
Legislating Chevron

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ABSTRACT

One of the most significant administrative law cases, *Chevron v. Natural Resources Defense Council*, is routinely referred to as "the counter-Marbury." According to the consensus view, Chevron deference is consistent with Marbury, as long as Congress has delegated to agencies the power to make policy by interpreting ambiguous statutory language or filling gaps in regulatory laws. Congressional delegation is not important just to reconcile modern administrative law with Marbury; it is also the reason provided by courts to justify strong deference to agency interpretations of law. In the first part of this article, I discuss the various ways courts have reached decisions about the delegation issue and provide a brief assessment of them. In the end, none of the judicial methods to determine whether Congress actually delegated law-interpreting authority to agencies can satisfactorily achieve that objective. Without explicit congressional direction regarding which institution, courts or agencies, should have the primary role in interpreting statutes, the institutional choice is necessarily made by courts when they decide cases that require such interpretation. Some scholars have argued that, if the decision has been effectively left to the courts, judges should devise and consistently apply a general rule of construction of regulatory statutes based on an explicit consideration of the institutional capacities of the courts and agencies. My project in this article is not to argue in favor of a particular rule of judicial review but rather to focus on a feature common to all of them. Whether courts search for some direction from Congress or whether they allocate interpretive authority based on other factors, all the methods of judicial review provide that a clear congressional instruction overrides any judicial rule. In the second part of this article, I describe a mechanism that could provide Congress an opportunity to provide explicit instructions about law-interpreting authority. Low expectations for congressional performance in this area stem in part from a failure to think creatively about the kinds of legislative vehicles available to Congress and about internal rules that can structure its deliberation. In statutes that periodically re-authorize administrative agencies and large federal programs or that annually appropriate funds to agencies, Congress could determine on an agency-by-agency basis whether to delegate the power to make policy through statutory interpretation with respect to all statutes that the agency administers, or with respect to some subset of decisions. This proposal is designed to take seriously the feature of judicial review of regulatory statutes that contemplates the possibility of an active role for Congress.