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# Administrative Deference Post-*Loper*: What Elder Law Attorneys and Special Needs Planners Need to Know

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# Judicial Review of Agency Action

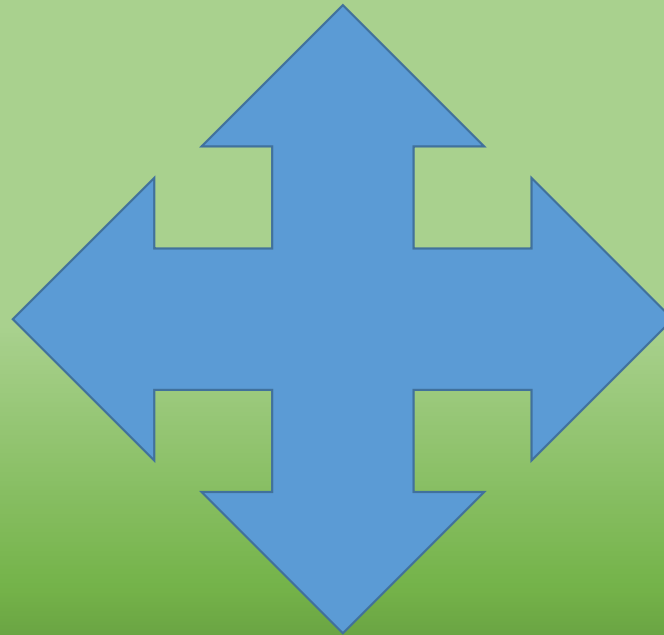
- The principles of judicial deference (WHY do courts defer)
- Deference and the nature of agency decisions (WHEN do courts defer)
- The doctrine and mechanics of deference (APA § 706) (HOW do courts defer)



# Principles of Judicial Deference

Legitimizing Agency Authority

National uniformity



Accountability / Transparency



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Agency Expertise/  
Institutional Competence

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# Judicial Deference and the Nature of Agency Decisions

- Agency factual determinations



- Substantial evidence / Arbitrary and capricious

- Agency policy decisions



- Arbitrary and capricious

- Agency legal interpretations



- MQD / *Skidmore* / *Kisor*



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# Deference Doctrine – Substantial Evidence

Substantial Evidence (APA § 706(2)(E)):

“[S]ubstantial evidence is more than a mere scintilla. It means **such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.**”

Universal Camera v. NLRB, 340 U.S. 474, 477 (1951).



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# Deference Doctrine – Arbitrary and Capricious

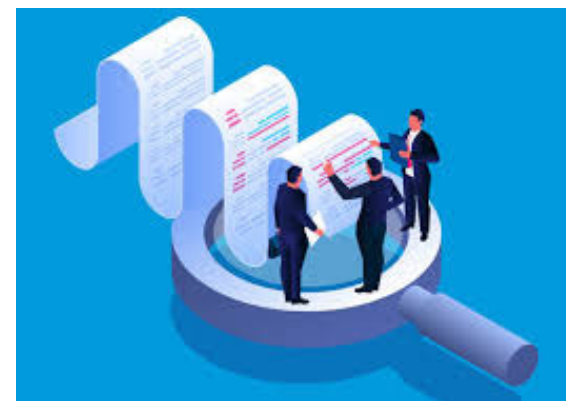
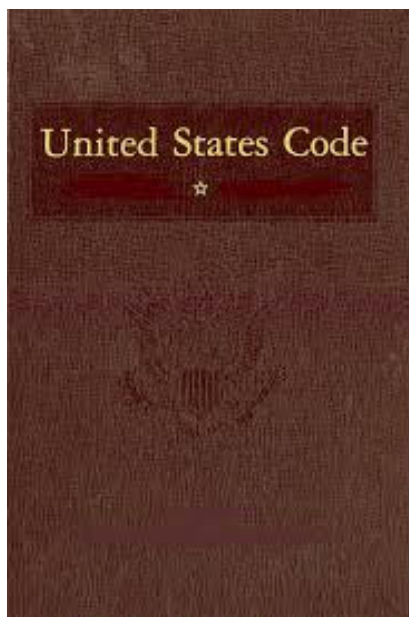
Arbitrary and Capricious Review (APA § 706(A)(2)):

- [A] **court is not to substitute its judgment for that of the agency.** . . . .
- The **agency must examine the relevant data and articulate a satisfactory explanation** for its action including a “rational connection between the facts found and the choice made.”
- In reviewing that explanation, **we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”**
- Normally, an agency rule **would be arbitrary and capricious if** the Agency:
  - **Relied on factors which Congress has not intended it to consider**
  - **[E]ntirely failed to consider an important aspect of the problem**
  - **[O]ffered an explanation . . . that runs counter to the evidence before [it], or**
  - **[I]s so implausible that it could not be ascribed to a difference in view or [to] . . . agency expertise.**

Motor Vehicle Mfgs Assoc. v. State Farm, 463 U.S. 29, 43 (1983).

# Deference Doctrine – Legal Questions

## How do courts review agency interpretations of law?





# Historical Development

NLRB v. Hearst Publications, 322 U.S. 111 (1944)

Whether newsboys are “employees” under the NLRA

“[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited.”







Issue: Whether company firefighters were entitled to overtime pay under FLSA

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

- “The weight of such a judgment in a particular case, would depend 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.”

# Chevron U.S.A., Inc. v. NRDC (1984)

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- EPA permit allows owners to treat pollution as “stationary source”
  - If agency is interpreting statute it administers:
    - Is term ambiguous?
    - If so, is agency interpretation of ambiguous language reasonable



# Kisor v Wilkie, 588 U.S. 558 (2019)



- Auer deference: courts must defer to an agency's interpretation of its own regulation unless that interpretation is clearly erroneous
- Controversy over whether agencies write intentionally ambiguous regulations to increase their own interpretive choices. (Justice Scalia & Dean Manning)

## Kisor factors:

- Genuinely ambiguous (via traditional tools of construction)
- Reasonable interpretation
- Entitled to controlling weight
  - Agency's authoritative position
  - Substantive expertise
  - Fair and considered judgment (not litigation position)



**West Virginia v. EPA,  
597 U.S. 697 (2022)  
(CJ Roberts, 6-3)**

## The “Major Questions Doctrine”

“[T]here are extraordinary cases \*\*\* in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.”



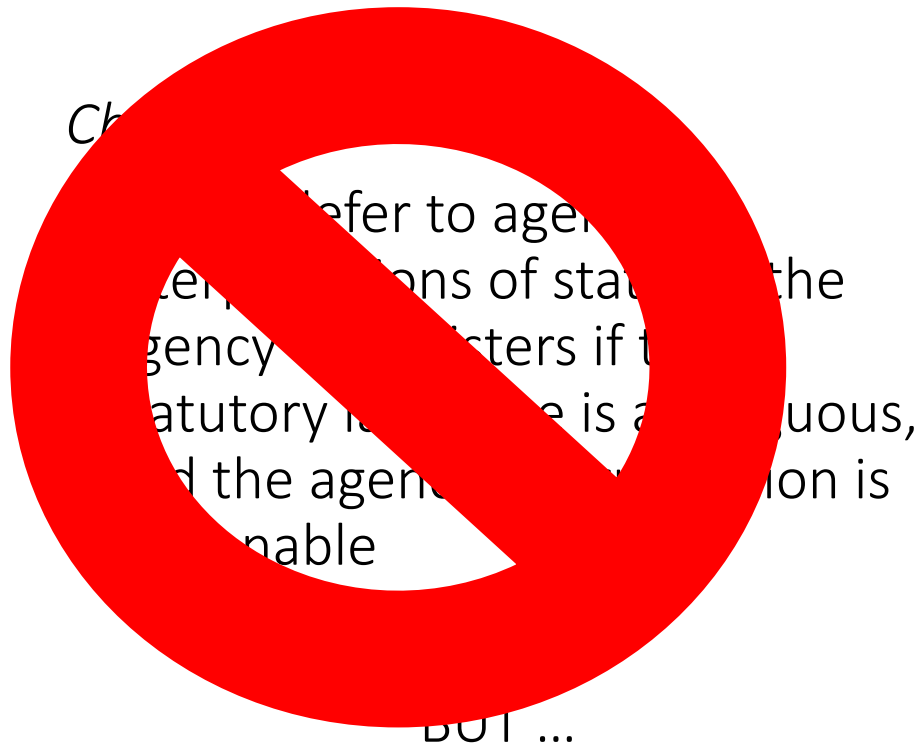
Loper Bright  
Enterprises v.  
Raimondo,  
603 U.S. 369 (2024)

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(consolidated with  
Relentless, Inc. v. Dept. of  
Commerce, No. 22-1219)



# The “Law”



5 U.S.C. § 706 (APA):

- “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”

# Deference Doctrine – Legal Questions: *West Virginia* (Major Questions), *Skidmore*, & *Kisor*

## West Virginia v. EPA:

“[T]here are extraordinary cases . . . in which the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.’”  
142 S. Ct. 2587, 2608 (2022)



## Skidmore v. Swift & Co.:

“The weight [accorded to an administrative] judgment in a particular case will depend 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.” 323 U.S. 134, 140 (1944).

## Kisor v. Wilkie:

An agency’s interpretation of its own regulation is controlling if (1) the text is ambiguous, (2) the interpretation is reasonable and (3) it is entitled to “controlling weight,” meaning it is the agency’s “authoritative,” “expert,” and “considered” conclusion. 139 S Ct. 2400 (2019).







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# Judicial Deference to Agency Legal Interpretations

Judicial Review of Agency Action		
Legal Issues		
<u>What</u> legal authority is the court interpreting?	<u>How</u> (through what form of agency action) did the Agency interpret the legal authority?	<u>Standard of Review</u> to be applied to the agency decision by the reviewing court
Constitution	N/A	De Novo
General Statute ( <u>not</u> administered by agency)	N/A	De Novo
Agency Statute (statute that the agency administers)	<b>Major Question</b> (economically, politically, socially significant) (challenge to agency authority to regulate)	<b>Clear statement rule</b> (Congress must provide “clear authorization” for the rulemaking”)
	<b>NOT a major question</b>	<b>Skidmore “respect”</b> (does interpretation have “power to persuade”)
Regulation	Interpretive Rule, Guidance Document, etc.	<b>Auer Deference</b> Factors in <u>Kisor v. Wilkie</u>

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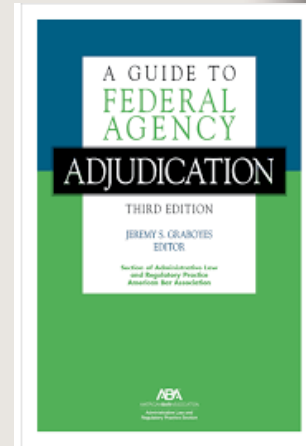
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## Judicial Review of Agency Action

Factual Issues	Policy Issues	Legal Issues		
<b>Formal Rulemaking or Adjudication</b> (§§ 556, 557)  <b>Substantial Evidence</b> ( <u>Universal Camera</u> )	<b>Arbitrary &amp; Capricious (Hard Look Review)</b> ( <u>State Farm</u> , <u>Fox</u> )  <u>State Farm</u> : reasoned explanation—or did agency (1) not rely on proper factors, (2) fail to consider important aspects of the problem, (3) offer an explanation that runs counter to the evidence, or (4) offer an implausible explanation?	<u>What</u> legal authority is the court interpreting?	<u>How</u> (through what form of agency action) did the Agency interpret the legal authority?	<u>Standard of Review</u> to be applied to the agency decision by the reviewing court
<b>Informal Rulemaking or Adjudication</b> (§§ 553, 555)  <b>Arbitrary &amp; Capricious</b> ( <u>Overton Park</u> )	<u>FCC v. Fox</u> : when changing policy, did agency acknowledge change, explain rejection of previous factual findings, and take into account reliance interests?	Constitution	N/A	De Novo
		General Statute ( <u>not</u> administered by agency)	N/A	De Novo
		Agency Statute (statute that the agency administers)	Major Question (challenge to agency authority to regulate only) (e.g., <u>WV v. EPA</u> )	De Novo (Congress needs “clear statement” to authorize major question rulemaking)
			Not major question	<u>Skidmore “respect”</u> – does agency interpretation have “power to persuade”
		Regulation	Orders, Interpretive Rules, Guidance Documents, etc.	<u>Auer Deference</u> <ul style="list-style-type: none"> <li>Five factors in <u>Kisor v. Wilkie</u></li> </ul>

# Other relevant issues in Administrative Law: The Future Of ...

- Agency Adjudication
- ALJ Independence





# SEC v. Jarkesy, 144 S. Ct. 2117 (2024) (Roberts, 6-3)

Do SEC civil penalty actions violate Article III and the 7<sup>th</sup> Amendment?

YES!

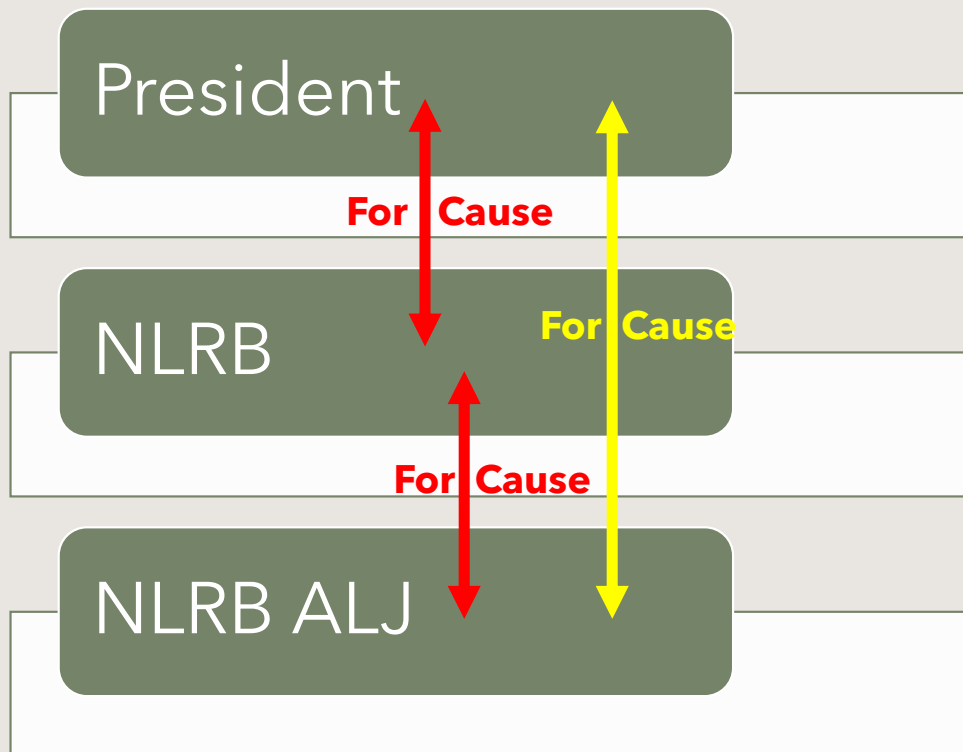
Seventh Amendment applies

Penalties = legal remedy

Securities fraud ~ common law fraud

No public rights exception

# ALJ Removal



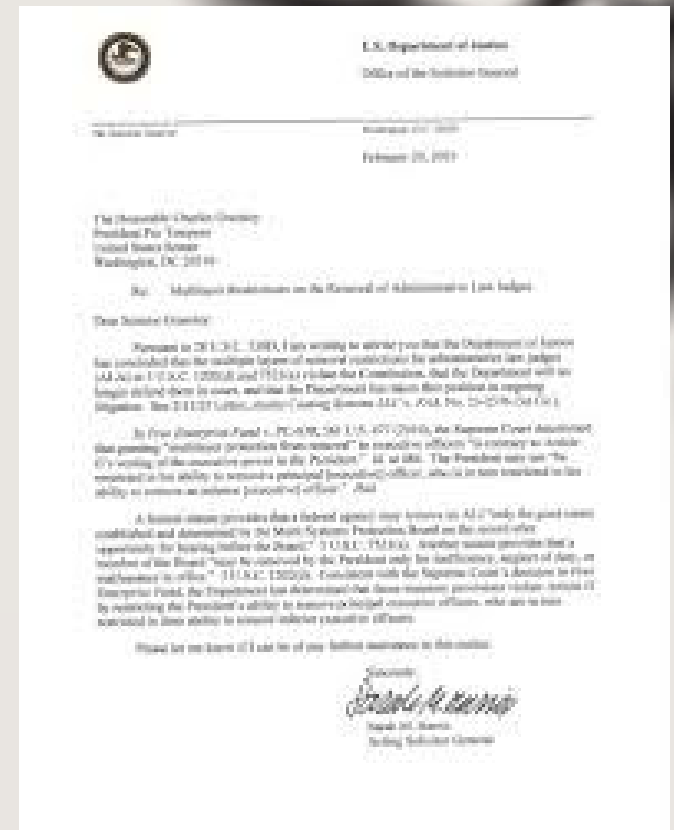
Free Enterprise Fund v.  
PCAOB, 561 U.S. 477 (2010)

Fn 10: “[O]ur holding also does not address ... administrative law judges.... [U]nlike members of the Board, many [ALJs] of course perform adjudicative rather than enforcement or policymaking functions ....”

# The Current Debate

- VHS Acquisition Subsidiary No. 7 v. NLRB (D.D.C. Dec. 10, 2024) (severing “good cause” provision of 5 U.S.C. 7521(a))
- Circuit split
  - 5<sup>th</sup> Circuit (Jarkesy)
  - versus
  - 6<sup>th</sup>, 9<sup>th</sup>, and 10<sup>th</sup> Circuits

## DOJ “Harris Letter” (Feb. 20, 2025)





Thank you!

