How should administrative officials interpret statutes? Michael W. Spicer and Larry D. Terry argue that this is an important question given the broad delegation of authority to public administrators by the legislative branch. The authors suggest that traditional approaches to statutory interpretation on their own may be deficient in that they conflict with the world view of the founders of the Constitution. Spicer and Terry argue that, in many cases, common-law reasoning provides a more suitable guide for administrative interpretation of statutes.

Central to the delegation debate are questions relating to statutory interpretation. These questions focus on two analytically distinct, yet interrelated areas of concern. The first pertains to the characteristics of an agency’s statute(s) and the extent to which such characteristics impermissibly increase the discretionary authority and power of career civil servants. It is generally presumed that the characteristics of a statute have a significant influence on the amount of discretionary authority and power exercised by administrative officials. Theoretically speaking, broad, vague, and ambiguous statutes increase the discretionary authority and power of administrative officials because these characteristics allow, among other things, greater latitude and autonomy in the realm of statutory interpretation.

The second area of concern relates to the actual exercise of discretionary authority and power by administrative officials in the interpretation of statutes and the policy choices made as a result of such interpretations. Stated somewhat differently, it is the type of policy choices made by administrative officials in the translation of statutory mandates into concrete action (i.e., rules, programs, and policies) that is the focus of attention. Because statutory interpretation is "unavoidably an act of creating meaning", scholars have engaged in lengthy conversations about who (i.e., judges, elected political officials, or career administrators) has the ultimate authority to determine the exact meaning of a statute. This issue is front and center in discussion concerning the so-called "judicial deference" doctrine, which encourages the courts to defer to an agency’s interpretation of a statute when it has primary responsibility for administering the statute. The judicial deference doctrine is based on the argument that if an agency’s statute is silent or ambiguous with respect to a specific issue and, if the legislative intent or history is unclear, the agency's interpretation, not the court’s, should be given controlling weight, if it is reasonable. Underpinning this argument is the assumption that agency officials are in a better position to understand the intricacies of statutory provisions because of their specialized-knowledge, expertise, and experience.

The nature, scope, and complexity of the issues noted above indicate the importance that statutory interpretation has in the American political system. Despite its importance, public organization theorists have not expressed much interest in examining statutory interpretation from the perspective of public administrators. Although administrative law scholars have devoted attention to the subject, much of the statutory interpretation literature concentrates on the judiciary, that is, how judges interpret or should interpret statutes and the various approaches useful for such purposes (see, for example, Eskridge and Frickey, 1990; Fish, 1982; White, 1982; Dworkin, 1982; Brest, 1980). It is certainly a worthwhile scholarly enterprise to examine statutory interpretation from the perspective of judges. But a predominantly judiciary focus is myopic; it prevents one...
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Administrative agencies should assume a substantial role in the interpretation of statutes when the legislature has "endowed the agency with significant policy making responsibility" (Diver, 1985) and when statutes are not clear. We contend that common-law reasoning, when examined within the context of administrative institutions, provides a suitable guide for administrative interpretation of statutes.

Administrative Interpretation of Statutes in the Aftermath of Chevron: A New World Order?

The Chevron case involved a dispute concerning the Environmental Protection Agencies (EPA) interpretation of the Clean Air Act Amendments of 1977. At issue was how EPA interpreted the term "stationary source." (6) During the Carter administration (1977-1981), the EPA favored a narrow interpretation of stationary source. The Carter EPA adopted a pipe-by-pipe definition Farina, 1989) as opposed to a plant-wide or so-called bubble definition (EPA previously had used both definitions). (7) Under the pipe-by-pipe definition, individual pieces of equipment were regarded as a source whereas the bubble definition treated an entire plant, including all its various pieces of equipment, as a single source. Of the two definitions, the pipe-by-pipe definition is much more demanding. Consequently, it was endorsed by organized environmental interests and opposed by many in the steel and other so-called smoke-stack industries.

In 1981, the Reagan administration aggressively sought to implement a more conservative and pro-business agenda. An integral part of this agenda was providing greater regulatory relief for private industry and transferring decision-making authority from the federal government to the states. In an effort to translate the Reagan agenda into action, the EPA readily embraced the bubble definition, thus repealing an earlier agency ruling favoring the pipe-by-pipe definition (Federal Register, 1981; 766). The Natural Resource’s Defense Council, Inc., challenged this definition in court on the grounds that it undermined and
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frustrated the intent of the Clean Air Act. The Court of Appeals for the District of Columbia agreed but its decision was unanimously overturned by the Supreme Court. The Court ruled that EPA’s bubble definition is a permissible construction of the term stationary source (Chevron, 1984) and that the court of appeals should have deferred to the agency’s interpretation rather than substitute its own. In delivering the decision of the Court, Justice Stevens outlined the widely cited two-step framework for analyzing an agency’s interpretation of its statute.

If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute (Chevron, 1984). Justice Stevens continued:

If Congress has explicitly left a gap for the agency to fill, there is an expressed delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes, the legislative delegation to an agency ... is implicit rather than explicit. In such cases, a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency (Chevron, 1984).

Whether or not the Chevron decision created a new world order for public administration, it appears to have sanctioned the broad delegation of authority from the legislature to administrative agencies and thus exacerbated the decline of the nondelegation doctrine (Kmiec, 1988). This decision has also made it more difficult for the courts to overrule policy choices made by administrative agencies when these choices are embodied in legal interpretations administered by the agency" (Starr, 1986; 283). As a result of Chevron, it can be argued that administrative agencies and public administrators have been granted a significant role in statutory interpretation. Given the significance and complexity of this role, public administrators need guidance to enhance their effectiveness and overall performance in this area. The two-step test described by Justice Stevens provides some advice and instruction for public administrators as it outlines when they are authorized to fill the gaps of statutory mandates and the court’s likely response once they have done so. Such knowledge is essential and no doubt reduces the level of uncertainty in the administrative process. But knowing when to fill the gaps is only one part of the complicated statutory interpretation process; public administrators must also know how to interpret statutes. This requires, among other things, an understanding of the various approaches to statutory interpretation.

Approaches to Statutory Interpretation

Approaches to statutory interpretation have been broadly classified into two categories: originalism and nonoriginalism (Brest, 1980). Originalist approaches give binding authority to the text of a statute and the intentions of the legislature when they enacted the law. These approaches are grounded in the assumption that fidelity to the text and original understandings of the legislature "constrains the discretion of decision-makers" and guarantees that the law is interpreted consistently over time (Brest, 1980; 204). The dominant forms of originalism are textualism and intentionalism. Textualism "takes the language of a legal provision as the primary or exclusive source of law" whereas intentionalism is primarily concerned with the "adopters" intentions whether or not they are embodied in the text" (Brest, 1980; 205, 212).

Three major arguments are typically offered in support of originalism. These include legal formalism, economic-interest group, and legal process (Eskridge, 1987). Legal formalism assumes that the Constitution assigns all lawmaking authority and responsibility to the legislative branch. Legal formalists contend that originalism is the only approach to statutory interpretation that is faithful to the constitutional doctrine of the separation of powers. The economic-interest group argument views a statute as a contract between interest groups and legislative bodies. From this perspective, "legislation is sold by the legislature and bought by beneficiaries of the legislator" (Eskridge, 1987; 1511). Public administrators and others must adhere to the legislatures’ original intent; the failure to do so is a breach of the contract. Contractual violations can result in legal sanctions. The final argument, legal process, suggests that nonelected officials lack the legitimacy and authority to formulate policy in the American system. To expand the interpretation of a statute beyond its original intent is akin to policy making and thus, problematic.

In stark contrast to originalism, nonoriginalism does not treat the text nor the original intent of the legislature as authoritative. Although the text and original understanding are considered, these sources have inferior status when
compared to changing conditions, public values, and demands of society (Dworkin, 1986; Eastbrook, 1983; Calabresi, 1982). Nonoriginalism is considered a more viable approach to statutory interpretation because unlike originalism, it recognizes the imperfection of most, if not all statutes. Furthermore, nonoriginalist approaches take into consideration the changing nature of society. There is acknowledgment that the circumstances which contributed to the enactment of a statute may no longer exist or may have drastically changed, creating an entirely different set of circumstances not foreseen by the legislature.

The public values approach, or public values analysis as it is sometimes called, is a form of nonoriginalism that has attracted attention in recent years. This approach assumes that public values play a critical role in statutory interpretation, especially when the legislature has not specified or made clear a determinate result. William Eskridge (1989: 1018-1019) describes the public values approach this way:

Many rules and presumptions of statutory interpretation find their policy origin (at least partially) in our society’s commitment to particular public values, and public values are often equally important as background context for statutory interpretation.... Public values have a gravitational force that varies according to their source ... and the degree of our historical and contemporary commitment to these values. The gravitational force will exercise a pull on other sources of law including statutes. The gravitational force will not affect the evolution of a statute when the force is weak ... and the statutory language is clear. Yet the gravitational force of a public value will have a decisive influence on the statutory orbit when the force is strong ... and the statutory language is less clear.

When viewed from the perspective of judges, legal scholars, and others within the legal community, both originalism and nonoriginalism provide a useful framework for statutory interpretation. But are these approaches, when used alone, suitable for administrative interpretation of statutes? In other words, given that the set of unifying principles, values, and political context of judicial institutions are distinctively different from administrative institutions, do originalism and nonoriginalism hold much promise for guiding and understanding administrative interpretation of statutes? (9)

Relevance of the Founders

In answering these and other questions, we believe that it is useful to consult the writings of the founders whose constitutional thinking, after all, provides the basis for our system of government. The importance of the founders’ writings and also the Constitution itself as a guide to administrative action has been emphasized by John Rohr (1986) and other writers in the "Constitutional School" of public administration (Rosenbloom, 1971 and 1983; Wamsley et al, 1990; Cook, 1992). It may be objected, of course, that the founders’ writings are themselves subject to varying interpretations and, therefore, can provide little clear guidance for administrative action. However, the founders’ writings become more coherent when seen as part of a worldview or vision of how the world works (Sowell, 1987; Spicer, 1995, 1994).

In particular, it seems clear that the founders’ writings, especially those of Alexander Hamilton and James Madison, along with those of John Locke, David Hume, Adam Smith, Edmund Burke, and others come out of what has been termed an antirationalist or constrained vision of the world, which sees the powers of human reason as limited and prone to error. According to this worldview, as the founders observed, "the reason of man continues fallible" (Wills, 1982; 43), and we must moderate "our expectations and hopes from the efforts of human sagacity" (p. 179) and rely on experience as "the guide that ought always to be followed whenever it can be found" (p. 267). We must beware of "Utopian speculations" (p. 21), of "airy phantoms" that flit before "distempered imaginations" (p. 37), and of "the chimerical pursuit of a perfect plan" (p. 446). Human nature is seen here as fallible, passions and interests "have a more active and imperious control over human conduct than general or remote considerations of policy, utility or justice" (p., 24), and "the passions of men will not conform to the dictates of reason and justice" (p. 72). According to this worldview, while government is necessary to restrain social conflict arising from the destructive impulses of men and women, government itself is fallible and its power must be checked by constitutional rules and procedures. Within government,
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"ambition must be made to counteract ambition" (p. 262), and the "defect of better motives" must be overcome by providing for "opposite and rival interests" (p. 263). It is in the context of this worldview that we seek to evaluate alternative approaches to statutory interpretation.

It should be noted here that the founders' writings addressed the problem of constitutional design and did not deal directly with the issue of administrative interpretation. Nonetheless, we believe that the antirationalist vision that guided the founders in their efforts at constitutional design carries with it important implications for statutory interpretation, and it is these that we seek to explore.

The Textual Approach

A textual approach to statutory interpretation would emphasize fidelity to the text of a statute in administrative actions. Administrators should look to the language of a statute as the primary or exclusive guide for their actions. Viewed from the founders' perspective, the textual approach to administrative interpretation would seem troublesome. The notion that the text of a statute, assuming that it is properly written, can always provide clear guidance to administrative action assumes that legislators can, in fact, foresee all of the different circumstances facing administrators at some future point in time; a prospect which the founders would have seen as unlikely, if not impossible. It would not be consistent with their observation that "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications" (Wills, 1982: 179). In other words, the precise meaning of a law can only be worked out over time and with experience. This was inevitable for the founders because of both "the obscurity arising from the complexity of objects and the imperfection of the human faculties" (p. 179). Laws must inevitably be applied in unforeseen and unforeseeable situations and, therefore, cannot be interpreted by public administrators solely on the basis of their text.

The textual approach also presumes a clarity in the use of language that seems at odds with the founders' views. The founders saw an inherent ambiguity in the use of language denoting its "inadequateness" as "the vehicle for ideas" (p. 180). They argued that "however accurately objects may be discriminated in themselves, and however accurately the discrimination be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered" (p. 180). "No language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas" (pp. 179-180). "Unavoidable inaccuracy" is inevitable, in their view, because of the "cloudy medium" of language (p. 180). Given the cloudy medium of language, the ability of public administrators to determine what they should do on the basis of the text of statutes would seem limited.

The foregoing should not be taken as meaning that a textual approach is unimportant in interpreting statutes, given the founders’ worldview, but rather that such an approach is difficult and unlikely in many cases to yield clear prescriptions for action. The founders, after all, would never have suggested that public administrators should ignore the explicit legal directives of elected representatives. If public administrators were free to ignore the legal directives of legislators contained in the text of statutes, this would essentially vitiate the ability of elected officials to check the discretionary power of public administrators through legislation and enable administrators to exercise relatively unfettered political power; a notion quite contrary to the founders' worldview. Therefore, it would seem to follow that, where the text of a statute clearly requires or prohibits certain actions on the part of the administrator, the administrator is obliged to follow the dictates of the text.

This suggests that the clearer the direction to administrators provided by a statute, the greater the value of a textual approach in administrative interpretations of statutes. Furthermore, given that the ability of legislators to foresee the future circumstances facing public administrators is likely to be greater with respect to the near future than the more distant future, it may also be argued that the text of the statute is more relevant for newer statutes than for older statutes and that a textual approach to administrative interpretations is more appropriate for newer statutes. Nonetheless, conceding that a textual approach should sometimes play an important role in administrative interpretation of statutes, it must still be recognized that, given the inevitable ambiguities that are likely to remain in the texts of even relatively clear and relatively new statutes, a textual approach alone is unlikely always to provide a clear guide for administrative actions.

The Intentionalist Approach

The intentionalist approach, like the textual approach, also presumes too much in terms of the ability of legislators to foresee the circumstances or situations in which administrators find themselves. As the founders argued, "It is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and
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variety of means which may be necessary to satisfy them" (p. 112). In light of this, the guidance provided by legislative intent must of necessity be limited. Furthermore, the presumption of the intentionalist approach that administrators should seek to identify a particular legislative intent, not explicitly expressed in the text of a statute, would also seem problematic from the founders' perspective.

To interpret a statute in terms of the intent of a particular legislator or a particular group of legislators would seem to run counter to the very purpose of the Constitution as envisaged by the founders. The founders sought, by combining majority rule and checks and balances, to frustrate the attempts of factions in society to achieve their interests and purposes at the expense of others. Through majority rule, relief is supplied against a minority faction by enabling "the majority to defeat its sinister views by regular vote" and by rendering a minority faction "unable to execute and mask its violence under the forms of the Constitution" (Wills, 1982; 45). Majority rule makes it more difficult for a particular legislator or group of legislators to achieve their intentions at the expense of others.

Furthermore, according to the founders, the ability of the majority to secure its intentions must also be checked. The creation of an extended federal republic was designed to "take in a greater variety of parties and interests," to "make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens," and, "if such a common motive exists," to "make it difficult for all who feel it to discover their own strength, and to act in unison with each other" (p. 48). They observed that "If a majority be united by a common interest, the rights of the minority will be insecure" (p. 264). In other words, the founders consciously designed a Constitution to sometimes frustrate rather than accommodate the common intentions of the factions comprising a majority.

The desire of the founders, therefore, was to limit the ability of particular factions or coalitions of factions, whether in the minority or majority, to achieve their intentions through the political process at the expense of others, by making sure that a wide variety of interests were represented in the legislative process. They recognized that human intentions derived not solely from reason but rather from conflicting passions and interests and sought, therefore, to limit the ability of factions to realize their interests. An intentionalist approach to statutory interpretation would seem to undermine this design by according an unwarranted legitimacy to the intentions of particular legislative factions. Such an approach to statutory interpretation accentuates the problems of factions by, in effect, giving particular legislators or groups of legislators the ability to attain in government action that which they were not actually able to attain in the writing of the text of the statute.

The text of a statute often reflects not a common intent but rather a compromise between the different and conflicting intentions of different legislative factions. Indeed, this is why it may be difficult to infer a common intent from the text of the statute. In this situation, it is not at all clear that administrators should seek to identify and implement the intent of any particular legislative faction involved in reaching this compromise. Indeed, such an action would seem to undermine the compromise of different intentions from which the text of the statute emerged. It should not be surprising that an argument, based on the founders' worldview should be critical of an intentionalist approach to statutory interpretation. The notion of a legislature acting as a body with a common intention or will is, after all, relatively new and dates back only to the 19th century (Eskridge, 1987).

Of course, public administrators cannot and should not ignore the intentions of lawmakers in interpreting statutes. For one thing, as a practical matter, because modern courts often take an intentionalist approach to statutory interpretation, public administrators who ignore the intentions of legislators may end up in legal trouble. As noted earlier, Justice Stevens made it clear that public administrators "must give effect to the unambiguously expressed intent of Congress" (Chevron, 1984). Also, as a practical matter, since administrators deal on an ongoing basis with lawmakers, they may risk political trouble if they ignore the intentions of lawmakers. Furthermore, to ignore the clear and shared intentions of legislatures in helping interpret the meaning of a statute's text would not seem consistent with the founders' worldview. Given that the text of a statute can often only acquire meaning in the context of intentions, such an approach would seem again to vitiate the ability of legislators to check the discretionary power of public administrators and would, at the very least, invite disingenuous and opportunistic interpretations of the text of statutes by administrators.

What this suggests, therefore, is that where a statute was enacted on the basis of clear and shared intentions among lawmakers, public administrators are obliged to take these intentions into account in interpreting the meaning of statutes. However, where, as is often the case, the intentions of lawmakers are ambiguous or in conflict, an intentionalist approach becomes more problematic because administrators are then forced into the position of choosing among competing interpretations of legislative intentions and, in choosing among them, administrators can become the instruments of particular narrow legislative
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factions. Therefore, although administrators cannot and should not ignore the intentions of lawmakers, intentionalism alone, from the founders' perspective, cannot provide an adequate guide to administrative interpretation of statutes.

The Public Values Approach

Given the limitations of the textual and intentionalist approaches, would the founders then embrace a nonoriginalist approach to statutory interpretation based on contemporary public values? Such an approach presumes the existence of some public interest or common good which can be ascertained by consulting contemporary public values. The founders certainly recognized the existence of the common or public good. However, they were also clearly aware of the inevitable diversity of opinions held regarding the public good. According to the founders,

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves (Wills, 1982; 43).

Furthermore, the founders argued that A zeal for different opinions concerning religion, concerning Government and many other points, as well as speculations as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good (p. 44).

The founders recognized that, given the limits of reason, differences in conceptions of the common good, based on conflicting interests and passions, were inevitable and that these differences would, if unchecked, be dangerous to the Republic. They observed that even while "the people commonly intend the common good," we should not "pretend that they always reason right about the means of promoting it" (p. 363). These observations of the founders would suggest that they would not be entirely comfortable with the idea that administrators should interpret statutes on the basis of their own particular conceptions of what are desirable public values. Administrators are, after all, fallible, and it is likely that their own conception of the common good is both imperfect and not necessarily widely shared by the citizens whom they serve. To allow public administrators to interpret statutes would seem to cast administrators as simply another faction in the political process. More seriously, given the potential power inherent in statutory interpretation, it would run the risk, from the founders' perspective, of promoting an administrative despotism.

It must be admitted that a public values approach to statutory interpretation may still be helpful on occasion provided that a genuine broad consensus exists on public values relevant to the statute. To the extent that public administrators interpret statutes in light of an existing broad consensus regarding public values, this is likely to moderate the harmful effects of statutes on minorities. In this respect, a consensus-based approach to interpretation may serve as a useful check on power. However, whether such consensus exists today with respect to many public policy issues is open to serious question. As Aaron Wildavsky (1988; 753) observed, we live in an era of "ideological dissensus within the political spectrum" involving "profound disagreements over equality, democracy, and hence the role of government, disagreements that create conflicting expectations that no conceivable cadre of civil servants can meet." Given such dissensus, interpreting a broad range of statutes in terms of contemporary public values would seem problematic in that administrators are often unlikely to find any set of consensus-based public values to provide dear guidance for them as they seek to apply those statutes.

In light of the limitations of these three approaches to statutory interpretation, what is needed is an approach that recognizes the deficiencies of the text of a statute but also recognizes the dangers inherent in acceding to every intention of legislators or to particularistic visions of the public good held by administrators. However, the type of approach used should, in our view, be consistent with the
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Perspective of the founders. Such an approach, we believe, can be promoted through the use of common-law reasoning.

Common-Law Reasoning in Administrative Interpretation

Common-law reasoning is reasoning by example. Judges, in applying common law, try to find principles or rules from past cases that they can use to guide their own decisions (Levi, 1949). It is important to observe that, in applying common law, judges are not bound necessarily by the actual rules applied in past cases. Rather, each judge has some freedom to determine his or her own rule or rationale for that past decision and to use that rationale to support a decision in a current case. Although common-law reasoning is inevitably tied to the past to a significant extent, it also involves a re-interpretation of the past from the point of view of the present. This affords a dynamic character to common law that allows it to change according to changing social views while still requiring some consistency over time.

As Jay White (1990) has observed, common-law reasoning is quite applicable to administrative decision making. According to White, public administrators, like lawyers and judges, "employ reasoning by example ... to determine what ends should be-sought and what actions should be taken" (p. 138). The relevance of common-law reasoning to administrative decision making seems also to be seen by Norton Long (1993) who argues that "The development and use of a standard of the public interest ... can only be effectively undertaken in the same way as common law, by experience and the cumulative development of standards and by observing the consequences of acting on them" (p. 10).

The use of common-law reasoning as a means of statutory interpretation, when the text of a statute is not clear, entails looking for past precedents for alternative administrative actions. In the case of an old statute, such an approach would give primary weight to how public administrators have acted with respect to the statute in the past. Public administrators would look to the actions of past administrators in regard to the statute, determine some sort of rationale for those actions, and then use that rationale to guide their own actions. In the case of a new statute, the use of reasoning by example to determine actions is obviously more complicated. Even here, however, past administrative actions can be used as a guide to present actions to the extent that such actions are still consistent with the text of the statute. In other words, the text of a new statute may modify the process of reasoning by past example but need not always eliminate it.

This approach to statutory interpretation has a number of virtues in terms of the worldview of the founders. First, consistent with the founders' arguments for checking power, common-law reasoning provides a check on the arbitrary use of discretionary power by public administrators. The use of common-law reasoning in determining administrative actions restrains administrators from using their discretion to reward or penalize individuals or groups of individuals as they please, by requiring that they justify their actions in terms of their past treatment of individuals. A common-law approach can then reduce partiality in the treatment of citizens by administrators.

Second, consistent with the founders' concerns about legislative factions, a common-law reasoning approach to statutory interpretation can limit the ability of legislative factions to abuse or inflict harm on citizens. Where the statute is unclear or ambiguous, a common-law approach encourages the administrator to interpret new statutes in light of past administrative actions. This provides a continuity between past and present administrative actions and moderates the adverse impact of any new legislative policies on citizens. In this way, administrators, in interpreting statutes, can limit the harm done to citizens as a result of innovations or changes in legislative policies.

Third, by tying administrative actions to past precedents, common-law reasoning provides greater stability in the exercise of discretion allowed by the statute. Stability is important because it provides greater predictability in administrative actions for citizens. For the founders, stability was a virtue to be sought in government actions. They wrote of "the mischiefs of that inconstancy and mutability in laws, which form the greatest blemish in the character and genius of our governments" (Wills, 1982; 373). Seeming to echo Locke, the founders argued that it "poisons the blessings of liberty itself" if the laws can be "repealed or revised before they are promulged, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow" (p. 317). Mutable government, furthermore, gives "unreasonable advantage" to the "sagacious" and "damps every useful undertaking; the success and profit of which may depend upon a continuance of existing arrangements" (p. 317). Worst of all, according to the founders, mutable government results in a "diminution of attachment and reverence which steals into the hearts of the people, towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes" (p. 317). The use of common-law reasoning in administrative interpretation of statutes then can be seen as valuable because it reduces the mutability of government and law.
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Finally, a common-law approach to statutory interpretation would seem consistent with the founders’ views on the limits of reason and the importance of experience as a guide to human action. Common-law reasoning enables administrators to combine the knowledge and experience explicitly or implicitly contained in past decisions with their knowledge of current circumstances. As such, it connects the knowledge held by past administrators with the knowledge held by current administrators. Common-law reasoning then enables administrators to cope with inevitable limits on their own knowledge regarding current situations.

A common-law reasoning approach to statutory interpretation therefore, would seem quite consistent with the worldview of the founders. It may be argued that common-law reasoning is deficient in that it can trap administrators into following the bad precedents of the past and prevent them from imposing better interpretations. Given the fallibility of reason, administrators may sometimes develop rules and policies on the basis of common-law reasoning that are perhaps later seen to have undesirable consequences. These rules and policies may constrain future administrators, who may then be forced to pass on bad precedent to their successors and so on. The problem here is similar to that faced in the past with respect to judicial common law where as Hayek (1973) has observed, the law may, as a result of precedent, "develop in very undesirable directions" and may require "correction by legislation" (p. 88). In a similar fashion, administrators, from time to time, may have to develop and make known new administrative rules or policies that correct deficiencies in administrative common law. However, this deficiency does not per se invalidate the common-law reasoning approach to statutory interpretation particularly when compared with the deficiencies of alternative approaches. Furthermore, although the approach may, on occasion, perpetuate bad interpretations of a statute, it may also sometimes prevent administrators from imposing new and even worse interpretations. As a result, to use the words of the founders, "The injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones" (Wills, 1982; 374).

The common-law approach to administrative interpretation of statutes may be seen by some as too conservative or incremental because it ties present interpretations of statutes to past interpretations. However, because the decision maker using a common-law approach has some freedom to determine his or her own rule or rationale for past decisions, a common-law approach to administrative interpretation of statutes does not necessarily rule out creativity or innovation in the interpretation of statutes (Levi, 1949). In this sense, while it must be conceded that a common-law approach may rule out certain innovative interpretations of statutes, it is much more than simply an incremental approach to decision making.

The idea that administrative interpretation of statutes should be guided by common-law precedent seems particularly relevant to cases of administrative rule making and administrative adjudication, given the quasi-legislative aspects of the former activity and the quasi-judicial aspects of the latter. However, its relevance extends more generally to most, if not all, aspects of public administration. Indeed, if White (1990) is correct, administrators already typically use a form of common-law reasoning simply to "make sense of what is going on" (p. 138). What is argued here is that this approach to statutory interpretations is consistent with the perspective of the founders. It should be emphasized that we are not suggesting that administrators should rely solely on common-law reasoning in interpreting statutes. As we have noted, the textual, intentionalist, and public values approaches may provide valuable guidance in certain instances. We do suggest, however, that because of the deficiencies of these approaches in providing a clear guide to administrative actions, common-law reasoning can provide an additional valuable approach to statutory interpretation that is consistent with our constitutional heritage.

Conclusion

Administrative interpretation of legislative statutes is an inevitable and not necessarily undesirable feature of modern government. For laws to be translated into government actions, administrators, like judges, must give meaning to the written words of legislators. As actors within our constitutional system of government, administrators, however, should give meaning to statutes in a manner consistent with our constitutional values and tradition. This means that while they should not, in interpreting a statute, violate its text, neither should they always feel obliged to discover a common, clear, legislative intent, where none exists; nor should they impose arbitrarily their own sense of contemporary public values on the statute, where these are not shared by a consensus of the community. Rather, they should also seek to draw upon their own and others’ past administrative experience and contribute to the development of a common law enveloping and amplifying the statute.

Michael W. Spicer is a professor of urban affairs and public administration at Cleveland State University. He is
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author of The Founders, the Constitution, and Public Administration (Georgetown University Press), coauthor of Managing Local Government (Sage), and has written articles on a variety of topics including public administration, public choice, taxation, educational policy, and health care policy. His current research is on the relevance of social and political philosophy to public administration and policy.

Larry D. Terry teaches in the public administration program at Cleveland State University. His research interests include the role of bureaucratic leaders in governance, the works of Carl J. Friedrich, and statutory interpretation from the perspective of public administrators. He is author of Leadership of Public Bureaucracies: The Administrator as Conservator (Sage). He is currently working on a book tentatively titled, Interpreting Law: Public Administrators and the Creation of Meaning.

Notes

(1.) Even Theodore Lowi (1987; 295), a steadfast anti-delegationist known for his absolutist position (Sargentich, 1987; Gellhorn, 1987), concedes this point. (2.) Public administration theorists often note that broad, vague, and ambiguous statutes make the administration of public bureaucracies more difficult and complex. In this context, complexity is viewed as a serious problem. But as Harlan Wilson (1975) and Gary Wamsley (1990) point out, complexity need not be viewed as a serious problem. Indeed, the complex nature of statutes can be viewed as an asset since such complexity broadens the discretion of administrative officials. (Also see Terry, 1995a). (3.) See Shuck and Elliot (1990) for a discussion of this point. (4.) For example, a rigid interpretation of the separation of powers doctrine suggests that the judiciary must respect the right of administrative agencies to interpret statutes because they are delegated this authority and responsibility by the legislature. Because statutory interpretation involves making policy choices, public administrators are held accountable and must answer to the political branches for their actions. The same cannot be said for judges; they are not elected. The relaxed view suggests that our constitutional form of government, as envisioned by the Founders, requires the sharing of power among the three political branches. Consistent with the notion of blending and sharing power, the legislative branch (at all levels of government) has delegated authority and responsibility to administrative officials for statutory interpretation. This responsibility is clearly reflected in the increased rulemaking authority delegated to administrative agencies by the legislature (Kerwin, 1994; Breyer, 1987). (5.) Many legal scholars (Belcaster, 1992; Scalia, 1989; Starr, 1986; Pierce, 1985) consider Chevron a significant decision for it has drastically changed the interaction of courts and agencies in the realm of statutory interpretation. Even so, there are those who disagree with this assessment (Farina, 1989; Sorenson, 1989; Sunstein, 1987; Breyer, 1986). Despite the objections of many critics, the amount of attention devoted to Chevron by the legal community suggests that it is, to use Justice Scalia’s words, "a highly important decision" (1989; 512). (6.) The Clean Air Act Amendments were enacted in response to the failure of many highly industrialized states to meet federally mandated air-quality standards. In order to ensure compliance, the Congress required the so-called “nonattainment” states to submit revised State Implementation Plans (SIPS) that included a permit program for regulating the “construction and operation of new or modified major stationary sources” of air pollution (42 U.S.C. 7502 [b][6]). The “term stationary source” was defined as “any building, structure, facility, or installation which emits or may emit any air pollutant” (42 U.S.C. 7502 [b][6]). The permit provisions outlined stringent standards that must be met before a permit could be issued. (7.) The EPA used the term “bubble” to describe the plant-wide definition because a facility’s emissions were viewed as coming from a single stack that created an imaginary bubble that encased the entire plant. For an insightful discussion of EPA’s bubble policy, see Landy, Roberts, and Thomas (1994). (8.) For a related discussion of the various approaches of Statutory interpretation with specific reference to agency mission, see Terry (1995b). (9.) See Seiznick’s (1992; chap. 12) discussion of the various approaches of Statutory interpretation. Even so, there are those who disagree with this assessment (Farina, 1989; Sorenson, 1989; Sunstein, 1987; Breyer, 1986). Despite the objections of many critics, the amount of attention devoted to Chevron by the legal community suggests that it is, to use Justice Scalia’s words, “a highly important decision” (1989; 512). (6.) The Clean Air Act Amendments were enacted in response to the failure of many highly industrialized states to meet federally mandated air-quality standards. 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For a related discussion of the various approaches of Statutory interpretation with specific reference to agency mission, see Terry (1995b). (9.) See Seiznick’s (1992; chap. 12) discussion of institutional integrity. He makes a persuasive argument that institutions have distinctively different values and set of unifying principles.

References


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