

## TOPIC EIGHT: Aleinikoff and statutory interpretation

### Legal process

- Accepts that judges enjoy substantial discretion – placed special emphasis on judges engaging in reasoned elaboration
- Judges should not make policy choices but draw on the body of the legal material and its underlying principles
- Looks at difference between what Warren Court was doing morally and criticising how they reached this decision
- Legal process = emphasises the process of reasoning judges employed and thinking about what could lend legitimacy to judicial decision making in the overall political process. It is a purposive approach and looks at how the law is operating
- Vs
- Legal formalism: applies a strict approach to law – straightforward – able to apply based on an objective account – no substantive value: intentionalism or merely plain reading?
- Regarding realists: judges make decisions on subjective values, despite saying they used a literal approach – wanted judges to articulate the policy consequences of the choices they made
- Law being a science is arbitrary

### Public choice:

- Employed economic theory to the behaviour of the state
- Market seen as self-interested agents, make rational decisions, can analyse this decision making as deciding a cost-value on something i.e. people value electric cars, due to high demand
- Price cap on defence for example, no individual would pay for this – thus not enough and this is seen as free loading: if know you will get something for free, will not invest in this – if everybody thinks this, no one will pay
- Thus when it comes to state survival, the state is to make decisions for us i.e. put costs on defence and we go along with it i.e. puts a cost on defence and we go along with it
- In terms of democratic theory, majority does not have as much power – legislature decided by lobby groups, not individual person
- Role of judiciary to analyse what legislation means to fit it into our rule of law – give it a proper meaning to today's society
- Demands of legal system same as market in economic problem – free loaders
- Judiciary to interpret legislation for today's society

### Alexander Aleinikoff

- Two different ways about thinking of statutory interpretation: archaeological and nautical

#### Archaeological

- Meaning of statute is set in stone on the date of enactment – called archaeological as it is outdated
- Seen as in the sense of separation of powers and that the judicature cannot legislate
- A judge is to uncover and describe an already fixed past
- Can be through textualism or intentionalism

- Textualism: version of formalism and is seen as the plain meaning/reading of a text. Upholds what legislature is intended and prevents judicial law making – textualism need not be archaeological
- Textualism is grounded on the positivist claim that only the language adopted by the legislature is law: plain meaning upholds what legislature intended
- intentionalism: locates statutory law beyond or behind the statutory language, unlike textualism
- Posner- judge- new trend away from Aleinikoff
- Hart and Sacks use a weak form of intentionalism and since it is hard to answer what original intention was, extra-textualism is referred to = having a text and adding something to it i.e. looking at drafts, debates etc.
- Hart and Sacks recommend this broader approach – look to broad intention
- Hart and Sacks can be seen as adopting the legal process theory
- Their conception of law and legal institutions is a deeply instrumental one – law is a doing of something, a purposive activity
- The legal system has not settled upon a single theory of statutory interpretation as both textualism and institutionalism co-exist
- Job of the adjudicator is to fit the statute and its application into an ongoing, coherent legal system

### Nautical

- Statute is an ongoing process such as a ship's journey
- Can change i.e. who is steering the interpretation, different orders make us arrive at different destinations
- Aleinikoff's main argument is defending nautical model against originalist model the idea that judges use a special form of reasoning that respects separation of powers
- Few judicial opinions openly adopt a purely originalist strategy
- Statutes ought to be responsive to today's world
- Aleinikoff's argument compared to Dworkin and Eskridge: Dworkin asserts that an interpretation of a statute must justify the story as a whole not just the ending
- Judges are not making new law, simply interpreting law for a modern audience – what law means for people today, not when law was enacted
- Dworkin looks at interpreting a statute that fits with earlier interpretation: Aleinikoff looks at statute interpretation that fits not only earlier interpretations but also structure, purpose and context
- Aleinikoff – Horizontal: everything over time – fits current stance into horizontal story
- Aleinikoff: cannot only rule their exclusion, but also rule that homosexuals are psychopathic – this would be a strange ruling under contemporary society
- Aleinikoff argues law is a meaningful system – need to make sense for us today – criticises archaeological system
- the crux of the argument is that the law is not changing, yet to make sense of it, we need to think of the law as though it was enacted yesterday – cut ties with originalism
- synchronic coherence: comes from Hart and Sacks and the process of law – we don't all think of homosexuals as a psychopathic personality - -involves overturning a precedent when using a present mindedness approach
- Precedence: stare decisis: there are many considerations for making decisions i.e. rule of law – foundation of legal system and includes stability, predictability and consistency – limited effect – looks weak

- Aleinikoff is not a realist – wants to keep it as it is, yet get rid of original intention – wants to put forward idea of idea of present mindedness.
- Aleinikoff wants to change focus on how ordinary statutes interpretation takes place
- Thus the principle roadblock is intentionalism: under a nautical approach, a court may well reach a result following precedent that it would not reach if it were considering the question for the first time
- Judicial activism: a nautical approach is an interpretive model – the task is not to make current policy judgements or to ask how the current legislature would decide the issue today, but to make sense of a statute’s language and structure in light of the current social and legal context: not making policy judgements – not making policy judgements – not judicially active – simply sees legislation based on how a modern person would make sense of it.
- Original meaning is inconsistent with the nautical model
- Yet plain meaning cannot be the adequate theory of interpretation – not interest in searching for a sensible reading of a statute