State Interpreters

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Abbe R. Gluck, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond, 121 **Yale L.J**. 534 (2011).

Oral arguments on the constitutionality of the Patient Protection and Affordable Care Act will consume three days of the Supreme Court's schedule, an unusual assignment of the Court's time. But the constitutional challenge, assuming it fails, will be just the first act in a long performance. Abbe Gluck's tremendous essay recently published in the *Yale Law Journal* takes up some of the fascinating potential statutory interpretation questions waiting in the wings.

These questions arise from the mix of institutional design choices involving the states in the Act (and in other legislation). The choices include provisions implemented only by the federal government, provisions implemented only by the states, and, of particular interest, provisions involving both sets of actors. Gluck trains on this last category, noting that the Act "appears to deploy the [state-federal] relationship *strategically* – as a way to expand the federal presence into several key areas of traditional state control – and somewhat paradoxically, also *expressively*, as a way to acknowledge the states' traditional authority over health insurance." (pp. 584-5)

These design choices, interesting on their own as a descriptive matter, motivate Gluck to construct an "intrastatutory federalism" framework to consider the decisions' normative implications. These implications should grab the attention of anyone interested in administrative law: "Should federal agencies have less discretion, for example, to use their regulatory power to constrain interstate implementation variation in statutes that give states a lead implementation role? Does Congress's purpose for intervening in the first place – the reason Congress decided national legislation was necessary – matter in answering these questions? When, if ever, does Congress's use of state implementers signal Congress's assent to – even encouragement of – the idea that the federal statutory law will mean different things in different states?" (p. 540)

Gluck does not want to join the policy debate over whether state actors are better than others in carrying out assignments. Rather, she takes as given that Congress can choose whether to task state actors in federal statutes and examines what should follow for how those statutes are interpreted. It is unsettled, complicated doctrinal territory. Should canons concerning state-federal relations govern (i.e., the presumption against preemption and the federalism canon)? These canons, however, help when federal law conflicts with state law, which does not capture the complex institutional design choices in the recent health care legislation and other statues. Or should canons concerning agency action dominate (i.e., *Chevron/Mead*)? Yet, these canons also ignore state actors as interpreters of federal statutes.

After demonstrating how both approaches are deficient, Gluck suggests that "a *Mead*-like approach may be the easiest way to incorporate the role of state implementers into familiar interpretative doctrines." (p.599) Her suggestion is not simply to have courts apply *Chevron* to state interpreters – in the language of *Mead*, did Congress intend to delegate to the states the power to interpret particular provisions with the force of law and did the states act with that authority? Gluck rightly realizes that some of the justifications for deference to federal agencies do not map directly onto state actors. In the

end, her tentative proposal may come, in many contexts, closest to having courts apply Skidmore (and its multifactor framework) to state interpreters. If *Mead* was a muddle for the courts with only federal agencies[1], it may become sheer chaos with complicated yet prevalent institutional design choices involving federal *and* state actors.

In sum, Gluck's essay (a bit of a misnomer, since the piece runs close to 90 pages) reminds us that we ignore states at our peril. States are not bit actors in major areas of public policy, but instead often play critical parts. The Patient Protection and Affordable Care Act is only one example. Gluck deftly demonstrates how their presence interpreting federal statues (here, in execution, and, in other work, in judicial review) should force us to reassess how we think about fundamental questions in federal legislation and administrative law.

1. Lisa Schultz Bressman, How Mead Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443 (2005).

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