RETHINKING AQUACULTURE REGULATION IN A POST-*CHEVRON* WORLD

Kamaile A. N. Turčan[*]

ABSTRACT

After the Supreme Court overruled *Chevron* deference in *Loper Bright v. Raimondo*, commentators warned of the detriment to federal agencies resulting from the loss of judicial deference to agencies' interpretations of the statutes they administer. This Essay takes a different approach and examines how advocates for agency authority can use this shift away from judicial deference to their advantage—by refocusing litigation strategy toward congressional delegations. Statutory interpretation arguments need no longer focus on whether an agency is intruding on the judicial prerogative to interpret the law and can now focus instead on whether a court is intruding on the congressional prerogative to delegate discretionary authority to agencies. This is a powerful shift in framing.

Using marine aquaculture regulation as an analytical reference, this Essay makes the affirmative case for agency regulation. Even while overruling *Chevron*, the Court did not take the most restrictive approach to agency authority and instead reaffirmed that authority in the form of discretion. The *Loper Bright* delegation is thus a forceful legal mechanism through which agencies may exercise the full extent of their statutory authority and defeat major questions doctrine challenges to that authority. At a time when anti-regulatory sentiment pervades the federal Executive and Judicial branches, *Loper Bright*

[*] Associate Professor of Law, University of Hawai`i William S. Richardson School of Law. For early conversations that contributed to development of this piece, thank you to Robin Craig, Alex Erwin, Katy Kuh, Andrew Mergen, Anthony Moffa, Mark Nevitt, Dave Owen, Michael Pappas, Ethan Prall, Jill Ramsfield, Edward Richards, Paul Rink, Melissa Stewart, and Jack Whiteley. Many thanks to Anna Meeks, Katherine Pothier, and Kaila Wilkinson for valuable research assistance. Finally, special thanks to the Editors of the Fordham Environmental Law Review for preparing this Article for publication.

enables agencies to accomplish their substantive congressional mandates—a role critical to a functioning democracy.

I. A NEW ERA OF ADMINISTRATIVE LAW

This Essay goes to press at a turbulent moment. During these first few months of the second Trump Administration, the breadth of the President's agenda to dismantle federal agencies raises significant questions about the legality of his conduct.[1] It has become difficult to visualize how an administrative agency operating constitutionally and within its statutory mandate can accomplish its substantive policy directive. This new anti-agency agenda out of the Executive Branch follows a recent sea change in administrative law out of the Judicial Branch: *Chevron* deference is overruled.[2] In *Loper Bright v. Raimondo*, the Supreme Court disavowed 40 years of administrative law doctrine to declare that when it comes to interpreting the meaning of statutes administered by agencies, federal courts, not those agencies, "say what the law is."[3] Both developments prompt existential questions about the extent and nature of administrative agencies' continued role in our system of government.

The federal agency tasked with managing fisheries in U.S. ocean waters—the National Oceanic and Atmospheric Administration (NOAA) Fisheries Service—plays an inadvertently outsized role at

---

1. This Essay is written as President Trump, early in his second term, issues a series of Executive Orders throwing much of the routine functioning of the executive branch into disarray. *See, e.g.*, Dell Cameron, *NOAA Employees Told to Pause Work with 'Foreign Nationals'*, WIRED (Feb. 5, 2025, 7:29 PM), https://www.wired.com/story/noaa-employees-foreign-nationals; Brendan Pierson, *Trump Administration Sued by Government Workers over Cuts to USAID*, REUTERS (Feb. 7, 2025, 11:45 AM), https://www.reuters.com/world/us/trump-administration-sued-by-government-workers-over-slashing-usaid-2025-02-07; Brandon J. Johnson, *Normalizing Emergencies*, YALE J. ON REGUL. (Feb. 6, 2025), https://www.yalejreg.com/nc/normalizing-emergencies-by-brandon-j-johnson. This Essay proceeds from the premise that environmental agencies will continue to endeavor to implement their statutory directives according to judicial precedent, either during the second Trump Administration or in subsequent Administrations.

2. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

3. *Id.* at 385.

this moment. *Loper Bright* itself arose out of a NOAA fishing case.[4] And during his first term, President Trump issued an Executive Order backing the expansion of commercial aquaculture activity in federal waters and designating NOAA the lead agency for aquaculture projects; thus, the aquaculture issue is likely to gain traction again during his second term.[5]

Aquaculture regulation presents many of the complications agencies across the government will face in the coming years: a circuit split from the *Chevron* era about the scope of a federal agency's statutory authority, a commercial industry outpacing government regulation, and the new uncertain interplay of *Loper Bright* delegations, *Skidmore* guidance,[6] and the *West Virginia*[7] major questions doctrine.[8] The question presented is whether the Magnuson–Stevens Fishery Conservation and Management Act (MSA), which is the primary law that governs fisheries management in federal ocean waters,[9] grants NOAA authority to regulate aquaculture conduct in federal ocean waters as part of its statutory authority over fishing in those waters.

Using aquaculture regulation as the analytical reference, this Essay proposes that although the loss of *Chevron* deference after *Loper Bright* is indeed transformative of agency litigation, agencies can use this shift in legal framing to their advantage. The "deference" part was Step 2 of the *Chevron* Two-Step.[10] Step 1 was statutory

---

4. For all its broad implications to administrative law, the underlying question in *Loper Bright* was whether NOAA had statutory authority to require fishing vessels to cover the cost of fisheries observers statutorily tasked with collecting data necessary for the conservation and management of the Atlantic herring fishery. *Id.* at 381.

5. *See* Exec. Order No. 13921, 85 Fed. Reg. 28471 (May 7, 2020); Exec. Order No. 14276, (Apr. 17, 2025) (directing the Secretary of Commerce to address U.S. seafood competitiveness); *see generally* U.S. DEP'T OF COM. ET AL., GUIDE TO PERMITTING MARINE AQUACULTURE IN THE UNITED STATES, NOAA FISHERIES (2022).

6. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

7. West Virginia v. EPA, 597 U.S. 697 (2022).

8. *See infra* Part II.

9. Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1884 (2007).

10. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).

ambiguity: courts would first determine whether the statutory language was ambiguous, and only if the answer was "yes" would courts then defer to the agency.[11] Statutory interpretation in agency cases is no longer driven by a finding of ambiguity.[12] While more subtle in rhetorical impact than its rejection of deference, *Loper Bright*'s rejection of ambiguity as the dispositive threshold framing for questions about agency authority is equally significant for the future of administrative law.

After *Loper Bright*, whether statutory terms are ambiguous is not the paramount question to ask. The question to ask is whether a statute delegates discretionary authority to an agency.[13] The rhetorical emphasis thereby moves from the judicial to the congressional: Before, the focus was whether an agency was intruding on the judicial prerogative to interpret statutory terms; now, the focus is whether an agency is exercising its congressional directive. Or, stated more persuasively from the agency's vantage, whether a court is intruding on the congressional prerogative to delegate. Because even while abandoning the concept of *Chevron* deference, the Supreme Court in *Loper Bright* conceded—as it must—that if Congress delegates to agencies a degree of discretion in implementing their statutes, then courts are obliged to respect Congress's prerogative to do so.[14] "The statute's meaning may well be that the agency is authorized to exercise a degree of discretion," the Court acknowledged.[15] This is a powerful stance from which agencies may make their case.

---

11. *Id.*

12. *Loper Bright*, 603 U.S. at 400.

13. For early insightful reflections on the significance of delegations in lieu of *Chevron* deference, see Donald L.R. Goodson, *Discretion Is Not (*Chevron*) Deference*, HARV. J. ON LEGIS. (Sept. 24, 2024), https://journals.law.harvard.edu/jol/2024/09/24/discretion-is-not-chevron-deference; Thomas W. Merrill, *The Demise of Deference — And the Rise of Delegation to Interpret?*, 138 HARV. L. REV. 227 (2024); Kristin E. Hickman & Amy J. Wildermuth, *Harmonizing Delegation and Deference After* Loper Bright, 100 N.Y.U. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5175305.

14. *Loper Bright*, 603 U.S. at 394.

15. *Id.*

And in these *Loper Bright* delegation cases, agency expertise still matters.[16] The Court repeatedly reaffirmed the principles from *Skidmore v. Swift*, whereby courts "properly resort [to] for guidance" the "interpretations and opinions of the relevant agency, made in pursuance of official duty and based upon . . . specialized experience."[17] In so doing, the Court rejected what could have been a more extreme manifestation of anti-deference, whereby courts would afford no weight to agency interpretations at all.[18] *Loper Bright* preserves agencies' policymaking powers and technological expertise in the course of acknowledging Congress's Article I authority.[19]

These two attributes of *Loper Bright*—its concession to congressional delegations and its affirmation of *Skidmore*—provide an opportunity for agencies to position their policymaking role at the forefront of statutory interpretation cases. In this act of embracing congressional delegations, agencies may simultaneously counteract the inevitable *West Virginia* major questions doctrine challenges to their assertions of delegated power.[20] We do not yet have judicial guidance about when a *Loper Bright* delegation might become a so-called major questions case. Still, when such a delegation triggers the major questions doctrine, agencies may argue the delegation itself provides the clear congressional authorization required by courts to uphold agency action in major questions cases.

---

16. *See* Kristin E. Hickman, *Anticipating A New Modern* Skidmore *Standard*, DUKE L. J. ONLINE (forthcoming 2025), https://ssrn.com/abstract=4941144; *see also* Kristin Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard,* 107 COLUM. L. REV. 1235 (2007).

17. *Loper Bright*, 603 U.S. at 388 (internal quotations and citation omitted).

18. The Court recently affirmed this approach, without citing *Skidmore*, when it upheld ATF's final rule defining the term "firearm" to include weapon parts kits in *Bondi v. VanDerStok*, 145 S. Ct. 857, 874 (2025) ("[T]he contemporary and consistent views of a coordinate branch of government can provide evidence of the [statute's] meaning.").

19. *See generally* Kamaile A.N. Turčan, *The Bogeyman of Environmental Regulation: Federalism, Agency Preemption, and the Roberts Court*, 109 MINN. L. REV. 2529 (2025) (discussing the separation of powers and federalism implications of the Roberts Court jurisprudence).

20. *See* Kamaile A.N. Turčan, *"Major Questions" About Preemption*, 69 VILL. L. REV. 737 (2024) (discussing, in the context of preemption litigation, how the major questions doctrine operates as a "step zero" to questions of agency authority); West Virginia v. EPA, 597 U.S. 697 (2022).

The Essay concludes with thoughts on reframing the narrative about the administrative state. In this moment of unprecedented agency upheaval, debates about deference-versus-delegation doctrines may feel, to employ an overused but apt nautical idiom, like rearranging the deck chairs on the Titanic. Quite the contrary, it remains important to think through these longer-term issues, which pre-date the first Trump Administration and will post-date the second. If anything, the escalating attacks on federal agencies from the Judicial branch and now the head of the Executive branch underscore the importance of administrative process in maintaining a functioning democracy.

II. LESSONS FROM THE FIGHT TO REGULATE OCEAN AQUACULTURE

After *Loper Bright*, NOAA's authority over aquaculture projects turns not on whether certain statutory terms (here, "fish," "fishing," or "fisheries") are ambiguous enough to require deference but, rather, on whether Congress through the MSA delegated to NOAA the discretion to regulate aquaculture.

A. A Brief Legal History of Aquaculture Regulation

Marine aquaculture is the raising and harvesting of marine plants and animals, typically for food, and usually confined in mesh cages that are submerged under water and either tethered to the ocean floor or motorized to maintain a fixed location.[21] Relevant to this Essay, NOAA has passed regulations and issued permits for commercial aquaculture net pens that stock, raise, and harvest finfish (think almaco jack, redfish, and amberjack, for example) in federal ocean waters.[22]

---

21. For a robust analysis of the regulatory structure surrounding aquaculture and other activities in federal waters, see Robin Kundis Craig, *It's Not Just an Offshore Windfarm*, 39 PUB. LAND & RES. L. REV. 59 (2018).

22. *See* Kahea v. Nat'l Marine Fisheries Serv., No. 11-00474 SOM, 2012 WL 1537442, at *1 (D. Haw. Apr. 27, 2012), *aff'd in part, rev'd in part and remanded sub nom.* KAHEA. v. Nat'l Marine Fisheries Serv., 544 F. App'x 675 (9th Cir. 2013); Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 456 (5th Cir. 2020). The federal government manages natural resources within the Nation's exclusive economic zone, which extends 200 nautical miles from the baseline. *See* Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983); 16

Open ocean finfish aquaculture is controversial, with proponents touting its benefits as a stable source of nutrition and opponents warning of negative impacts on the environment. Advocates argue that finfish aquaculture may: supplement wild fish catch that cannot meet the Nation's (and world's) expanding desire for fish as a healthy source of protein; remove strains on overfished wild stocks; eliminate or reduce the use of environmentally harmful methods of fishing that tend to injure or kill other protected marine animals as bycatch; minimize the incidents of human rights violations prevalent on fishing vessels that are at sea for months at a time; and improve regional food security.[23] Opponents, however, point to risks associated with large, concentrated farming operations in the water: fish feces, feed, and associated organic debris that enter the water may impact water quality; chemicals and antibiotics introduced to the farmed population to combat disease may find their way to surrounding waters; fish that escape the pens due to gear failure may spread disease and parasites to wild stocks; escaped fish may mate with wild stocks and alter the gene pool; and cages that attract wild fish and their predators to the area may alter predator-prey relations in the wild.[24] Controversy notwithstanding, aquaculture is a billion-

---

U.S.C. § 1802(11). Through the Submerged Lands Act, the federal government returned to the States authority to manage natural resources (subject to certain reservations to the federal government) in the nearshore waters, typically three or nine nautical miles from shore depending on the particular State in question. *See* 43 U.S.C. § 1312. To date, the majority of aquaculture projects take place in state rather than federal waters, presumably in part because of the Fifth Circuit ruling discussed herein and because of practical proximity to shore. President Trump's Executive Order, however, suggests that commercial interest in federal waters will expand. *See* Exec. Order No. 13,921, 85 Fed. Reg. 28471 (May 7, 2020). This, in turn, may lead to clarity from the courts about who is authorized to regulate aquaculture in federal waters.

23. *See generally* Robin Kundis Craig, *Re-Tooling Marine Food Supply Resilience in a Climate Change Era: Some Needed Reforms*, 38 SEATTLE U.L. REV. 1189, 1191–96 (2015); Carson Turner et al., *Floating Crime Laboratories*, REG. REV. (May 25, 2024), https://www.theregreview.org/2024/05/25/floating-crime-laboratories; Alyson Diaz, *Tackling Illegal and Unregulated Fishing*, REG. REV. (Oct. 8, 2024), https://www.theregreview.org/2024/10/08/diaz-tackling-illegal-and-unregulated-fishing; Chris Wold, *Slavery at Sea*, 39 WIS. INT'L L.J. 485 (2022).

24. *See generally* Craig, *Re-Tooling Marine Food Supply Resilience*, *supra* note 23; Alexandra Carter & Miriam Goldstein, *American Aquaculture* (May 13, 2019), https://www.americanprogress.org/article/american-aquaculture; Marcel Martinez-

dollar industry worldwide, and commercial interest is unlikely to dissipate.[25] One study estimates that global fish consumption will increase by nearly eighty percent by the year 2050.[26]

A burgeoning aquaculture industry in U.S. waters implicates multiple federal laws and regulatory agencies.[27] The Army Corps of Engineers, for example, exercises permitting approval authority under the federal Rivers and Harbors Act and the Clean Water Act, and permit applications must undergo environmental review under the National Environmental Policy Act.[28] Federal approvals must be consistent with the Marine Mammal Protection Act and the Endangered Species Act.[29] The Coast Guard has a role in safe

---

Porchas & Luis R. Martinez-Cordova, *World Aquaculture: Environmental Impacts and Troubleshooting Alternatives*, SCI. WORLD J. 1–9 (2012), https://pmc.ncbi.nlm.nih.gov/articles/PMC3353277.

25. FOOD & AGR. ORG. OF THE U.N. (FAO), THE STATE OF WORLD FISHERIES AND AQUACULTURE 2022, at vii (2022).

26. Josie Garthwaite, *Study Suggests Rising and Shifting Demand for Seafood by 2050*, STAN. U. NEWS & EVENTS (Sept. 15, 2021), https://sustainability.stanford.edu/news/study-suggests-rising-and-shifting-demand-seafood-2050.

27. *See generally* Craig, *It's Not Just an Offshore Windfarm*, *supra* note 21; George A. Kimbrell & Meredith L. Stevenson, *Ensnared: 21st-Century Aquaculture Law and the Coming Battle for the Ocean*, 53 ENVTL L. REP. (ENVTL. LAW INST.) 10383 (2023); Robin Kundis Craig, *Promoting "Climate Change Plus" Industries Through the Administrative State: The Case of Marine Aquaculture*, 39 YALE J. ON REG. 479 (2022); Read Porter & Rebecca Kihslinger, *Federal Environmental Permitting of Offshore Aquaculture: Coverage and Challenges*, 45 ENVTL L. REP. NEWS & ANALYSIS (ENVTL. LAW INST.) 10875 (2015); Colby Stewart, *A Current Affair: Ensuring Sustainable Aquaculture in the U.S. Exclusive Economic Zone*, 20 VT. J. ENV'T L. 70 (2019); Eric Laschever et al., *U.S. Aquaculture's Promise: Policy Pronouncements and Litigation Problems*, 50 53 ENVTL L. REP. (ENVTL. LAW INST.) 10826 (2020); Elan Lowenstein, *Regulating the Blue Revolution: A Sea of Change for the United States' Offshore Aquaculture Industry or A Missed Opportunity for Increased Sustainability*, 26 U. MIAMI INT'L & COMP. L. REV. 473 (2019).

28. *See generally* Craig, *It's Not Just an Offshore Windfarm*, *supra* note 21; Don't Cage Our Oceans v. United States Army Corps of Eng'rs, No. C22-1627-KKE, 2024 WL 4349548, at *1 (W.D. Wash. Sept. 30, 2024) (discussing the Corps' issuance of a nationwide permit for mariculture); Don't Cage Our Oceans v. United States Army Corps of Eng'rs, No. C22-1627-KKE, 2025 WL 835058 (W.D. Wash. Mar. 17, 2025) (requiring individualized permitting review and imposing prospective vacatur of permit).

29. *See, e.g.*, 16 U.S.C. § 1374; *id.* § 1536.

navigation in ocean waters.[30] The Food & Drug Administration and Department of Agriculture have roles in overseeing food safety in aquaculture projects.[31] Of these, NOAA is the only agency whose primary statutory purpose centers on fishing and who is charged with managing the Nation's fisheries throughout the 200 nautical mile exclusive economic zone (EEZ).[32] In 2020, President Trump issued Executive Order 13921, titled "Promoting American Seafood Competitiveness and Economic Growth," which designated NOAA as "the lead agency for aquaculture projects located outside of the waters of any State or Territory" that is "responsible for navigating the project through the Federal environmental review and authorization process."[33]

NOAA's apparent authority over aquaculture derives from the MSA, enacted in 1976 "to conserve and manage the fishery resources found off the coasts of the United States."[34] In 1996 and 2006, Congress revised and reauthorized the statute.[35] Under the MSA,

---

30. *See* U.S. COAST GUARD, RULES OF THE ROAD, https://www.dco.uscg.mil/NavRules/#:~:text=Navigation%20Rules%20are%20regulations%20which,Navigation%20Rules%20Act%20of%201977 (last visited Apr. 30, 2025).

31. *See, e.g.*, 21 C.F.R. pt. 123 (FDA); *see generally* ACQUACULTURED SEAFOOD, U.S. FOOD & DRUG ADMIN. (Sept. 19, 2023), https://www.fda.gov/food/seafood-guidance-documents-regulatory-information/aquacultured-seafood; U.S. DEP'T OF AGRIC., AQUACULTURE, https://www.usda.gov/farming-and-ranching/aquaculture (last visited Apr. 30, 2025); 7 U.S.C. § 3321.

32. *See infra*; Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1884 (2007) (MSA). NOAA may also restrict certain fishing activities such as aquaculture in marine sanctuaries or monuments. *See* National Marine Sanctuaries Act, 32 U.S.C. §§ 1431–1445 (2000); Antiquities Act, 54 U.S.C. §§ 320301–320303 (2014) (Monuments). Its conduct would need to be consistent with the goals of the Coastal Zone Management Act. Coastal Zone Management Act, 16 U.S.C. §§ 1451–1468 (1972). This article focuses on the statutory interpretation question that most squarely presents the *Loper Bright* issue: aquaculture regulation under the MSA.

33. Exec. Order No. 13,921, 85 Fed. Reg. 28471 (2020).

34. 16 U.S.C. § 1801(b)(1).

35. *See* Anthony R. Marshak, CONG. RSCH. SERV., IF10267, MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT (MSA): REAUTHORIZATION ISSUES FOR THE 115TH CONGRESS (2018); NOAA, LAWS & POLICIES: MAGNUSON-STEVENS ACT, https://www.fisheries.noaa.gov/topic/laws-policies (last visited Apr. 30, 2025); *see also* Sustainable Fisheries Act, S. 39,

NOAA (operating via Regions around the country) may issue fishing permits.[36] In coordination with Regional Fishery Management Councils, NOAA may also approve regulations for the conservation and management of fishery resources in federal waters in accordance with Fishery Management Plans.[37] Through these actions, NOAA furthers the United States' "sovereign rights" in "exploring, exploiting, conserving, and managing all fish, within the exclusive economic zone."[38] Separate from the MSA, in 1980, Congress passed the National Aquaculture Act to encourage the development of the Nation's aquaculture industry.[39] While aspirational, that Act did not create a regulatory program and does not specifically identify NOAA as the lead agency.[40] Subsequent bills have been introduced periodically in Congress to address aquaculture but have stalled.[41] So, the MSA remains NOAA's source of statutory authority over aquaculture activities in federal waters.[42]

During the *Chevron* era, a circuit split arose between the Fifth Circuit and the Ninth Circuit regarding whether NOAA's MSA

104th Cong. (1996); Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, H.R. 5946, 109th Cong. (2007).

36. 50 C.F.R. § 665.224.

37. 16 U.S.C. §§ 1801, 1852–1854.

38. *Id.* § 1801(b)(1).

39. National Aquaculture Act, 16 U.S.C. §§ 2801–2810 (1980).

40. Craig, *It's Not Just an Offshore Windfarm*, *supra* note 21.

41. *See, e.g.*, Science-Based Equitable Aquaculture Food Act, H.R. 5944, 118th Cong. (2023); Advancing the Quality and Understanding of American Aquaculture Act, S. 1861, 118th Cong. (2023); Sustaining Healthy Ecosystems, Livelihoods, and Local Seafood Act, S. 2211, 118th Cong. (2023); *see generally Chapter N: Marine Resources*, 2021 ABA ENV'T ENERGY & RES. L.: YEAR IN REV. N-1, N–3 (2021) (aquaculture developments).

42. Importantly, if NOAA lacks authority under the MSA to regulate aquaculture, the activity itself can still continue in federal waters. NOAA does not *authorize* the aquaculture conduct, rather, it regulates the conduct so as to protect certain interests enumerated in the MSA. Absent NOAA's involvement, these projects proceed subject only to regulation by other entities such as the Army Corps or FDA or state governments, operating within their own statutory realm of authority. *See* Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 471 n.5 (Higginson, J., dissenting) ("[T]he [MSA] is an important link in protecting the environment from the impacts of offshore aquaculture because it authorizes [NOAA] to deploy management measure and permit conditions . . . that are not adequately addressed by other regulatory programs.") (quoting Porter & Kihslinger, *supra* note 27, at 10882).

authority over "fish," "fishing," and "fisheries" encompassed aquaculture.

The Ninth Circuit upheld NOAA's interpretation of its statutory authority to issue a fishing permit to the applicant, Kona Blue, which sought to farm fish in federal waters off of Hawai`i.[43] In a short unpublished decision, the panel declined to answer whether *Chevron* deference applied to the case and instead applied *Skidmore* to uphold NOAA's issuance of the permit: "Even if deference under the standard in *Chevron* isn't appropriate, [NOAA's] actions were lawful when reviewed using *Skidmore* deference. [NOAA] has the authority under the [MSA] to issue the fishing permit to Kona Blue."[44] Referring to NOAA's conferred authority to issue permits for experimental fishing gear, "Congress would expect [NOAA] to be able to speak to whether Kona Blue's requested activity was permitted."[45]

The Fifth Circuit ruled differently in a case out of Louisiana, and its ruling represents an aggressive form of anti-deference that the Supreme Court did not endorse in *Loper Bright*. This time, rather than issuing an individual fishing permit, NOAA had promulgated an aquaculture regulatory regime in the Gulf of Mexico.[46] In a published opinion, the panel (over a dissent) held that the MSA did not authorize the regulations.[47] The majority reasoned that the MSA "neither says nor suggests that the agency may regulate aquaculture. The agency interprets this silence as an invitation, but our precedent

---

43. KAHEA v. Nat'l Marine Fisheries Serv., 544 F. App'x 675 (9th Cir. 2013); *see generally* Kristen L. Johns, *Farm Fishing Holes: Gaps in Federal Regulation of Offshore Aquaculture*, 86 S. CAL. L. REV. 681 (2013) (discussing aquaculture regulation and the *KAHEA* litigation).

44. *KAHEA v. Nat'l Marine Fisheries Serv.*, 544 F. App'x at 675 (citing 16 U.S.C. §§ 1801(a)(6), (b)(1); 1853(b)(1)).

45. *Id.*

46. President Trump issued an Executive Order to rename the Gulf of Mexico the Gulf of America. *See* Exec. Order No. 14,172, 90 Fed. Reg. 8629 (Jan. 20, 2025). This Essay retains the original nomenclature, because that was how the area was referred to in the Fifth Circuit's opinion and to comport with AP style guidance. *See* Amanda Barrett, *AP Style Guidance on Gulf of Mexico, Mount McKinley,* ASSOCIATED PRESS (Jan. 23, 2025), https://www.ap.org/the-definitive-source/announcements/ap-style-guidance-on-gulf-of-mexico-mount-mckinley.

47. Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 456 (5th Cir. 2020).

says the opposite: Congress does not delegate authority merely by not withholding it."[48] Thus, the panel decided that under *Chevron* Step One, aquaculture under the plain meaning of the statute was not fishing.[49] Noting that the court typically starts with the text, the panel stated "more telling here is the Act's lack of text. As far as aquaculture, the Magnuson-Stevens Act is a textual dead zone: the original Act does not mention aquaculture or fish farming at all."[50] Accordingly, the Fifth Circuit rejected NOAA's interpretation that the statute was broad enough to embrace aquaculture, which the federal district court in Hawai`i (and via affirmance the Ninth Circuit) had accepted. The dissent would have ruled that the MSA was clear and written broadly enough to encompass aquaculture or, in the alternative, if ambiguous, NOAA's interpretation was reasonable.[51]

Both cases focused primarily on whether the statutory language was ambiguous, but the *Chevron* Two-Step is no longer the appropriate legal framework for these decisions.

B. Applying the New Loper Bright *Delegation Framework to NOAA's Asserted Authority Over Aquaculture*

With *Chevron* overruled, agencies like NOAA can transcend the earlier ambiguity-before-deference jurisprudence and refocus the judicial inquiry to delegations rooted in Congress's Article I prerogative. The key to *Loper Bright* delegation cases is for agencies to argue that the operative statutory language indicates an affirmative congressional *choice* to endow the agency with discretion. Purposefully broad language is neither vague nor ambiguous.[52] This type of congressional delegation is, and always has been, different from court-created *Chevron* deference.[53] Agencies should argue that, contrary to the controversial *Chevron* deference, courts operate from

---

48. *Id.* at 456.

49. *Id.* at 460.

50. *Id.*

51. *Id.* at 471 (Higginson, J., dissenting).

52. "A broad term is not the same thing as a 'vague' one. A broad term is comprehensive, extensive, wide-ranging." West Virginia v. EPA, 597 U.S. 697, 759 (2022) (Kagan, J., dissenting).

53. *See* Goodson, *supra* note 13 (distinguishing discretion post-*Loper Bright* from *Chevron* deference).

solid constitutional grounding when they concede space in the policy realm to Congress and (via delegations) to administrative agencies.[54]

Loper Bright offers a roadmap for agencies taking this approach. Through this opinion, the Supreme Court instructs that "[w]hen the best reading of a statute is that it delegates discretionary authority to an agency," the role of the court is "to effectuate the will of Congress subject to constitutional limits."[55] A statute's meaning, the Court concedes, "may well be that the agency is authorized to exercise a degree of discretion."[56] Rather than relinquishing its judicial role like when (says the Court) courts deferred under *Chevron*, a court *fulfills* its judicial role when it "recogniz[es] constitutional delegations."[57] The tone of the Court's language may be begrudging, but the language is there for agencies to utilize nonetheless. The implication: The demise of *Chevron* is not the demise of agency authority. Instead, by declining to take the most restrictive approach to agency authority, the Court reaffirms that authority, framed as discretion rather than deference.

Under *Loper Bright*, a statute may bestow discretionary authority upon an agency in two principal ways: by express delegation or by flexible language.[58] Through the first, express statutory delegation, Congress explicitly grants agencies the "authority to give meaning to a particular statutory term."[59] *Loper Bright* offers by way of example the Atomic Energy Act, a statute which expressly states that a "substantial safety hazard" under the statute is to be "defined by regulations which the [Nuclear Regulatory] Commission shall promulgate."[60] By statute, it is not a court's role to decide what constitutes "substantial" or a "safety hazard." That falls squarely within the agency's expertise, as Congress instructed. Through the

---

54. *See generally* Turčan, *The Bogeyman of Environmental Regulation*, *supra* note 19.

55. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

56. *Id.* at 394.

57. *Id.* at 395.

58. Not the focus here, the Court notes a third way, namely, that Congress may permit agencies to issue rules that "fill up the details" of a statutory scheme. *Id.* That particular category appears less forceful in application than the other two, at least at this moment.

59. *Id.* at 394, 395 & nn.5–6.

60. *Id.* at 395 n.5 (citing 42 U.S.C. § 5846(a)(2)).

second, flexible language, Congress utilizes terms that "leave[] agencies with flexibility" to decide how and when to implement their statutory directive.[61] Flexible language in a statute, *Loper Bright* says, would include terms like "appropriate" or "reasonable."[62] The Clean Air Act, for example, directs the EPA to regulate power plants "if the Administrator finds such regulation is appropriate and necessary."[63]

This *Loper Bright* roadmap retains *Skidmore* as a component of answering delegation questions.[64] Even as a court makes its own independent judgment about the true meaning of a statute, it may consider an agency's persuasive decision-making. A court may, the Supreme Court allowed, give weight to an agency's interpretation and still remain consistent with its constitutional and statutory obligations.[65] Of course, courts are not obliged to follow an agency's interpretation, so it remains to be seen what practical impact *Skidmore* has on *Loper Bright* delegation outcomes. But studies during the *Chevron* era suggest that where *Skidmore* was applied, agency interpretations prevailed in over fifty percent of cases.[66] One study conducted in the first six months after *Loper Bright* indicates that most lower federal courts are retaining *Skidmore* to accord federal agencies' statutory constructions some amount of weight in their deliberations.[67] *Skidmore* remains an argument worth making.

---

61. *Id.*

62. *Id.* at 395 & n.6.

63. *Id.* (citing 42 U.S.C. § 7412(n)(1)(A)).

64. *Id.* at 394, 402.

65. *Id.* at 394; *see generally*, Hickman, *A New Modern Skidmore Standard*, *supra* note 16.

66. *See* Hickman, *A New Modern Skidmore Standard*, *supra* note 16 at 2 & n.5.

67. Robin Kundis Craig, *The Impact of Loper Bright v. Raimondo: An Empirical Review of the First Six Months*, 109 MINN. L. REV. 2671 (2025). More recently, one panel of the Fifth Circuit queried what role *Skidmore* plays in a *Loper Bright* analysis, but still acknowledged that if *Skidmore* did apply, it would do "work" to uphold the agency rule at issue. Mayfield v. United States Dep't of Lab., 117 F.4th 611, 619 (5th Cir. 2024); *see also* Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs., 120 F.4th 494, 503 (5th Cir. 2024) (recounting that the Supreme Court recognizes that a "statute's meaning may well be that the agency is authorized to exercise a degree of discretion" to uphold an agency rule, without applying *Skidmore*). At least two Ninth Circuit panels would look to agency interpretations for guidance under *Skidmore* while evaluating a *Loper Bright* delegation case. *See, e.g.*, Lopez v. Garland, 116 F.4th 1032, 1036 (9th Cir.

How much weight the court will grant an agency's interpretation under *Skidmore* depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[68] Courts have considered various factors influencing the amount of weight an agency interpretation is entitled to in the 80 years since *Skidmore*'s issuance, and here *Loper Bright* offers refinement by emphasizing two of these: whether the agency interpretation was issued contemporaneously with enactment of the statute, and the consistency with which the agency has applied that interpretation.[69]

So, how might an agency use this new *Loper Bright* framework to its advantage? Aquaculture offers some insight: Through the MSA, Congress delegated discretionary authority to NOAA over aquaculture. As the Supreme Court prefers, the argument begins with the statutory text.

Under the *Loper Bright* express delegation theory, the MSA explicitly grants NOAA discretionary management authority over all fish in federal waters. Period. The MSA's core statutory provisions are clear on this. The directive is expressly linked to the Nation's very sovereignty over seas. The MSA codifies international law and President Reagan's Proclamation No. 5030 so that the United States, through NOAA, exercises "sovereign rights for the purposes of exploring, exploiting, conserving, and *managing all fish*, within the exclusive economic zone."[70] The United States, through NOAA, claims "*exclusive* fishery *management authority* over *all fish* . . .

2024) (explaining that courts "may look to agency interpretations for guidance, but do not defer to the agency"); *Murillo-Chavez v. Bondi*, 128 F.4th 1076, 1081 (9th Cir. 2025) (same). *But see* Kaweah Delta Health Care Dist. v. Becerra, 123 F.4th 939, 953 (9th Cir. 2024) (Nguyen, J., dissenting) (explaining that "in close cases, courts should not dismiss an agency's reasonable interpretation of the statute it administers").

68. *Loper Bright*, 603 U.S. at 388 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

69. *Id.* at 394.

70. 16 U.S.C. § 1801(b)(1) (emphasis added). This provision was amended in 1986 to adopt the President's 1983 extension of the US EEZ. *See* Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. 99–659, title I, § 101(c)(1), 100 Stat 3706, 3707 (1986); Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

within the exclusive economic zone."[71] "Fish," in turn, is defined broadly as "finfish, mollusks, crustaceans, and *all other forms* of marine animal and plant life other than marine mammals and birds."[72] There is no requirement that the fish be (or ever have been) "wild." Further, both terms "fishery resource" and "fishing" are defined broadly as "*any* fishery, *any* stock of fish, *any* species of fish, and *any* habitat of fish,"[73] and "(A) the catching, taking, or harvesting of fish; (B) the attempted catching, taking, or harvesting of fish; (C) *any other* activity which can *reasonably* be expected to result in the catching, taking, or harvesting of fish; or (D) *any* operations at sea in support [thereof],"[74] respectively. Insofar as the overarching goal of the MSA is conservation and management, the phrase "conservation and management" of fish refers to "all of the rules, regulations, conditions, methods, and other measures" that will assure, among other things, a "*multiplicity of options available* with respect to future uses of these resources."[75] Finally, in a subpart titled "Discretionary provisions," the Secretary of Commerce, through NOAA, is empowered to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."[76] The MSA, quite simply, bestows management authority to NOAA over fish in federal waters to further the United States' sovereign interest in managing those resources.

True, the core provisions of the MSA do not expressly authorize management of "aquaculture." No matter—when Congress bestows discretionary judgment on an agency (as here), then there is no need for a long list of exceedingly specific terms in the statute. That would undermine the very concept of discretion. Case in point, the MSA also does not specifically authorize management of, for example, "hook and line" fishing, or "purse seine" fishing, or "longline"

---

71. 16 U.S.C. § 1811(a) (emphasis added).
72. 16 U.S.C. § 1802(12) (emphasis added).
73. 16 U.S.C. § 1802(15) (emphasis added).
74. 16 U.S.C. § 1802(16) (emphasis added).
75. 16 U.S.C. § 1802(5)(B)(iii).
76. 16 U.S.C. § 1853(b)(14) (emphasis added). "Fishery" is defined as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics." 16 U.S.C. § 1802(13)(A).

fishing, or "lobster traps," and yet all are well-recognized methods of fishing involving a variety of lines, pots, cages, nets, and enclosures that NOAA has historically regulated.[77] This is where the *Loper Bright* delegation analysis is most distinguishable from the Fifth Circuit's *Chevron* Step 1 analysis, wherein the Fifth Circuit's narrow textual read demanded that the statute specifically use the term aquaculture and did not seriously consider NOAA's discretionary power. Under *Loper Bright*, it does not matter that the type of harvesting activity might be referred to as "aquaculture." It is merely harvesting fish by another name.

Even if a court is unpersuaded that the MSA contains an express delegation, the statute certainly utilizes flexible terms, which is the second avenue for asserting a *Loper Bright* delegation. The definition of "fishing," for instance, includes "any act" that "reasonably" results in fishing—"reasonable" being one of the terms specifically identified in *Loper Bright* as signaling a congressional delegation.[78] The statute also includes a provision allowing the Secretary to "prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery."[79] "Appropriate" being another term specifically identified in *Loper Bright* as signaling a congressional delegation. The very nature of the MSA's language imbues the agency with discretionary authority to achieve the congressional policy goal: to manage fish stocks and fisheries within the U.S. EEZ.[80]

As a court deliberates on this *Loper Bright* analysis of the MSA, it should accord NOAA's interpretation persuasive weight under *Skidmore*.[81] NOAA has asserted its authority to regulate aquaculture

---

77. *See* Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 458 (5th Cir. 2020) (Higginson, J., dissenting).

78. *See* 16 U.S.C. § 1802(16); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 395 (2024).

79. 16 U.S.C. § 1853(b)(14).

80. 16 U.S.C. § 1801(b)(1). NOAA is given broad flexible authority to implement fishery management plans that achieve optimum yield for fisheries. *Id.* §§ 1801(b)(4), (b)(7), (c)(3).

81. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 394, 402 (2024); KAHEA v. Nat'l Marine Fisheries Serv., 544 F. App'x 675 (9th Cir. 2013). Agencies who may not be able to claim favorable application of the *Skidmore* factors need not admit defeat in advance. *Skidmore* remains just a tool of statutory

as fishing since at least as early as 1993.[82] This interpretation is contemporaneous with both congressional reauthorizations in 1996 and 2006, albeit not with the MSA's initial enactment in 1976. Since that time—over 30 years—NOAA has maintained this interpretation. It has held this interpretation throughout two federal lawsuits spanning a decade,[83] and is even now conducting an environmental review process for a proposed aquaculture management program in the Pacific Islands region.[84] Its consideration of this question has been thorough and robust. The actions themselves (issuance of permit in the Pacific Islands region and promulgation of regulations for the Gulf of Mexico) involved extensive notice and public comment procedures that reflect a deliberate implementation of its delegated discretionary authority over fish, fisheries, and fishing in federal waters. This extensive deliberation is born of the agency's core statutory authority, by which it holds a unique role as the agency charged with the technical expertise over fisheries management.

This should not be, from this Author's perspective, a close call under *Loper Bright*. Even still, agencies like NOAA that exercise their statutory delegations to respond to arguably new, changing, or politically charged matters must be mindful of yet another judicially imposed hurdle: the major questions doctrine.[85]

---

construction; it is not binding, and an agency can still make its *Loper Bright* delegation arguments on the text of the statute alone. *See Loper Bright*, 603 U.S. at 394, 402.

82. In 1993, the NOAA Office of General Counsel issued a legal opinion interpreting the scope of the agency's MSA authority to include offshore aquaculture permitting. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-594, OFFSHORE MARINE AQUACULTURE: MULTIPLE ADMINISTRATIVE AND ENVIRONMENTAL ISSUES NEED TO BE ADDRESSED IN ESTABLISHING A U.S. REGULATORY FRAMEWORK (2008) (referencing Memorandum from Jay S. Johnson, NOAA Deputy General Counsel, and Margaret F. Hayes, NOAA Assistant General Counsel for Fisheries, to James W. Brennan, NOAA Acting General Counsel (Feb. 7, 1993)).

83. *See supra* Section II.A (discussing lawsuits).

84. *See* NOAA & NAT'L MARINE FISHERIES SERVS., PACIFIC ISLANDS AQUACULTURE MANAGEMENT PROGRAM: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT (2022).

85. *See* Mayfield v. United States Dep't of Lab., 117 F.4th 611, 617 (5th Cir. 2024) (evaluating first a major questions doctrine challenge and then, having determined the doctrine did not apply, evaluating the agency's authority under *Loper Bright*).

C. Delegation-as-Antidote to the Major Questions Doctrine

When operating pursuant to a *Loper Bright* delegation, an agency will need to assess whether such an interpretation is vulnerable to a major questions doctrine challenge.[86] Although the type of cases qualifying as "major questions" remains ill-defined, the Court has previously identified certain characteristics of agency actions that may trigger the heightened review. Two characteristics are most potentially problematic for agencies asserting they have a *Loper Bright* delegation: economic or political significance, and novelty.[87] Significance and novelty determinations are largely subjective, based on the court's perception of the matter at issue beyond the confines of the statutory text.[88] In the court's view, is the agency striving to accomplish something new or significant, or is it operating squarely within its long-understood statutory authority to accomplish something routine and technical? Consequentially, when it comes to the major questions doctrine, the courtroom fight is less about law and more about framing the matter at hand.

Once a court frames a case as a "major questions case," it places a thumb on the scale against the agency. This is because an agency must then justify its exercise of statutory authority under a heightened judicial review standard—it must "point to 'clear congressional authorization' for the power it claims."[89] *Loper Bright* did not have occasion to discuss its interplay with the major questions doctrine, but this requirement that an agency point to "clear congressional authorization" seems most troublesome for agencies locating their authority in broad, flexible statutory language.

Major questions challenges are a veritable game of whack-a-mole for an agency. Is aquaculture significant either economically or politically? Is it a novel application of the MSA? NOAA can argue aquaculture regulation is just one additional form of fishing within a

---

86. *See* West Virginia v. EPA, 597 U.S. 697 (2022).

87. *See id.* at 721, 724–28; Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., Occupational Safety & Health Admin., 55 U.S. 117 (2022) (per curiam) (citation omitted) (applying the doctrine before "authorizing an agency to exercise powers of vast economic and political significance"); *see generally* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

88. *See* Turčan, *"Major Questions" About Preemption*, *supra* note 20; Turčan, *The Bogeyman of Environmental Regulation*, *supra* note 19.

89. *West Virginia v. EPA*, 597 U.S. at 723.

range of fishing conduct historically regulated by the agency. NOAA may argue that it has been pursuing aquaculture policy for decades, and that NOAA locates its authority not in some rarely used statutory provision but within its core statutory power over fishing. It may help from an economic perspective to emphasize that NOAA does not seek to *prohibit* this form of commercial conduct but, rather, through implementing regulations, allow for a more orderly operation. NOAA may need to address whether it matters that other agencies already regulate certain aspects of aquaculture activity, and NOAA may need to address the political significance, if any, of the failed aquaculture bills.[90] The Supreme Court has not offered guidance on any of these potential points of contention. Given the inherent capriciousness of the major questions doctrine, an agency has no control over whether a court labels a case a "major" one, and an agency could not with any certainty develop an administrative record to avoid its application.[91]

Rather than attempting to avoid the major questions label, an agency exercising a *Loper Bright* delegation may be on firmer footing if it argues that the *Loper Bright* delegation itself constitutes the "clear congressional authorization" that courts demand in a major questions case. The argument would be that flexible language in a statute does not represent a drafting failure vulnerable to a major questions challenge but, instead, embodies Congress's purposeful decision to empower agencies to respond to evolving circumstances. Even if "novel," NOAA may argue that Congress, via flexible language, entrusted the agency to apply existing laws to emerging technologies or commercial practices. There is no need for a specific listing of fishing methods, in the aquaculture example for instance, because Congress intentionally left that decision to the agency. *Loper Bright* delegations derive from Congress's authority to exercise its

---

90. No other agency is statutorily authorized specifically to manage fisheries, and with its authority under the MSA, NOAA will serve a helpful role as the lead coordinating agency. As for the failed congressional bills, one may argue that the failure to pass the bill is a sign that the matter is not "major" enough for Congress to supplement existing law—a version of legislative acquiescence. *See, e.g.*, Mayfield, 117 F.4th at 620.

91. Turčan, *"Major Questions" About Preemption*, *supra* note 20.

legislative prerogative through grants of discretionary authority, and this should satisfy a court's demand for a clear statement.[92]

• • •

Looking back at the earlier Fifth and Ninth Circuit cases, one may ask whether the new *Loper Bright* delegation framing would prompt an alignment of their outcomes. Perhaps. The Ninth Circuit's outcome was consistent with a *Loper Bright* delegation, and that panel appeared to apply an early version of this delegation analysis, giving some weight to the agency's interpretation while concluding that Congress intended the agency to decide the aquaculture question.[93] The Fifth Circuit majority's restrictive approach to agency discretion, on the other hand, is now arguably out-of-step with the new *Loper Bright* framework. Maybe, with *Loper Bright*'s emphasis on delegations, the Fifth Circuit panel would have been swayed to rule the other way. In a more recent ruling by a different Fifth Circuit panel about a Department of Labor minimum salary rule, for example, that panel began by conceding that the statute at issue contained an explicit *Loper Bright* delegation and went on to uphold the agency rule on a purely textual basis while simultaneously acknowledging that *Skidmore* might do some work to uphold the rule.[94]

Ultimately, the point is not so much whether a particular judge may rule a particular way; there will continue to be disagreements, and circuit splits in these agency cases, as there exists in other statutory interpretation cases outside the agency realm. The point is the new context within which judges will be having these conversations as they deliberate and how agencies can take advantage of this new context to reshape the narrative about

---

92. *See supra* Section II.B. Another potential hurdle is the nondelegation doctrine. The *West Virginia* court majority went to great pains to clarify the major questions doctrine is a statutory interpretation doctrine, declining to adopt Justice Gorsuch's concurring opinion on the nondelegation doctrine. Turčan, *"Major Questions" About Preemption*, *supra* note 20. For now, while the nondelegation doctrine is not yet endorsed by a majority on the Court, the major questions doctrine remains the immediate risk to agencies.

93. KAHEA. v. Nat'l Marine Fisheries Serv., 544 F. App'x 675 (9th Cir. 2013).

94. *Mayfield*, 117 F.4th at 619–20.

agencies' roles in policymaking. Agencies seeking to exercise the full extent of their statutory authority (or litigants urging reluctant agencies to do so) have a forceful argument in the *Loper Bright* delegation.

III. REFRAMING THE NARRATIVE ABOUT THE ADMINISTRATIVE STATE

Probably unintentionally, but helpful nonetheless, the language of *Loper Bright* frees agencies from the *Chevron* framing that so often focused public perception and judicial rhetoric on agencies' supposed usurpation of the judicial role. Now, advocates can refocus the conversation on the congressional and agency policymaking role, of which courts play no part.[95] The risk associated with the loss of *Chevron* deference is that interpretation outcomes may be more easily swayed by negative perceptions about the policymaking role of agencies. So, redefining the dominant narrative about agencies and the so-called administrative state is essential to the future development of administrative law.

Proponents of federal agencies' role in government must offer a compelling narrative for why a robust administrative body (operating within constitutional bounds and based on its technical and policy expertise) is not only *tolerable* under the law but affirmatively a *good thing*. Opponents of agency power have long pressed their own narratives. That agencies are run by unelected bureaucrats, for one example.[96] That agencies have no special competence in statutory interpretation, for another.[97] There are rebuttals to these.[98] Yet,

---

95. "Judges are not experts in the field, and are not part of either political branch of the Government." Loper Bright, 603 U.S. at 478 (Kagan, J., dissenting) (quoting Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865 (1984)); *see* Turčan, *The Bogeyman of Environmental Regulation*, *supra* note 19.

96. *See* West Virginia v. EPA, 597 U.S. 697, 739 (2022) (Gorsuch, J., concurring).

97. *See* Loper Bright, 603 U.S. at 400.

98. These criticisms have been addressed more fully in other writings, so they warrant only a brief response here. First, environmental agencies are staffed with career civil servants who ultimately answer to politically appointed heads; the branch of government that is entirely unaccountable is the federal judiciary. *See* Turčan, *The Bogeyman of Environmental Regulation*, *supra* note 19. Second, it is simply incorrect that agencies have no competence in interpreting the law; on the contrary, agency officials and lawyers specialize in interpreting and applying

merely rebutting criticism is insufficient to meet the moment. Advocates need an affirmative countervailing statement. At least two possible rhetorical themes align with the new *Loper Bright* framework: fidelity to substantive statutory mandates, and the defense of our participatory democracy.

The first, honor substantive mandates. Adopting a full-throated defense of *Loper Bright* delegations may give agencies (and administrative law scholars) an avenue through which to address a long-simmering tension in administrative law: the manipulation by courts of supposedly neutral administrative law principles to infringe upon Congress's substantive mandates.[99] The major questions doctrine, for instance, purports to be neutral; even accepting that premise, Congress's substantive statutes need not and frequently are not neutral. Those statutes represent a normative policy value of some kind. Courts should not "elevate the values of administrative law over those codified in environmental statutes."[100] In the case of the MSA, for instance, Congress prioritized the conservation and management of fishery resources in the EEZ and asserted the United States' sovereign authority over resources in federal waters.[101] A hyper-narrow read of the MSA to exclude aquaculture would directly undermine those directives. The federal agency charged with managing "all fish" in the Nation's EEZ would be unable to engage in permitting or management of fish in federal waters simply because a commercial entity makes economic use of fish in those waters and calls it "aquaculture." That is absurd. "Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible."[102] Purportedly neutral administrative law doctrines should

---

substantive statutes in accordance with their associated procedural obligations. *See id.*; *see also* Anya Bernstein & Cristina Rodriguez, *Working with Statutes*, 103 TEX. L. REV. (forthcoming 2025); Loper Bright, 603 U.S. at 460 (Kagan, J., dissenting).

99. Sanne Knudsen critiques the use of administrative law doctrines to undermine the goals of environmental statutes in *Sidestepping Substance: How Administrative Law Plays an Outsized Role in Shaping Environmental Policy and Why Recalibration Is Necessary*, 76 ADMIN. L. REV. 519, 525 (2024).

100. *Id.*

101. 16 U.S.C. §§ 1801(b)(1), (4).

102. Am. Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982).

not be wielded by courts as cudgels to undermine the normative policy preferences of Congress and its delegated agency.[103]

The second, preserve participatory democracy. A United States government with functioning administrative agencies is, simply, more democratic. "Democratic" not in the narrow sense of holding elections, but in the broader sense of the public having a participatory role in its own governance.[104] In other words, the opportunity for individuals to have a say in decisions that affect them directly. The public elects representatives, who then pass laws setting general policy goals, which are then implemented through administrative rulemaking pursuant to the public notice-and-comment process of the Administrative Procedure Act or other statutorily required administrative processes.[105] Agency public notice and comment processes create forums for speech and participation that are not replicated by any other branch of government.[106] For instance,

---

103. Having recognized that a *Loper Bright* delegation has occurred, a court is not excluded from its judicial role. At that point, a court's reviewing role shifts from interpreting the scope of agency statutory authority to determining whether the agency has, on the merits, acted appropriately pursuant to its statutory authority. *See* Loper Bright, 603 U.S. at 395 (citing Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)). In this sense, the practical day-to-day work of an agency has not changed. As before, agencies must support their decisions with contemporaneous documentation and reasoned explanation.

104. For discussion of the various conceptions of democracy and roles the branches of government play, *see, e.g.*, Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process*, 77 GEO. WASH. L. REV. 924 (2009); Michael Sant'Ambrogio & Glen Staszewski, *Democratizing Rule Development*, 98 WASH. U. L. REV. 793 (2021); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emissions Standards*, 63 ADMIN. L. REV. 99, 123 (2011); Alex Ingrams, *Do Public Comments Make a Difference in Open Rulemaking? Insights from Information Management Using Machine Learning and QCA Analysis*, 40 GOV'T INFO. Q. 1 (2023), *available at* https://www.sciencedirect.com/science/article/pii/S0740624X22001149.

105. *See, e.g.*, 5 U.S.C. § 553.

106. *See* 5 U.S.C. § 553; 5 U.S.C. §§ 706(2)(A), (E). In the judicial branch, apart from being an active litigant or submitting an amicus brief, of course, the public has no role in the court's ultimate decision. In the legislative branch, an individual's opportunity to participate directly in lawmaking is minimal. The primary mode of participation in that federal forum is through voting—but only every few years for one's elected representatives, and even then, the vote is an up-or-down vote for the candidate and not an opportunity to weigh in on the

NOAA's Pacific Islands region prepared an environmental assessment that was open for public notice and comment prior to approving the aquaculture project permit.[107] NOAA's Southeast region held a notice-and-comment period before deciding upon aquaculture applications in the Gulf of Mexico.[108] Through these procedures, members of the public had the chance to offer criticism, support, new information, or suggestions for the agency to consider before it took final action. While not a perfect process, agency public notice and comment is the only vehicle at the federal level of government where individual members of the public may contribute to the decisions that govern much of daily life.[109] Congressional delegations to agencies make this notice and comment process possible. Judicial limitations on these delegations necessarily result in the repression of the public's voice. When judging congressional delegations, therefore, courts should not proceed from a default position of skepticism. Instead, courts should pursue their important adjudicative role while mindful that their rulings do not unduly hamper the apparatus of our democracy—an apparatus that includes the public.

Loper Bright provides a pathway for introducing a counter-narrative centering these or other themes not considered here.[110] At

---

particulars of any specific project or legislative proposal. Phone calls to one's elected representatives or campaigns by organized advocacy groups may go unheeded and unaddressed, and apart from the aforementioned voting mechanism, elected representatives need not explain their ultimate decisions.

107. Kahea v. Nat'l Marine Fisheries Serv., No. 11-00474 SOM, 2012 WL 1537442, at *7 (D. Haw. Apr. 27, 2012), *aff'd in part, rev'd in part and remanded sub nom.* KAHEA. v. Nat'l Marine Fisheries Serv., 544 F. App'x 675 (9th Cir. 2013).

108. Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv., 968 F.3d 454, 458 (5th Cir. 2020).

109. Agency rulemaking is not by popular vote—agency expertise and statutory directive guide the process—but agency regulations can be and frequently are modified according to feedback from the regulated community, other interest groups, and the public. *See* 5 U.S.C. § 553.

110. This Essay offers two narratives tied to the *Loper Bright* framework, and in so doing adds a new dimension to the already robust scholarship on the legitimacy and value of agencies in our government system. *See, e.g.*, Ronald M. Levin, *The Duty to Respond to Rulemaking Comments*, 134 YALE L.J. FORUM 821 (2025) (portraying the duty of administrative agencies to respond to rulemaking comments); Brian D. Feinstein, *Legitimizing Agencies*, 91 U. CHI. L. REV. 919

this current moment in American political history, with many norms and assumptions giving way, it is important for agency proponents to reassert why these governing bodies remain critical to the functioning of our democratic society. This effort will require deeper exploration in the months and years to come. That is the task for agency advocates and scholars in the post-*Chevron* era.

(2024) ("[A]n independent and technocratic civil service is worth defending."); Emily S. Bremer, *The Undemocratic Roots of Agency Rulemaking*, 108 CORNELL L. REV. 69, 131 (2022) (interrogating the agency rulemaking process); Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1539 (2018) (investigating agencies and the petition power).