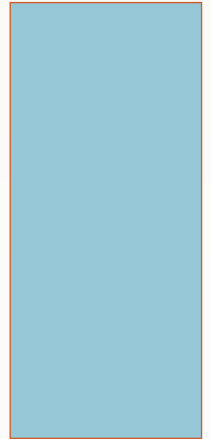


# POWERS AND FUNCTIONS OF ADMINISTRATIVE AGENCIES

## CHAPTER 5



# LEARNING OBJECTIVES

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1. How are federal administrative agencies created?
2. How do the three branches of government limit the power of administrative agencies?
3. What are the three basic functions of most administrative agencies?
4. What sequence of events must normally occur before an agency rule becomes law?
5. How do administrative agencies enforce their rules?
6. Why we regulate business and financial activity?

# INTRODUCTION

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**Administrative law** is the body of law created by administrative agencies in order to carry out their duties and responsibilities.

New agencies created after Great Recession

- Financial Stability Oversight Council
- Consumer Financial Protection Bureau(CFPB)

Administrative agencies issue regulations that make up the body of administrative law.

# PRACTICAL SIGNIFICANCE

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An **administrative agency** is a federal or state agency/department established to perform a specific function.

## Administrative Agencies **Exist at All Levels of Government**

- Executive agencies, e.g., Food and Drug Administration (FDA)
- Independent regulatory agencies, e.g., Federal Trade Commission (FTC)
- State and local administrative agencies

DEPARTMENT NAME	SELECTED SUBAGENCIES
<b>State</b>	Passport Office; Bureau of Diplomatic Security; Foreign Service; Bureau of Human Rights and Humanitarian Affairs; Bureau of Consular Affairs; Bureau of Intelligence and Research
<b>Treasury</b>	Internal Revenue Service; U.S. Mint
<b>Interior</b>	U.S. Fish and Wildlife Service; National Park Service; Bureau of Indian Affairs; Bureau of Land Management
<b>Justice<sup>a</sup></b>	Federal Bureau of Investigation; Drug Enforcement Administration; Bureau of Prisons; U.S. Marshals Service
<b>Agriculture</b>	Soil Conservation Service; Agricultural Research Service; Food Safety and Inspection Service; Forest Service
<b>Commerce<sup>b</sup></b>	Bureau of the Census; Bureau of Economic Analysis; Minority Business Development Agency; U.S. Patent and Trademark Office; National Oceanic and Atmospheric Administration
<b>Labor<sup>b</sup></b>	Occupational Safety and Health Administration; Bureau of Labor Statistics; Employment Standards Administration; Office of Labor-Management Standards; Employment and Training Administration
<b>Defense<sup>c</sup></b>	National Security Agency; Joint Chiefs of Staff; Departments of the Air Force, Navy, Army; service academies
<b>Housing and Urban Development</b>	Office of Community Planning and Development; Government National Mortgage Association; Office of Fair Housing and Equal Opportunity
<b>Transportation</b>	Federal Aviation Administration; Federal Highway Administration; National Highway Traffic Safety Administration; Federal Transit Administration
<b>Energy</b>	Office of Civilian Radioactive Waste Management; Office of Nuclear Energy; Energy Information Administration
<b>Health and Human Services<sup>d</sup></b>	Food and Drug Administration; Centers for Medicare and Medicaid Services; Centers for Disease Control and Prevention; National Institutes of Health
<b>Education<sup>d</sup></b>	Office of Special Education and Rehabilitation Services; Office of Elementary and Secondary Education; Office of Postsecondary Education; Office of Vocational and Adult Education
<b>Veterans Affairs</b>	Veterans Health Administration; Veterans Benefits Administration; National Cemetery System
<b>Homeland Security</b>	U.S. Citizenship and Immigration Services; Directorate of Border and Transportation Services; U.S. Coast Guard; Federal Emergency Management Agency

- a. Formed from the Office of the Attorney General.
- b. Formed from the Department of Commerce and Labor.
- c. Formed from the Department of War and the Department of the Navy.
- d. Formed from the Department of Health, Education, and Welfare.

# SELECT INDEPENDENT REGULATORY AGENCIES

NAME OF AGENCY	PRINCIPAL DUTIES
<b>Federal Reserve System Board of Governors (the Fed)</b>	Determines policy with respect to interest rates, credit availability, and the money supply.
<b>Federal Trade Commission (FTC)</b>	Prevents businesses from engaging in purported unfair trade practices; stops the formation of monopolies in the business sector; protects consumer rights.
<b>Securities and Exchange Commission (SEC)</b>	Regulates the nation's stock exchanges, in which shares of stock are bought and sold; enforces the securities laws, which require full disclosure of the financial profiles of companies that wish to sell stock and bonds to the public.
<b>Federal Communications Commission (FCC)</b>	Regulates all communications by telegraph, cable, telephone, radio, satellite, and television.
<b>National Labor Relations Board (NLRB)</b>	Protects employees' rights to join unions and bargain collectively with employers; attempts to prevent unfair labor practices by both employers and unions.
<b>Equal Employment Opportunity Commission (EEOC)</b>	Works to eliminate discrimination in employment based on religion, gender, race, color, disability, national origin, or age; investigates claims of discrimination.
<b>Environmental Protection Agency (EPA)</b>	Undertakes programs aimed at reducing air and water pollution; works with state and local agencies to help fight environmental hazards.
<b>Nuclear Regulatory Commission (NRC)</b>	Ensures that electricity-generating nuclear reactors in the United States are built and operated safely; regularly inspects operations of such reactors.

# AGENCY CREATION AND POWERS

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Congress creates federal administrative agencies.

- **Enabling legislation:** Statute that specifies the name, purposes, functions, and powers of administrative agency.
- Federal administrative agencies may exercise only those powers Congress has delegated to them.

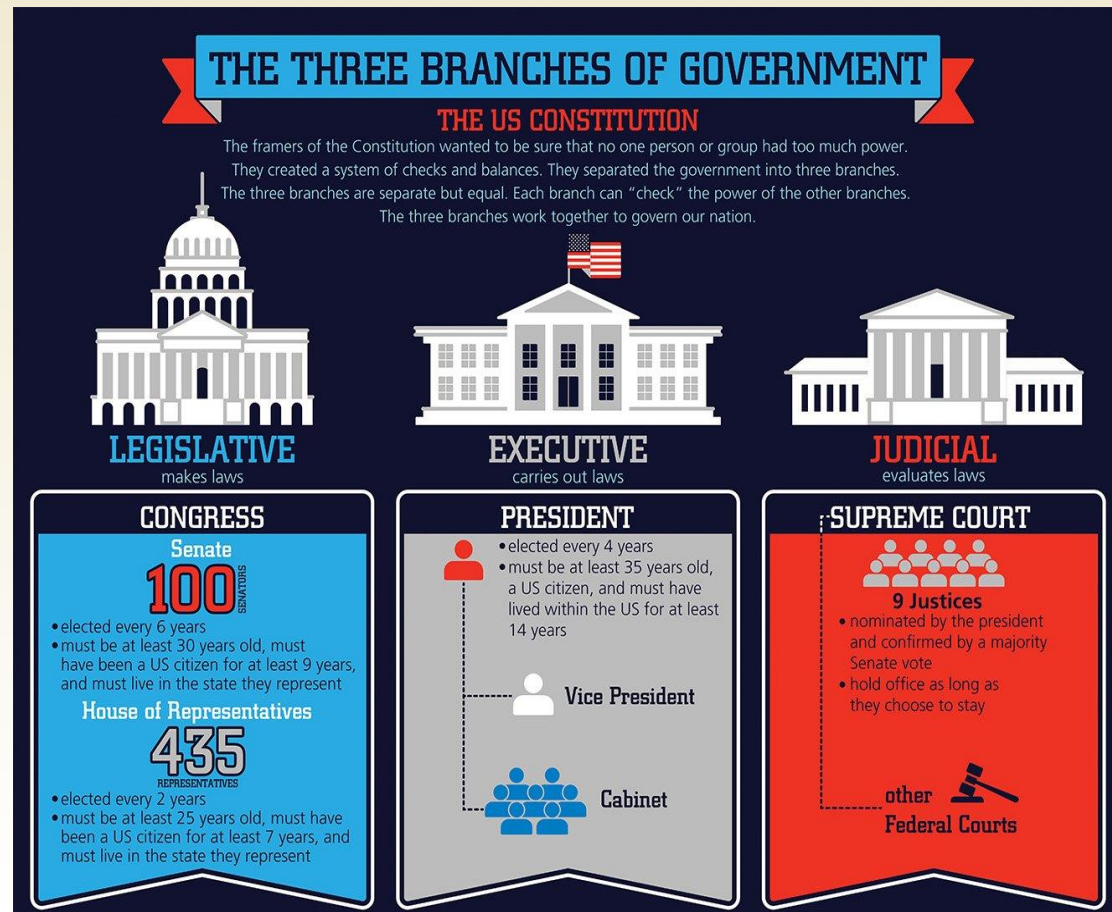
## State Enabling Legislation Example

- CT Green Bank – Conn. General Statute 16-245n

# AGENCY CREATION AND POWERS

## Agency Powers and the Constitution

- Executive controls
- Legislative controls
- Judicial controls





# AGENCY CREATION AND POWERS

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Administrative Procedure Act (APA)  
includes procedural requirements

- **Arbitrary and capricious test** - APA provides that courts should set aside agency decisions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”
- **Fair notice**

# THE ADMINISTRATIVE PROCESS

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## Rulemaking

- Formulation of new regulation.
- Notice-and-comment rulemaking involves three steps:
  1. Notice of the proposed rulemaking
  2. Comment period
  3. Final rule

# THE ADMINISTRATIVE PROCESS

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## Enforcement Investigation

- Agency enforces its rules by conducting investigations to monitor compliance
- Investigation might begin when an agency receives a report of a possible violation

### Investigative Tools:

- Inspections and tests
- Subpoenas
- Search warrants (not required for highly regulated or dangerous industries)

# THE ADMINISTRATIVE PROCESS

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## Adjudication

- **Negotiated settlements**
- Formal complaints (public document)
- Role of the administrative law judge
- Hearing procedures
- Resolution of dispute through a hearing by the agency.
- Agency orders

# THE ADMINISTRATIVE PROCESS

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## Adjudication (cont'd)

- Role of the administrative law judge (ALJ)
  - An ALJ presides over a trial-like hearing.
  - An ALJ must be unbiased.
- Hearing procedures – vary from agency to agency
- Agency orders

# JUDICIAL CONTROLS

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Courts can review agency decisions

Exhaustion Doctrine – party seeking court review must first exhaust all administrative remedies.

Why should a court wait to review an agency's order until it has gone through the entire procedural process and can be considered final?

When they do review....

# JUDICIAL DEFERENCE TO AGENCY DECISIONS

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Agencies have great discretion to interpret their own agency rules

- *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*: courts should defer to agencies in matters of fact and law
- “Chevron Deference” is a term coined after this landmark case, referring to the doctrine of judicial deference given to administrative actions.

# JUDICIAL DEFERENCE TO AGENCY DECISIONS

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## Holding of the *Chevron* Case

- Did Congress directly address the issue in dispute in the enabling statute? If so, the statutory language prevails.
- If the statute is silent or ambiguous, is the agency's interpretation "reasonable"? If it is, a court should uphold the agency's interpretation, even if the court would have interpreted the law differently.



# JUDICIAL DEFERENCE TO AGENCY DECISIONS

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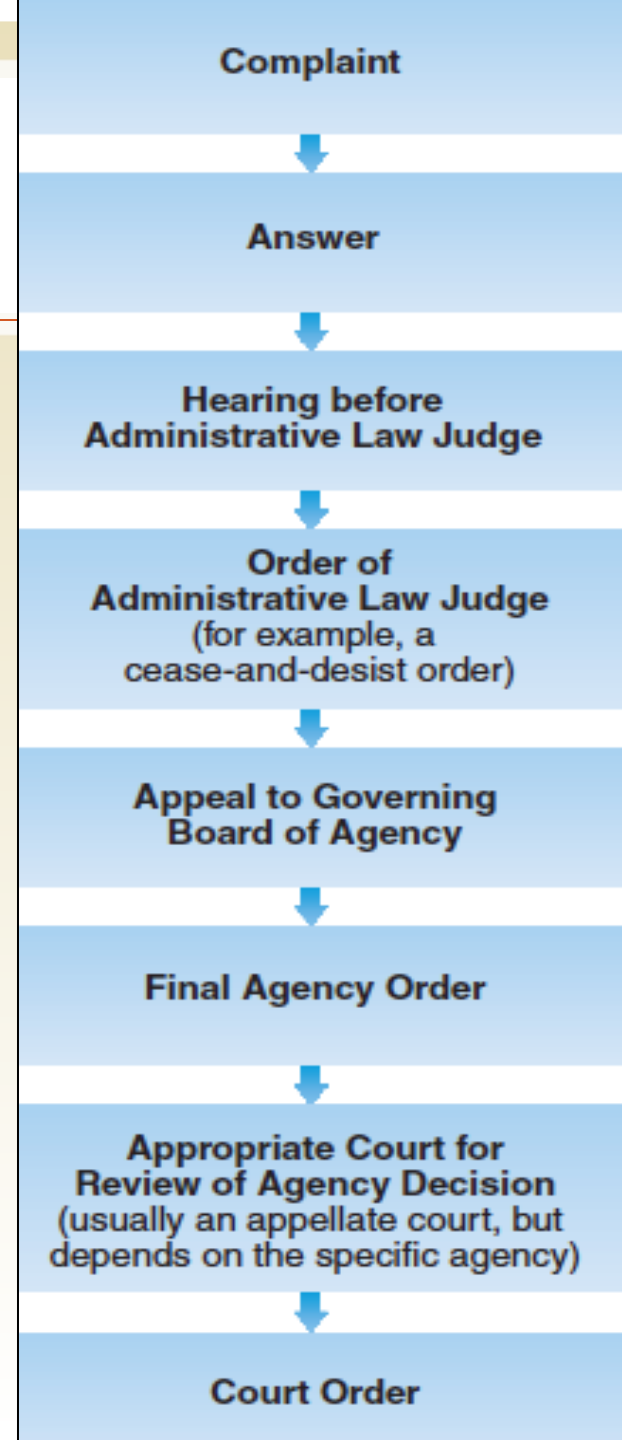
## When Courts Will Give *Chevron* Deference to Agency Interpretation

- In order for agencies to receive Chevron deference, they must meet formal legal standards for notice-and-comment rulemaking.

# THE PROCESS OF FORMAL ADMINISTRATIVE ADJUDICATION



E.G., Social Security Disability Hearing



# PUBLIC ACCOUNTABILITY

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## Freedom of Information Act

- Requires federal government to disclose certain records to any person on request, even if no reason is given for the request.
- All federal government agencies are required to make their records available electronically.
- All State's have similar disclosure requirements

# PUBLIC ACCOUNTABILITY

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## Government in the Sunshine Act

- The legislation requires that “every portion of every meeting of an agency” be open to “public observation.”
- Adequate notice of meetings must be given to the public.
- Closed meetings are authorized in a limited number of instances.

# PUBLIC ACCOUNTABILITY

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## Regulatory Flexibility Act

- Concern over the effects of regulation on the efficiency of businesses.
- In response, Congress passed the Regulatory Flexibility Act.
- Requires an analysis of the cost a regulation will impose on small business and must consider less burdensome alternatives.

# PUBLIC ACCOUNTABILITY

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## Small Business Regulatory Enforcement Fairness Act (SBREFA)

- Allows Congress to review new federal regulations for at least 60 days before they can take effect.
- Authorizes courts to enforce Regulatory Flexibility Act

# LOVING VS I.R.S.

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IRS responds to concerns about unscrupulous behaviors of paid tax-return preparers.

Creates rule that they must pass exam, pay fee and continuous education courses.

Used authority to “regulate the practice of “representatives” “before” the Department of Treasury”

Three tax return preparers filed suit – court ruled in their favor – IRS appealed and the decision was affirmed.

As a policy matter, some observers might argue that the IRS should be allowed to regulate tax-return preparers more strictly.

**Who has the authority to give effect to this policy and how would it be accomplished?**

# FEDERAL COMMUNICATIONS COMMISSION V. FOX TELEVISION STATIONS, INC.

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FCC polices “indecent” speech—“language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs.”

The FCC had long ignored “fleeting expletives.”

FCC fines Fox for Bono’s use of the F word at the Golden Globes.

FCC policy change was upheld.

Technology advances make it easier to “bleep” out offending words – does this development support a more or less stringent enforcement policy?

Today, children are likely exposed to indecent language in various media far more often than they were in the 70s, when the FCC first began to sanction indecent speech. **Does this mean that we need more—or less—stringent regulation of broadcasts?**



# BUREAUCRACY

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What are the advantages of a long-standing bureaucracy consisting of agencies made up of individuals who hold their jobs regardless of changes in the political winds?

What are the disadvantages? Are these threats real?

# ARBITRARY AND CAPRICIOUS TEST

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Mike is an airline pilot was convicted of disorderly conduct, a minor misdemeanor

On his National Transportation Safety Board pilot application, he was asked about criminal history

He left it blank

Previous policy was to consider an applicant understanding of what information was sought

Without explanation, the Board departed from this policy and refused to consider Mike's argument and he lost his license.

# MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY

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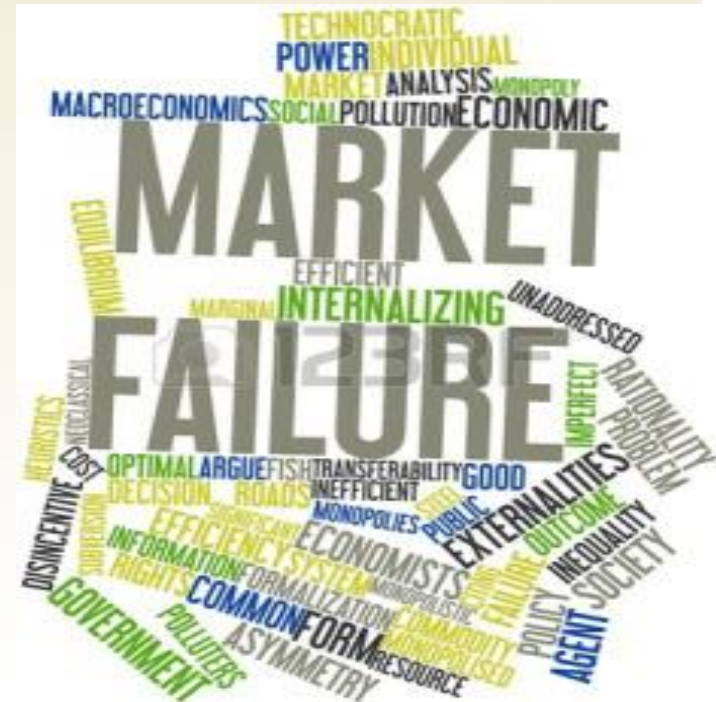
Twelve states as well as various cities and organizations sought to require the EPA to regulate greenhouse gases like carbon dioxide under its authority to regulate air pollution. The lawsuit was based on a Clean Air Act provision that requires the EPA Administrator to set emission standards for air pollutants from motor vehicles that the Administrator judges to play a role in pollution that could be reasonably expected to endanger public health or welfare.

Responding to that mandate, the EPA had decided that it lacked authority to regulate greenhouse gases like carbon dioxide for climate change purposes. Even if it did have that authority, it felt that it was unnecessary to set greenhouse gas emissions standards for vehicles. The case combined the substantive issue of whether the agency had decided correctly on these issues with the procedural question of whether the states, cities, and organizations even had standing to bring such a claim. The concrete injury that they alleged was the loss of coastline to rising sea levels in global warming.

**Should the EPA be required to regulate vehicle emissions for climate change?**

# WHY REGULATE FINANCIAL AND BUSINESS ACTIVITIES?

1. **Market failure** - Select whether you want 2 points, or 6 points added onto your midterm exam, but there's a small catch... if more than 10% of the class selects 6 points, then no one gets any points
2. **Asymmetric information**



# WHY REGULATE FINANCIAL AND BUSINESS ACTIVITIES?

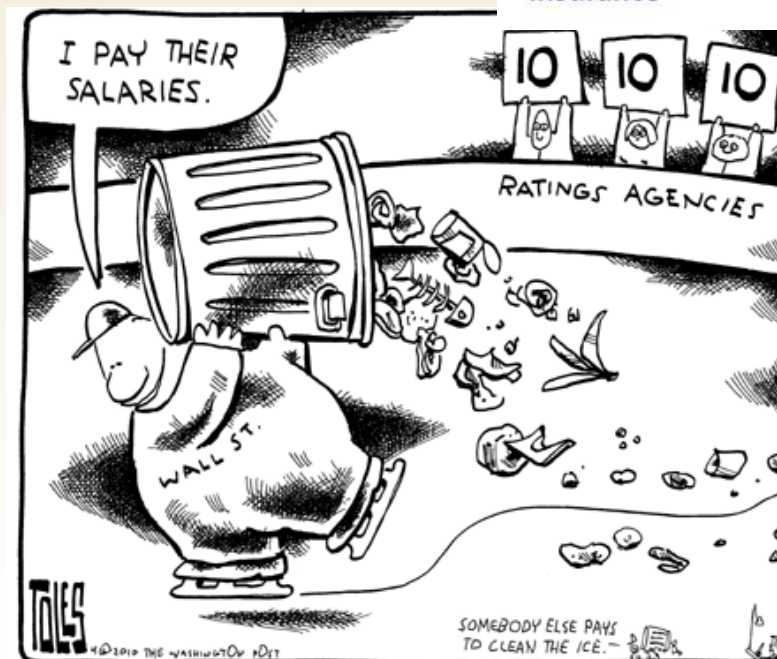
- 3. Principal-agent problems
- 4. Risk shifting

## Sales Commission

\$ > \$

whole life  
insurance

term life  
insurance





# WHY REGULATE FINANCIAL AND BUSINESS ACTIVITIES?

5. Moral hazard

6. Adverse selection



# WHY REGULATE FINANCIAL AND BUSINESS ACTIVITIES?

7. Externalities

8. Collective action problems/coordination failures



## Collective Action

When It Works

When It Fails

