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### A Cross-Cutting Public Law Scholar for the Ages

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## A Cross-Cutting Public Law Scholar for the Ages

Nicole Huberfeld†

Thanks to Fred Shapiro's labor, we can see that the under-fifty category of most-cited legal scholars better represents the lawyering population than the all-time rankings of legal scholars, as it has more modern and diverse scholarship, and it has a higher percentage of women than the all-time rankings of legal scholars. Anyone who knows Professor Abbe Gluck's work cannot be surprised that she is included among the most-cited scholars under the age of fifty.<sup>1</sup> Abbe is a force of nature, a brilliant legal mind with a diabolical work ethic. Even if she ceased publishing today, her scholarly legacy would be considerable and durable. It is nearly impossible to research public law and not to use her work as an intellectual touchstone.

Abbe's ideas are prescient, critical, and careful. She has developed deep expertise in federal legislation, meaning not just the process of drafting but also statutory interpretation, its intersection with constitutional theory, and the interaction between federal statutes and state implementers. These inquiries are vitally important in an era marked by legislative complexity and rancorous politics combined with jurisprudential gaps in understanding

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† Edward R. Utley Professor of Health Law, Boston University School of Public Health, and Professor of Law, Boston University School of Law. Many thanks to the editors at the *University of Chicago Law Review* for compiling this special issue. Thanks always DT and SRHT.

<sup>1</sup> See Fred R. Shapiro, *The Most Cited Legal Scholars Revisited*, 88 U. CHI. L. REV. 1595, 1603 tbl.2 (2021).

the interactive relationship between states and the federal government. In addition, Abbe explores federalism,<sup>2</sup> civil procedure,<sup>3</sup> administrative law,<sup>4</sup> and health law.<sup>5</sup> She has held positions across the three branches in both state and federal government,<sup>6</sup> and she brings that valuable real-world perspective to the cross-cutting nature of her theoretical work.

The unusual marriage of theory, doctrine, and on-the-ground implications across public law domains is what makes Abbe's work stand out, even within lists of all-star scholars. Abbe combines legal theory with a keen eye for pragmatics, work that is especially relevant in the study of federalism and of health law. Consider, as an example, the 2011 article *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*.<sup>7</sup> This is her third-most-cited work,<sup>8</sup> and it is probably the one I cite most. This article argues for a legislation-centric theory of federalism that sets aside concerns about federalism as a constitutional matter and advocates for observing and theorizing the way in which modern federalism often occurs—through federal lawmaking. This article contains one of my favorite scholarly turns of phrase, that federalism occurs by legislative “grace”:

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<sup>2</sup> See generally, e.g., Abbe R. Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS U. L.J. 1045 (2015); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) [hereinafter *Intrastatutory Federalism*]; Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Abbe R. Gluck & Nicole Huberfeld, *The New Health Care Federalism on the Ground*, 15 IND. HEALTH L. REV. 1 (2018) [hereinafter *The New Health Care Federalism*]; Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Health Care For?*, 70 STAN. L. REV. 1689 (2018) [hereinafter *What Is Federalism in Health Care For?*].

<sup>3</sup> See generally, e.g., Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. PA. L. REV. 1669 (2017).

<sup>4</sup> See generally, e.g., Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 FORDHAM L. REV. 607 (2014).

<sup>5</sup> See generally, e.g., Abbe R. Gluck, *Why Health Lawyers Must Be Public-Law Lawyers: Health Law in the Age of the Modern Regulatory State*, 18 J. HEALTH CARE L. & POL'Y 323 (2015); Blase N. Polite, Abbe R. Gluck & Otis W. Brawley, *Ensuring Equity and Justice in the Care and Outcomes of Patients with Cancer*, 321 JAMA 1663 (2019).

<sup>6</sup> See Mike Scarcella, *Yale Law's Abbe Gluck, Former RBG Clerk, Named Special Counsel on Biden COVID-19 Team*, LAW.COM (Jan. 15, 2021), <https://perma.cc/4EBV-FLAC>.

<sup>7</sup> See generally *Intrastatutory Federalism*, *supra* note 2.

<sup>8</sup> Email from Fred Shapiro, Assoc. Dir. for Collections and Access and Lecturer in Legal Rsch., Yale L. Sch., to author (Feb. 28, 2021) (on file with author).

[A] legislation-focused theory of federalism . . . is a perspective concerned less with formal state sovereignty or the assumed policy benefits of federalism and concerned more with congressional intent and questions about how national power is created and elaborated. It is also a perspective that recognizes that, to the extent that these questions of state-federal regulatory authority are the main federalism questions of the modern age, it will fall upon the doctrines of statutory interpretation, not constitutional law, to address them. This is, after all, a federalism that comes by grace of Congress.

This is *intrastatutory* federalism—and it is messy, varied, and dynamic. This is federalism expressed from the inside of federal statutes rather than through the separation of state and federal law. It is a species of federalism that acknowledges the almost-infinite reach of the regulatory power of the modern federal government, but sometimes still tries to give effect, within that expanse, to traditional federalism values. It is also a brand of federalism that recognizes that state implementation comes in an almost-endless array of forms, ranging from the work conducted by expert state agencies, to the work done by independently elected state officials or legislators, to the work done by multiple states, drafting regulations or working together with federal regulators.<sup>9</sup>

Others have absorbed and built upon this crucial observation. HeinOnline counts 146 articles and 5 case citations, and Westlaw counts 170 total citations also including briefs and other kinds of publications. Though the numbers are impressive, these citations are more important for quality than quantity, as they demonstrate a wide-ranging influence on scholars, judges and clerks, litigators and other practicing lawyers, and students. The influence also reaches across subjects, being cited in the

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<sup>9</sup> *Intrastatutory Federalism*, *supra* note 2, at 542 (emphasis in original).

fields of constitutional,<sup>10</sup> legislation,<sup>11</sup> administrative,<sup>12</sup> immigration,<sup>13</sup> criminal,<sup>14</sup> health,<sup>15</sup> and environmental law,<sup>16</sup> to name a few. Chief Justice John Roberts infamously remarked that legal scholarship has little utility,<sup>17</sup> but work like Abbe's proves the critics wrong.

Abbe excels at continuing lines of inquiry. One follow-up to *Intrastatutory Federalism* was *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*.<sup>18</sup> Abbe did not toss away this symposium piece by regurgitating ideas but rather applied her theory to the Supreme Court's first and most famous Affordable Care Act (ACA) decision,<sup>19</sup> *NFIB v. Sebelius*.<sup>20</sup> Abbe's intrastatutory federalism idea was proven correct by this decision, though the Court may not have known it. Most remarkably, she highlighted the paradox at the center of the Court's decision: What good does it do states to prevent the federal government from inviting their participation in national goals? Though the Court seemed to envision a return

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<sup>10</sup> See, e.g., Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1853 (2015) (citing *Intrastatutory Federalism*, *supra* note 2, at 576–94).

<sup>11</sup> See, e.g., Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1280 (2012) (citing *Intrastatutory Federalism*, *supra* note 2, at 552).

<sup>12</sup> See, e.g., Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1368 (2012) (citing *Intrastatutory Federalism*, *supra* note 2, at 576–77); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521, 567 (2012) (citing *Intrastatutory Federalism*, *supra* note 2, at 576–77).

<sup>13</sup> See, e.g., Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 36 (2012) (citing *Intrastatutory Federalism*, *supra* note 2).

<sup>14</sup> See, e.g., Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1352 (2013) (citing *Intrastatutory Federalism*, *supra* note 2).

<sup>15</sup> See, e.g., Rachel E. Sachs, *Innovation Law and Policy: Preserving the Future of Personalized Medicine*, 49 U.C. DAVIS L. REV. 1881, 1904 (2016) (citing *Intrastatutory Federalism*, *supra* note 2, at 593 n.160, 619).

<sup>16</sup> See, e.g., Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N.C. L. REV. 1283, 1292 (2013) (citing *Intrastatutory Federalism*, *supra* note 2, at 539); Hannah J. Wiseman, *Disaggregating Preemption in Energy Law*, 40 HARV. ENV'T L. REV. 293, 300 (2016) (citing *Intrastatutory Federalism*, *supra* note 2, at 585–88); Erin Ryan, *Response to Heather Gerken's Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 1147, 1153–54 (2015) (citing *Intrastatutory Federalism*, *supra* note 2, at 539).

<sup>17</sup> See, e.g., Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, WALL ST. J. L. BLOG (Apr. 7, 2010), <https://www.wsj.com/articles/BL-LB-27402>.

<sup>18</sup> Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013).

<sup>19</sup> See Gluck, *supra* note 18, at 1770–75.

<sup>20</sup> 567 U.S. 519 (2012).

to state primacy, the alternative is that the federal government may take over.<sup>21</sup>

Abbe's probing questions reflect her time spent as a news reporter between college and law school. The instinct to ensure that novel perceptions and theories are accurate by interviewing stakeholders does not exist in all scholarship, but it has become a hallmark of Abbe's careful work. An example of her unique style of inquiry is the extensive empirical study about the realities of Congress's lawmaking processes that revealed that lawmakers and their aides do not think about the work of legislation in the same way as courts do. Somehow Abbe and Professor Lisa Schultz Bressman sold this massive undertaking to the *Stanford Law Review* as a two-article deal.<sup>22</sup> This is Abbe's most-cited article according to HeinOnline, at a total of 322 citations,<sup>23</sup> and a must-read for legislation scholars and others who want to know how the sausage is really made.

Abbe will change your mind, but her mind can be changed too. Coauthoring with Abbe is transformative and is bound to make anyone a more critical thinker and a stronger writer. She is always seeking to do better, is never satisfied, and is always rethinking and testing ideas and then making sure they are right. We have had countless conversations about the value and purpose of federalism in health care, with Abbe accusing me of being a "nationalist" and her position often being more state-law oriented. I remind her that state "experimentation" invites variability that may be unpredictable and undesirable; she reminds me that there are times that the federal government and states must work together, at the very least.

An article that we published in 2018 examined this very question through an intensive five-year study of the implementation of two of the ACA's key features: Medicaid expansion and health insurance exchanges.<sup>24</sup> We lucked into working together, discovering while speaking on a plenary panel at the 2013 Health Law

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<sup>21</sup> See Gluck, *supra* note 18, at 1755.

<sup>22</sup> See generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014).

<sup>23</sup> See Email from Fred Shapiro, *supra* note 8.

<sup>24</sup> See generally *What Is Federalism in Healthcare For?*, *supra* note 2.

Professors Conference<sup>25</sup> that we were both studying the ACA after *NFIB* to understand how the law's implementation would be changed by the Court's decision and the flipped federalism it rendered—I from the Medicaid perspective and she from the health insurance exchange perspective. We teamed up and used this division of responsibility, each of us tracking closely how states were implementing the ACA differently from the law as it was drafted. We discovered much more complexity than the Court or commentators imagined, including highly dynamic negotiations between the federal government and states to increase opting into Medicaid expansion<sup>26</sup> as well as hidden state assistance and regulation in the implementation of the federal health insurance exchange.<sup>27</sup> We also discovered that the Department of Health and Human Services (HHS) gave states cover for participating in the ACA's implementation when it seemed politically unpopular, a phenomenon we dubbed “secret boyfriend federalism.”<sup>28</sup> This observation could have seemed unserious, but it grew out of our interviews with officials and stakeholders, again, thanks to Abbe's instinct to ensure that theory meets reality.<sup>29</sup> We also observed the understudied—but very real—phenomenon of horizontal federalism, with states learning from one another's experiences in negotiating with HHS and waves of implementation. All of this offered a real-time experiment in the theory of intrastatutory federalism.<sup>30</sup> We presented the work in many phases at law school workshops and symposia,<sup>31</sup> often planning over snacks in conference hotels. It's fair to say that we did not anticipate in 2013 that the work would not be published until 2018. We concluded multiple times that we had a book-length project on our hands (and maybe we still do).

Once complete, a colleague called the publication our “magnum opus.” But we were not yet done. In part, this was true because the ACA has continued to command study, with regular

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<sup>25</sup> See Maximilian Burns, *36th Annual Health Law Professors Conference: Agenda*, SILO.TIPS 1, 6 (May 22, 2013), <https://perma.cc/C89S-V8V3>.

<sup>26</sup> See *What Is Federalism in Health Care For?*, *supra* note 2, at 1733–46.

<sup>27</sup> See *id.* at 1767–72.

<sup>28</sup> See *id.*

<sup>29</sup> See *id.* at 1700.

<sup>30</sup> See *id.* at 1772–78.

<sup>31</sup> See, e.g., *2017 Newsletter*, AALS L., MED. & HEALTH CARE SECTION 1, 20 (2017), <https://perma.cc/4FPB-8H4Q>.



trips to the Supreme Court,<sup>32</sup> political attention,<sup>33</sup> and other new variables in implementation arising regularly.<sup>34</sup> In part, this is because Abbe is never content to rest on her laurels. A single major article written over the course of several years birthed two essays and a book chapter, and none was a repeat performance. One article contained our interview data and analysis of the meaning of these conversations;<sup>35</sup> one article looked ahead to ascertain lessons for the next steps in health reform;<sup>36</sup> and the chapter assessed the history, durability, and meaning of the ACA at ten years.<sup>37</sup>

I have often observed to my students that a good lawyer understands the law, a great lawyer makes law understandable for everyone else, and a brilliant lawyer changes the law. Abbe models this notion in bringing every facet of being a legal scholar to life. Her work evidences the importance of detecting patterns across domains and pursuing the gaps in theory that help modernize legal thinking. She has the unusual ability to write skillfully in every dimension, not only the highest-level legal scholarship but also public commentaries,<sup>38</sup> amicus briefs,<sup>39</sup> and model laws.<sup>40</sup> I am eager to see what the next “most-cited” list brings.

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<sup>32</sup> See Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 517–25 (2020).

<sup>33</sup> See, e.g., Benjy Sarlin, *Obamacare Would Get a Big (and Quiet) Overhaul in the Covid Relief Bill*, NBC NEWS (Mar. 2, 2021), <https://perma.cc/ZTR8-CNFV>.

<sup>34</sup> See, e.g., Selena Simmons-Duffin, *Trump Is Trying Hard to Thwart Obamacare. How's That Going?*, NPR (Oct. 14, 2019), <https://perma.cc/ZYB3-498V>.

<sup>35</sup> See generally *The New Health Care Federalism on the Ground*, *supra* note 2.

<sup>36</sup> See generally Abbe R. Gluck & Nicole Huberfeld, *Health Care Federalism and Next Steps in Health Reform*, 46 J.L. MED. & ETHICS 841 (2018).

<sup>37</sup> See generally Abbe R. Gluck & Nicole Huberfeld, *Federalism Under the ACA: Implementation, Opposition, Entrenchment*, in *THE TRILLION DOLLAR REVOLUTION: HOW THE AFFORDABLE CARE ACT TRANSFORMED POLITICS, LAW, AND HEALTH CARE IN AMERICA* (Ezekiel J. Emanuel & Abbe R. Gluck eds., 2020).

<sup>38</sup> See, e.g., Jonathan H. Adler & Abbe R. Gluck, *What the Lawless ObamaCare Ruling Means*, N.Y. TIMES (Dec. 15, 2018), <https://perma.cc/2ES5-WNXY>; Abbe R. Gluck, *The Fate of the ACA Could Turn on Judge Kavanaugh's Appointment*, VOX (July 23, 2018), <https://www.vox.com/the-big-idea/2018/7/23/17596430/kavanaugh-kennedy-supreme-court-health-care-aca-confirmation-hearings>; Abbe R. Gluck, *Can a Judge Solve the Opioid Crisis?*, WALL ST. J. (May 7, 2018), <https://perma.cc/38RN-4872>.

<sup>39</sup> See, e.g., Brief of Amici Curiae Jonathan H. Adler, Nicholas Bagley, Abbe R. Gluck, & Ilya Somin in Support of Intervenor-Defendants-Appellants, *Texas v. United States*, 340 F. Supp. 3d 579 (2018) (No. 19-10011); Brief of Health Care Policy History Scholars as Amici Curiae Supporting Respondents, *King v. Burwell*, 576 U.S. 473 (2015) (No. 14-114); Brief of 104 Health Law Professors as Amici Curiae in Support of Petitioners, *NFIB*, 567 U.S. 519 (No. 11-398).

<sup>40</sup> See, e.g., *Professor Gluck '00 Elected to ALI Council*, YLS TODAY (May 22, 2018), <https://perma.cc/4CH4-543H>.

