**Dances with Judges (And Bureaucrats Too): Observations from a State Dance Hall Occasioned by Gluck & Bressman on Legislative Drafting**

Jess O. Hale, Jr

Legislative drafting is a craft. Though its practitioners labor in various settings--state, federal and international ---a legislative drafter can draw appreciatively from the analysis of a drafter in another context. Given that academic resources in the United States tend to be focused on drafting at the federal level, drafters for state legislatures can learn from congressional drafting even if they need to modify it on occasion to reflect differences due to scale, federalism or structure, such as single subject rules in state constitutions. 1

A recent law review article presents a helpful opportunity for state legislative drafters to reflect on their craft in response to a substantial empirical study of the legislative drafting process in Congress. Abbe R. Gluck and Lisa Schultz Bressman's "Statutory Interpretation from the Inside---An Empirical Study of Congressional Drafting and the Canons: Part I" 2 is the most significant substantive scholarship on legislative drafting that I have seen in many years. In grappling with legislative drafting, this article takes into account drafting realities instead of jurisprudential ideologies. It functions as an accessible, learned resource for state legislative drafters actively engaged in reflection on and continuing education in their particular practice of the craft of drafting statutes. As a drafter for more than two decades, who also has served as staff in the U.S. Senate, I commend this article as an excellent resource to practitioners. I look forward to seeing part II.

Gluck and Bressman's article "offers the most extensive empirical study to date about this intersection of statutory interpretation, administrative law doctrine and the process of legislative drafting." 3 Posing 171 questions, the authors interviewed 137 congressional counsels (including nonpartisan legislative counsel as well as partisan committee staff) with drafting responsibilities over five months during 2011 and 2012. The authors are capable legal scholars whose work I have found valuable in examining statutory interpretation in the past. 4 Abbe Gluck teaches at Yale Law School and Lisa Bressman teaches at Vanderbilt Law School.

Gluck and Bressman lay the foundation for taking account of the realities involved in drafting statutes in Congress— and by analogy drafting in state legislatures. While "doctrine rarely grapples with the role of staff," 5 Gluck's and Bressman's empirical endeavor emphasizes the role of staff and realities of the legislative process. The authors aptly observe:

Indeed, one central find of our study is that the text, legislative history and agency implementation are integrated parts of a single process. Drafters do not think about statutory text without legislative history, and both text and history are drafted with agency implementation in mind and often with agencies at the table. 6

The authors present a valuable typology of canons of statutory interpretation. They begin with feedback canons, such as the presumption against preemption and Chevron 7 delegations, where drafters are aware of legal rules.

---

1 For example, Tennessee’s Constitution provides: “That no bill shall become law which embraces more than one subject, that subject to be expressed in the title.” Article II, Section 17.

2 65 STANFORD LAW REVIEW 901 (May 2013).


3 Ibid, 905.


5 Gluck & Bressman, Statutory Interpretation from the Inside, 905.

6 Ibid, 929.

expressing what courts expect and draft in conversation with the judiciary. The presumption against preemption calls on courts to refrain from interpreting an ambiguous federal statute to preempt state law. In *Chevron*, the U.S. Supreme Court upheld a rule made the Environmental Protection Agency’s interpreting “stationary sources” in the Clean Air Act Amendments of 1977. The court held that Congress delegated interpretation authority to the agency. Under *Chevron*, the courts defer to certain administrative interpretations of a statute.

They move to approximation canons, such as *noscitur a socis* and some administrative delegation doctrines like *Mead*[^8], where courts intuit “how Congress signals its intent” and how legal rules reflect how statutes are drafted. The canon *noscitur a socis* would have drafters remember that terms are construed with reference to their associates in a list. *Mead* denied deference to an administrative Customs Service ruling letter while the Court looked to see whether Congress intended to delegate interpretive authority to an administrative agency through linguistic signals (such as notice and comment rule-making). Drafters should be aware that using certain devices may indicate that the legislature is ceding or delegating some portion of its authority to interpret statutes to an administrative agency.

Next are disconnected canons (such as clear statement rules, the rule against superfluities, or the value of dictionaries) where legislative drafters were either unaware of a canon or disregard a canon. Finally, the authors address rejected canons (such as the disregard of legislative history) where they knowingly reject a judicial canon for practical or institutional reasons.[^9]

The centrality of the dance[^10], or perhaps the conversation[^11], between the relevant audiences of the legislature, judiciary and the administrative state is a central strength of this article. Gluck’s and Bressman’s research usefully illustrates the interpretive dialogue between the legislature, the courts and administrative agencies. Legislative staff are often acutely aware of the interpretive stances toward legislation adopted by courts and administrative agencies even if the realities of the legislative process on occasion serve to trump that awareness. This survey demonstrates that staff view administrative agencies as their “primary statutory interpreters”[^12] even as they often draft with an eye to what courts may do. On one level, this viewpoint reflects a power struggle between the legislature and the judiciary, and administrative agencies as well, over controls the interpretive rules for a statute.[^13]

Though not a focus of this article, state legislative drafters know that legislators often attempt to limit judicial interpretation by enacting rules of statutory interpretation. Some states have minimal guidance and some have more substantial approaches, including the Uniform Law Commission’s Uniform/Model Statute and Rule Construction Act, which has not been widely used by states.[^14]

This empirical study of the dance among those enacting, interpreting and implementing a law produces provocative and valuable findings. For instance in assessing the dance with the canons, Gluck and Bressman insightfully remark concerning federal statutes:

> At the canon-specific level, for example, understanding that statutes are drafted by congressional committees that generally do not communicate with one another pulls the rug out from under the bases of many interpretive rules, beloved by textualists, that presume that statutory terms are used consistently within and across statutes. Understanding that legislative history plays an entirely different role in ordinary statutes than it does in omnibus or appropriations statutes arguably should affect how it is used by courts, but even purposivist proponents of legislative history do not make such distinctions. Realizing that Congress uses certain signaling conventions—for example, the words “in consultation with” to indicate that it wishes one agency to take the lead in a multiagency statute—might resolve continuing interpretive disputes.[^15]

[^9]: Ibid, 906-907.
[^10]: This useful image was profitably used in Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance?: Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1990-1991).
[^12]: Ibid, 910.
[^15]: Ibid, 908.
The discussion of legislative history stands among the most valuable contributions of the article. For congressional staff, Gluck and Bressman conclude "legislative history was emphatically viewed by almost all of our respondents—Republicans and Democrats, majority and minority, alike—as the most important drafting and interpretive tool apart from text." However, in states that provide far less sophisticated forms of legislative history than Congress' formal committee reports, such items as floor colloquies and amendments that were not adopted are often used for legislative history. In a state with limited resources for legislative history, I have seen both liberal and conservative legislators of both parties use floor speeches in order to produce the appropriate legislative history.

This article skillfully analyzes the place of legislative history in producing federal law. Apart from the jurisprudential debates on its propriety, it makes a variety of helpful suggestions for smarter and more discriminating use of legislative history to aid in interpreting ambiguity in statutes. The authors provide a gold mine of discussions of specific types of legislative history, assessing the value of committee-produced history, the role of staff, statements by party leadership as opposed to committee leaders and much more.

Similarly, the authors provide a useful treatment of the canons grounded in administrative law, such as the Chevron doctrine that Congress intends to delegate "interpretive authority" to an implementing administrative agency when Congress leaves ambiguity in a statute. They also address the Mead presumption of administrative delegation in instances where Congress signals such intent by authorizing procedures like rule-making and the presumption that ambiguity does not give an agency interpretive control over a statute's "major policy questions". They found that congressional staff are often unaware of such canons, except for Chevron, but that the judicial canon does usefully approximate how Congress actually operates. So under their typology, Chevron illustrates a feedback canon while Mead represents an approximation canon.

While Gluck and Bressman have begun a landmark assessment of statutory interpretation in light of congressional drafting practices, drafters for state legislatures will recognize that their argument needs to be qualified or modified when moving from federal to state lawmaking. As noted earlier, many legislatures do not produce legislative history in the quantity that Congress produces it, so that factor, rather than debates between Justices Breyer and Scalia, may account for more reticence in its use in some state courts. Other factors also produce a somewhat different environment in many states. For instance, single subject rules in many state constitutions limit the role of omnibus legislation that Gluck and Bressman usefully assess as a factor in the reality of congressional legislating. The issue of preemption is reversed for states; the question is does federal law preempt state action on a topic, not whether and to what extent state law should be preempted by a federal statute. Also many state legislatures have far fewer staff than Congress, so state legislators may have to rely more on nonpartisan staff than federal legislators do.

While canons of statutory construction and other rules and aids for interpreting statutes notoriously conflict and courts are wildly inconsistent in employing them, the question is how useful they are when producing an actual statute. In the dance among courts, legislators and bureaucrats, it helps drafters to be aware of how other parties will interpret their work, even when it is grounded in the realities of their own institution. To that end, I heartily recommend Gluck’s and Bressman's "Statutory Interpretation from the Inside"/Part I to all legislative drafters, particularly to my colleague drafters in state legislatures.

---

16 Ibid, 965.
17 Ibid, 990.
19 Ibid.
20 Ibid, 993.
21 Ibid, 990-995.