirable results.

Although this analysis might not fit perfectly into the issues addressed by the *MacLean* Court, in that it is not vagueness or ambiguity that the Court is faced with, rather omissions of language—whether laws encompass regulations—there is still something to be said about the Supreme Court ignoring a line of reasoning that, with careful consideration, could have easily been applied in order to provide analysis that deferred to precedent, producing a narrower and more guided result. Although Congress "spoke" to whether laws encompass regulations in section 2302, it only did because the *MacLean* Court decided that Congress implicitly stated that laws do not encompass regulations by omitting "rules or regulations" from § 2302(b)(8)(A).[141]

Were it not the court deciding that Congress implicitly spoke to § 2302(b)(8)(A), the Government provided two arguments that, according to Justice Scalia and *Chevron*, should have been considered and deferred to. In *MacLean*, the United States government argued that although not all regulations are encompassed in laws, those "regulations that have the 'force and effect of law' (*i.e.*, legislative regulations) . . . . " are encompassed in the term law, while interpretive rules are not encompassed by the term law.[142] The Supreme Court stated in *MacLean*, that in a previous Supreme Court case, *Chrysler Corp. v. Brown*, "legislative regulations generally fall within the meaning of the word 'law,' and that it would take a 'clear showing of contrary legislative intent' before we conclude[]

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[139] The fact that Congress included an exception for "law, rule, or regulation," in particular portions of section 2302, and only an exception for "law" in section 2302(b)(8)(A), was evidence that Congress spoke to (in other words, it had given its opinion) as to whether there was an exception created for whistleblowing in "law, rule, or regulation." Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 919 (2015).

[140] *Immgr. & Naturalization Serv.*, 480 U.S. at 447–48.

[141] *See supra* note 39 and accompanying text.

[142] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 920 (2015)

otherwise."[143] However, the Supreme Court found that because the term "law" is used within such a close proximity with "law, rule, or regulation," it is evidence that "law" does not encompass "law, rule, or regulation."[144] Moreover, the *MacLean* Court went on to explain that there were simple ways Congress could have distinguished "law" and "law, rule, or regulation" such that "law" would encompass "rule, or regulation"—Congress could have passed further legislation that stated laws encompass rules or regulations—pointing out that some state governments had done just that.[145]

This is a weak showing that Congress "spoke to" the meaning of § 2302(b)(8)(A). If Congress can easily supplement statutes by speaking to their intent, addressing ambiguity, and further defining statutes, as Justice Scalia and the *MacLean* Court pointed out, then Congress could have just as easily supplemented the ambiguity the court found in § 2302(b)(8)(A) by stating that "law," as used in this particular statute, does not encompass rules or regulations. The *MacLean* Court, by finding Congress implicitly spoke to the intent of § 2302, circumvented the *Chevron* rule that would allow regulatory agencies to weigh in on interpreting statutes.[146]

Justice Scalia spoke to what extent and for what reason administrative agencies should be deferred to in order to shed light on issues that arise from their regulations—although he does not address exactly the situation we find ourselves in with *MacLean*:

> What, then, is the theoretical justification for allowing reasonable administrative interpretations to govern? The cases, old and new, that accept administrative . . . familiarity with the history and purposes of the legislation at issue, their practical knowledge of what will best effectuate those purposes. *In other words,*

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[143] *Id.* (citing Chrysler Corp. v. Brown, 441 U.S. 281, 296 (1979)).

[144] *Id*.

[145] *Id.* at 920–21.

[146] *See generally* Dept' of Homeland Sec. v. MacLean, 135 S. Ct. 913, 915 (2015). However, it is important to keep in mind that the Court can consider omissions on behalf of Congress, in a statutes phrasing, to mean that Congress deliberately considered and left out particular phrases or words from a statute—meaning that Congress acted intentionally. *Id*. at 919.

> *they are more likely than the courts to reach the correct result.*[147]

Justice Scalia further states that by having the responsibility to interpret the law, a court must consider more than just some administrative agency's "competence" in order to override its argument, electing to follow the court's own interpretation and analysis instead, when evaluating an agency's argument.[148]

However, in *Department of Treasury, I.R.S. v. Federal Labor Relations Authority*, the Supreme Court, again in a broad sweeping manner, stated that "law" does not encompass "law, rule, or regulation."[149] That being said, the *Department of Treasury* Court rightfully addressed the fact that deference must be given to an administrative agency's interpretation of a statute, *if it is reasonable*, "even though it is not the one . . . [the court] would arrive at," but ultimately held that the Federal Labor Relations Authority's interpretation was not reasonable.[150]

Nevertheless, Justice Scalia seems to have wrapped up my argument in a succinct manner. He states that, "[t]o begin with, it seems… that the 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of *policy consequences*."[151] Policy consideration is such a crucial and momentous aspect of statutory construction, and even judicial interpretation of statutes, I posit, that it "has been enshrined in Latin: *'Ratio est legis anima; mutate legis ratione mutatur et lex.,*'" which translates to, "[t]he reason for the law is its soul; when the reason for the law changes, the law changes as well."[152] Furthermore, Justice Scalia highlights a consideration that the *MacLean* Court overlooked—the reason that a court might choose a particular interpretation over another is "that the alternative

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[147] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (emphasis added).

[148] *Id.*

[149] Dep't of Treasury, I.R.S. v. Fed. Labor Relations Auth., 110 S. Ct. 1623, 1629 (1990).

[150] *Id.* at 1627.

[151] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515 (1989) (emphasis added).

[152] *Id.*

interpretation would produce 'absurd' results, or results less compatible with the reason or purpose of the statute."[153]

However, some credence must be given to Justice Kennedy's and Justice Sotomayor's dissent in *MacLean*.[154] The dissenting justices argued that 49 U.S.C. § 114(r)(1), which states that "the Under Secretary *shall* prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security under authority of the Aviation and Transportation Security Act . . . . "[155] meant that the Under Secretary *must* prescribe regulations, taking the term "shall" to mean "must."[156] However, even the dissent failed to take notice of the fact that a more thorough analysis is required in order to determine whether the court needed to produce a narrower holding.

Nonetheless, having accepted that the *MacLean* and *Department of Treasury* Courts found that "law," when read against "law, rule, or regulation," restricts rules and regulations by not granting them the full force and effect of law, the determination must be made as to whether regulations encompass and hold the same weight as laws in general. Without discussing previously charted territory in great detail, it is worth noting the court's interpretation, and general definition of the word "law." The interpretation of the word "law" and the conclusion the Court came to on Congress's intent regarding § 114(r)(1) is too narrow, and deprives agencies of much of their ability to regulate its employees and cripples their ability to regulate safe travel.

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[153] *Id.*

[154] *See* Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 924–26 (2015) (Sotomeyer, J. & Kenedy, J., dissenting).

[155] 49 U.S.C. § 114(r)(1) (2012)(emphasis added).

[156] Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. Maclean: What Law is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1074 (2015) (citing Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 924 (2015)). The *MacLean* Court stated that the word "shall" usually means "must," citing to Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 432, n.9 (1995) as its authority. Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 924 (2015)). Moreover, the *MacLean* Court cited to *Fed. Express Corp. v. Holowecki*, which stated, "Congress' use of the term 'shall' indicates an intent to 'impose discretionless obligations." *Id.* (quoting Federal Express Corp v. Holowecki, 552 U.S. 389, 400 (2008)).

As Kristine A. Bergman and Joseph Weishampel state, the Court in *Chrysler Corporation v. Brown* concluded that regulations passed by agencies, not just the legislature, are considered to have the same "force and effect of law."[157] However as addressed earlier, a requisite showing of clearly established intent otherwise must be proven in order to show that an agencies' regulation does not hold the same "force and effect of law."[158] That being said, a number of sources define rules and regulations to be encompassed by, or, as having the same force and effect of laws.[159]

However prior to the Supreme Court deciding *MacLean*, Miguel Estrada and Ashley Boizelle—predicting how the Supreme Court would decide—commented "it is perhaps perplexing that the word 'law' is being construed to exclude federal regulations."[160] Nonetheless, the Supreme Court ultimately found the clearly established intent to show that Congress intended for "rules and regulations" to be excluded by the word "law" because Congress had used the term "law, rule, or regulation" numerously throughout § 2302 and omitted "rule, or regulation" from § 2302(b)(8)(A).[161]

Thomas W. Merrill and Kathryn Tongue Watts point out the fact that Congress delegated its power to create rules and laws to governmental agencies is irrelevant when considering what law is.[162] Rather, it is because an agency establishes and enforces a rule it has passed that the rule is considered to have the force and effect of

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[157] Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. Maclean: What Law Is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1071 (2015) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979)).

[158] *Id*.

[159] Law.com states that regulations are "rules and administrative codes issued by governmental agencies at all levels, municipal, county, state and federal. Although they are not laws, *regulations have the force of law*, since they are adopted under authority granted by statutes . . . . " Gerald Hill & Kathleen Hill, LAW.COM, http://dictionary.law.com/Default.aspx?selected=1771 (last visited March 3, 2016) (emphasis added).

[160] Miguel A. Estrada & Ashley S. Boizelle, *Looking Ahead: October Term 2014*, 2014 CATO SUP. CT. REV. 337, 355 (2013–14).

[161] Dep't of Homeland Sec. v. MacLean, 135 S. Ct. 913, 920 (2015); *see also* Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. MacLean: What Law is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1072 (2015).

[162] Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 470 (2002).

law.[163] They argue that there are two types of rules or regulations: (1) legislative rules, which are legally binding and (2) interpretative rules, which are not legally binding.[164]

Then the issue is to determine whether "rules or regulations" are legislative, or interpretive, in order to determine whether they have the force and effect of law. Merrill and Watts found the answer by the manner in which Congress stated, during the birth and early years of the Administrative State, that if a violation of an agency's rule "would subject the offending party to some sanction . . . . " then that rule or regulation had the force of law.[165] However, although that practice and knowledge disappeared from jurisprudence, and was left relatively unknown, a clear signal, like the inclusion of sanctions, might better establish a way to determine whether a regulation passed by an agency, and its provisions, carry the force and effect of law.[166] Although this approach would help determine whether a particular regulation is considered to have the same force and effect of law, there *may* still be room to clarify whether the "rules, or regulations" have the same effect and force of law when read against "law, rule, or regulation," like in § 2302(b)(8)(A).

Moreover, the Administrative Procedure Act (APA), an act that establishes how administrative agencies pass, modify, and repeal regulations, sets forth the steps a regulatory agency must take to create both legislative and interpretive rules. The three step process to establishing legislative rules, *which carry the same force and effect of law*, are: (1) issuing a notice that a rule is proposed for being created; (2) affording the opportunity to for individuals to participate in the rule making process, if notice is required to be given to "interested persons," responding to comments made regarding the rule; and (3) including a statement that speaks to the purpose of the rule, when the rule is promulgated.[167] This process, known as the

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[163] *Id.*

[164] *Id.* at 471.

[165] *Id.* at 472.

[166] "[T]he original convention for distinguishing between legislative and housekeeping grants – whether Congress prescribed some sanction for rule violations – not only has the imprimatur of history, but would also serve as a clear rule for Congress, agencies, courts, and regulated entities to follow in determining whether the critical delegation occurred." *Id.* at 474.

[167] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015).

"notice-and-comment" process, establishes legislative rules, which "*have the 'force and effect of law*.'"[168] Moreover, interpretive rules, which are not defined by the APA, "[are] the source of much scholarly and judicial debate," and do not require the "notice-and-comment" process, unless otherwise stated in another statute.[169]

Therefore, it could simply be determined that § 2302 is a legislative rule, and carries the force and effect of law. Thus, a discrepancy is uncovered that the *MacLean* Court did not address—the fact that the TSA's regulation has the force and effect of law—a difference only in syntax from the term "law."

However, the Supreme Court, and subsequent commentators–like Bergman, Weishampel, and Steve Vladeck from SCOTUSblog–have pointed out that the *MacLean* Court did not buy the government's argument that regulations are encompassed by the term law.[170] What is more, recent rulings have followed suit, citing *MacLean* for its holding that § 2032(b)(8)(A) does not allow for rules or regulations to establish exceptions to disclosures of SSI that are prohibited by law, because only statutes are able to create those exceptions.[171] Thus, the *MacLean* Court's holding that "rules and regulations" are not encompassed by "laws," or that they do not have the same force and effect of laws, even when considering the *Chrysler Corp*. analysis, is called into question and at odds with modern day jurisprudence. However, because regulations are not considered to

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[168] *Id.* at 1201–02 (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979) (emphasis added).

[169] *Id.* at 1203–04.

[170] *See* Kristine A. Bergman & Joseph Weishampel, *Department of Homeland Security v. Maclean: What Law Is and Who Makes It*, 46 LOY. U. CHI. L.J. 1067, 1075 (2015).

> Justices Elena Kagan and [Antonin] Scalia both appeared underwhelmed by [[the government's argument that some regulations are "law" for the purposes of 5. U.S.C. § 2032(b)(8)(A)], with the latter suggesting . . . that such a distinction was too "subtle," and that any arguments that Congress intended such a distinction when it enacted the whistleblower statute is "hard to believe."

Id. (quoting Steve Vladeck, *Argument analysis: Government's position in air marshal whistleblower case too 'subtle' for Justices*, SCOTUSBLOG, http://www.scotusblog.com/2014/11/argument-analysis-governments-position-in-air-marshal-whistleblower-case-too-subtle-for-justices/ (Nov. 6, 2014, 9:42 a.m.)).

[171] Losada v. Dep't of Defense, 601 F. App'x 940, 943 (Fed. Cir. 2015).

have the same force and effect of law, alternative solutions could have been reached.

V. CONCLUSION

The administrative state has seen its fair share of expansion, without ever having been meaningfully restricted, until now. It is unfortunate for the resolution of this case that the Supreme Court decided to take on the never-too-welcome issues of statutory interpretation and deciphering congressional intent. Moreover, it is never a good sign when the Supreme Court decides it must look into the minds and intentions of other governmental bodies and individuals in order to determine the resolution of a case. However, having done so, the Supreme Court may just have limited the scope of the administrative state more so than it ever has done before.

The *MacLean* Court, by its ruling, started down the slippery slope for the future of rule-making power of regulatory agencies and the administrative state. In the best case scenario, although one might argue that the *MacLean* Court's ruling was narrow and specific only to 5 U.S.C. § 2302(b)(8)(A) and 5 U.S.C. § 2302(b)(1)(E), by ruling that in at least one instance a rule or regulation does not hold the same force and effect as law, it opened the door for future courts to hold that rules and regulations do not have the same force and effect of law in other scenarios. Again, this interpretation would be a best-case scenario.

What is more, finding that the regulation in *MacLean* did not maintain the force and effect of law because there was clear congressional intent otherwise, it might have been determined differently had it been a different makeup of justices on the court. That is, the court's determination that congress spoke to whether it intended the term "law" to encompass "rule, or regulation," by separating the terms, or by mentioning "law, rule, or regulation" multiple times throughout § 2302, was merely attributing an implied action on behalf of Congress. Putting the holding in *MacLean,* and the future of the administrative state aside, the Supreme Court failed to consider alternative options.

Abbe Gluck, writing for the Yale Law Review, collected, analyzed, and summarized a number of different routes of analysis the Supreme Court could have taken without establishing the blanket

rule it did in *MacLean*.[172] The *MacLean* Court had a number of options it could have considered to adopt. Instead of developing a system by which the Supreme Court could have followed in future cases, referencing congressional hearing notes, or an established hierarchy of authority to defer to, promoting fair, just, and more predictable resolution of cases, the court found it best to decipher Congress's intent by delving into their implied intentions.

The Supreme Court could have, if nothing else, requested further information from Congress as to what its intent was when it drafted and passed 5 U.S.C.§ 2302. Moreover, the Supreme Court could have considered taking the multi-step analysis Gluck points out, that some states have taken when it comes to determining congressional intent and engaging in statutory interpretation.[173] However, and most unfortunately, the Supreme Court did not consider any alternatives, and did not take the time to consider how its holding would affect regulatory agencies and the administrative state in the future.

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[172] *See supra* note 90.

[173] *See supra* note 104.