

It's commonplace to say that agencies engage in lawmaking when they issue rules. Conservatives denounce this as a violation of the constitutional scheme; liberals celebrate it as an instrument of modern government. Both sides agree that in reality, though not in legal form, Congress has delegated its lawmaking power to agencies. But this is mistaking an analogy for an identity. It's true, of course, that Congress has given agencies the authority to make rules, which is *one* aspect of legislative power. But agency authority is a far cry from the robust policymaking power enjoyed by Congress. Thus, the idea that Congress has transferred a chunk of its lawmaking authority to agencies is quite an oversimplification- an oversimplification that has distorted debates over delegation.

Congress can legislate on any topic within its constitutional powers, with no need to explain its decisions or provide supporting evidence. Stakeholders and the general public may have a chance to appear at hearings, but a law can be introduced on the floor and passed without a word of explanation or any public participation. In reviewing the law, a court will ask only if there is *any* conceivable rational basis for the law.

Administrative rulemaking is quite different. Apart from exceptional circumstances, the agencies must announce its proposed action and provide an opportunity for public comment. It must assemble a record of all the evidence and explain how that evidence supports its final decision; it must also respond to all significant criticisms raised during the public comment period. Its decision has to be justified on the basis of what is often a very detailed statute. It then has to face judicial review, which can be quite searching. These procedures are not merely a formality: agencies are in fact constrained to the point where some observers worry about ossification of the regulatory process.

The modern administrative state was undoubtedly not contemplated by the Founding Fathers, but it has evolved checks and balances that prevent the evil they really cared about: the exercise of unaccountable and arbitrary power. We assure accountability because of the President's ability to oversee the agencies and because of the many informal ways that Congress keeps them in check, both of which apply to a significant extent even to the so-called independent agencies. We prevent arbitrary decision-making through the procedures discussed above and through judicial review. The courts and the civil service check the raw exercise of presidential power, while the President ensures that "faceless bureaucrats" remains subject to democratic oversight. And the threat of congressional intervention looms over all of the participants in the process.

The attacks made on agency rulemaking are actually internally incoherent. Rulemaking is attacked *both* as decision-making by "faceless bureaucrats" that is politically unaccountable *and* as a Presidential power grab that is too politicized. The fact is that the President and

the bureaucracy are both involved, and they contribute an element of non-political expertise on one side and an element of political accountability on the other.

Given the extensive strings attached to Congress's grant of rule making power, and the number of safeguards against abuse of that power, there is little practical reason to worry about "excessive delegation." Indeed, there's no reason to think that anyone really does care that regulations are being made by agencies rather than Congress. The argument that Congress has unconstitutionally delegated power to agencies is invariably made by people who would prefer that *no one* ever regulate anything. They don't really care about the source of the regulation. When agencies regulate, they argue that the regulator should have been Congress; when Congress regulates, they argue that the regulator should have been the states; and when states regulate, they argue that only the federal government can do so. That anti-delegation argument, in other words, is only a thin veil over anti-regulatory political views. Of course, people are never willing to admit that.. Instead, they attribute their own anti-regulatory preferences to the Founding Fathers, forgetting that the whole purpose of adopting the Constitution was to create a more vigorous and effective government than the prior Articles of Confederation.