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## Interpreting Regulations

Kevin M. Stack

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# INTERPRETING REGULATIONS

Kevin M. Stack\*

*The age of statutes has given way to an era of regulations, but our jurisprudence has fallen behind. Despite the centrality of regulations to law, courts have no intelligible approach to regulatory interpretation. The neglect of regulatory interpretation is not only a shortcoming in interpretive theory but also a practical problem for administrative law. Canonical doctrines of administrative law—Chevron, Seminole Rock/Auer, and Accardi—involve interpreting regulations, and yet courts lack a consistent approach.*

*This Article develops a method for interpreting regulations and, more generally, situates regulatory interpretation within debates over legal interpretation. It argues that a purposive approach, not a textualist one, best suits the distinctive legal character of regulations. Administrative law requires agencies to produce detailed explanations of the grounds for their regulations, called statements of basis and purpose. Courts routinely use these statements to assess the validity of regulations. This Article argues that these statements should guide judicial interpretation of regulations as well. By relying on these statements as privileged sources for interpretation, courts not only grant deference to agencies but also treat these statements as creating commitments with respect to a regulation's meaning. This approach justifies a framework for interpreting regulations under Chevron, Seminole Rock/Auer, and Accardi that is consistent with the deferential grounding of these doctrines, and provides more notice to those regulated than does relying on the regulation's text alone.*

*This Article also shows how regulatory purposivism constitutes a new foothold for Henry Hart and Albert Sacks's classic legal process account of purposivism. Hart and Sacks's theory is vulnerable to the criticism that discerning statutory purpose is elusive because statutes do not often include enacted statements of purpose. Regulatory purposivism, however, avoids this concern because statements of basis and purpose offer a consistent and reliable source for discerning a regulation's purpose. From this perspective, the best days for Hart and Sacks's legal process theory may be ahead.*

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## INTRODUCTION

As statutes gradually supplanted the common law during the twentieth century,<sup>1</sup> lawyers and judges devoted increasing attention to methods of statutory interpretation. By the century's end, statutory interpretation had ballooned into one of the most contested issues in judicial practice and scholarly debate.<sup>2</sup> The ascendance of statutory interpretation occurred, how-

1. For a classic expression, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 & 183 n.1 (1982), who notes that "[a]ll agree that modern American law is dominated by statutes."

2. For a concise overview of the debate, see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1761-68 (2010).

ever, as regulations issued by administrative agencies eclipsed statutes as sources of law.<sup>3</sup> With the rise of regulations, lawyers and judges now routinely confront questions of interpretation on this next frontier—that is, the interpretation of regulations themselves.

While all agree that regulations are primary sources of law, strikingly little attention has been devoted to the method of their interpretation. Courts and scholars have labored over legal interpretation generally and the methodology for statutory interpretation in particular. But regulations—specifically, the rules that administrative agencies produce largely through the notice-and-comment rulemaking process<sup>4</sup>—have been orphaned from those debates. Administrative law has done no better in attending to the interpretation of regulations. Administrative law specifies how agencies must make regulations—that is, the procedural requirements for rulemaking.<sup>5</sup> And courts and commentators have devoted tremendous attention to

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3. See CORNELIUS M. KERWIN & SCOTT R. FURLONG, RULEMAKING 13–21 (4th ed. 2011) (documenting, in terms of the number of rules and pages in the Federal Register devoted to federal regulations, a level of production of regulations beginning in the 1970s that far exceeds comparable measures for statutes).

4. By “regulations,” my primary reference is to rules that administrative agencies issue through the notice-and-comment rulemaking process provided in the Administrative Procedure Act (“APA”). See 5 U.S.C. § 553 (2006); *id.* § 551(4) (defining “rules”). These notice-and-comment or “legislative” rules are legally binding, see 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 6.3 (5th ed. 2010), and have long been viewed as the most significant category of agency rule. While my exposition focuses on notice-and-comment rules, my analysis also applies to other types of legally binding administrative rules, including rules produced through the APA’s formal rulemaking procedures, direct final rules, and interim final rules. See Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 16–18 (1995) (describing the use of direct final rules); Anne Joseph O’Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 901, 902 & n.33, 903, 931 (2008) (describing formal rulemaking, direct final rules, and interim final rules, and documenting use of the latter two). These types of rules are issued with a statement of their grounds that is the substantial equivalent to the “statement of basis and purpose” required for notice-and-comment rules. See 5 U.S.C. § 553(c) (statement of basis and purpose required in notice-and-comment rulemaking); 5 U.S.C. § 557(c)(3) (statement of reasons required in formal rulemaking); Levin, *supra*, at 18 (noting that direct final rules are issued with a statement of reasons that is the substantial equivalent to a statement of basis and purpose in a notice-and-comment proceeding); NAT’L ARCHIVES & RECORDS ADMIN., FEDERAL REGISTER DOCUMENT DRAFTING HANDBOOK 2-6 to 2-8 (1998), available at <http://www.archives.gov/federal-register/write/handbook/ddh.pdf> (noting that interim final rules and direct final rules should include preambles, including explanation of the grounds for the rule and the rule’s purposes). I do not address the interpretation of rules that are not legally binding, called nonlegislative rules, such as interpretative rules, guidance documents, and general policy statements. See 5 U.S.C. § 553(b)(3)(A) (providing exception to notice-and-comment requirements for these documents); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (interpreting the Attorney General’s manual on the APA to suggest that interpretative rules do not have the force of law); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (same).

5. See 5 U.S.C. § 553(c) (stating the default requirements for notice-and-comment rulemaking); *id.* §§ 556–557 (stating the default requirements for formal rulemaking).

refining the standards for judging the validity of regulations.<sup>6</sup> But theorizing about how a court—or any other legal actor, for that matter—should interpret regulations has attracted only occasional notice,<sup>7</sup> especially in comparison to the volume of legal work devoted to figuring out how to comply with regulations. We lack a debate over, much less an account of, the basic elements of regulatory interpretation, including “the overall goal of interpretation,”<sup>8</sup> “the admissible sources the interpreter may consider in attempting to achieve that goal,”<sup>9</sup> and the relationships among those sources.

The lack of attention to judicial methods of regulatory interpretation is more than a shortcoming in interpretive theory. It is also a practical problem for administrative law and lawyers who grapple with regulations. Several central doctrines of administrative law depend on courts interpreting regulations. Under *Chevron*, a court must interpret the regulation to judge whether it is permitted under the agency’s authorizing statute,<sup>10</sup> just as a court must interpret a statute to judge its constitutionality. Under *Seminole Rock/Auer*, a

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6. Both the *Chevron* doctrine and arbitrariness review under *State Farm* provide standards for courts reviewing the validity of agency action, including agency regulations. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) (articulating the framework for evaluating the validity of an agency’s interpretation of a statute applicable in review of agency regulations); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (providing the canonical statement of the “arbitrary and capricious” standard applied in review of agency rulemaking); see also 5 U.S.C. § 706 (setting forth standards for judicial review of the validity of agency action).

7. See, e.g., John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 688 n.359 (1996) (“Detailed consideration of the relative legitimacy and utility of particular approaches to [regulatory interpretation] is for another day.”). The most helpful descriptive accounts are more than a generation out of date. Frank C. Newman’s *How Courts Interpret Regulations*, 35 CALIF. L. REV. 509 (1947), bursts with insight and charm but addressed a legal landscape in the early days following the New Deal, one year after the enactment of the APA. Russell L. Weaver’s *Judicial Interpretation of Administrative Regulations: An Overview*, 53 U. CIN. L. REV. 681 (1984), usefully surveys examples of courts adopting a variety of approaches to regulatory interpretation the same year *Chevron* was decided. Among efforts to defend elements of a theory of regulatory interpretation, I have found the most useful to be Manning, *supra*, note (challenging *Seminole Rock* deference and proposing a model of independent judicial evaluation of regulations that would place greater reliance on agencies’ explanatory statements), and Lars Noah’s *Divining Regulatory Intent: The Place for a “Legislative History” of Agency Rules*, 51 HASTINGS L.J. 255, 306–22 (2000) (arguing that courts should pay more attention to original agency intention and suggesting a hierarchy of sources to do so). This Article defends a theory of interpretation that is different from these scholars’ contributions in substance—by offering a purposivist theory—and in scope—by developing a general theory of regulatory interpretation and adapting that theory to fit the demands of current administrative law doctrines. While I point out my departures from their views, I also attend to common ground and ways in which I rely on, and seek to build on, their contributions.

8. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 211 (2000).

9. ESKRIDGE, *supra* note 8 (suggesting a distinction between the goal of statutory interpretation and the admissible sources the interpreter may consider); see also Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 351–53 (2005) (invoking this distinction in a comparison between textualism and intentionalism in statutory interpretation).

10. *Chevron*, 467 U.S. at 842–43.

court must interpret the regulation to determine whether the agency's preferred construction is "plainly erroneous or inconsistent with the regulation."<sup>11</sup> Likewise, under the *Accardi* principle,<sup>12</sup> a court cannot determine whether an agency has failed to comply with its own regulation without interpreting the regulation itself. How a court interprets the regulation at issue can decide the outcome under these doctrines.

Yet courts have not developed a consistent approach to regulatory interpretation under these doctrines or elsewhere. Decisions sometimes rely exclusively on the regulation's text<sup>13</sup> and canons of construction,<sup>14</sup> but in other instances courts invoke aspects of the regulation's procedural history,<sup>15</sup>

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11. *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (internal quotation marks omitted)). This doctrine was traditionally associated with *Seminole Rock*, but since 1997 the Supreme Court and other courts have frequently attributed it to *Auer*, see, e.g., *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2265–66 (2011) (Scalia, J., concurring) (noting that the *Seminole Rock* doctrine has recently been attributed to *Auer*), despite the fact that *Auer* involved a straightforward application of *Seminole Rock*, see *Auer*, 519 U.S. at 461 (relying on *Seminole Rock* with little ado). Because I discuss some decisions rendered before *Auer*, I refer to the doctrine under its longstanding name *Seminole Rock*, but my reference to the *Seminole Rock* doctrine includes its progeny that has been attributed to *Auer*. For emphasis or to accord with the usage of some sources, I occasionally refer to this doctrine as *Seminole Rock/Auer*.

12. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (standing for the proposition that agencies must comply with their own regulations).

13. See, e.g., *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (concluding that the regulatory phrase "change in terms" is "ambiguous as to the question presented" because the "text alone does not permit a more definitive reading"); *Auer*, 519 U.S. at 461 (concluding that the phrase "subject to" bears the meaning the Secretary assigned to it based on this text and two dictionary definitions); *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 763 (D.C. Cir. 2011) (concluding that the phrase "active moiety" and its regulatory definition supported the Food and Drug Administration's grant of five-year exclusivity to a drug because the agency's "interpretation [was] squarely within the language of its regulations"); *Howmet Corp. v. EPA*, 614 F.3d 544, 548–50 (D.C. Cir. 2010) (construing a regulation as ambiguous based on a textual reading of the phrase "purpose for which it was produced").

14. See, e.g., *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 668–69 (2007) (invoking the canon against surplusage in interpretation of regulation); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (invoking the canon that the specific governs the general); *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1087 (D.C. Cir. 2007) (relying on *nosctitur a sociis* as part of determination that the plain meaning of "form work" precludes the agency's interpretation of the regulation); *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 260–61 (D.C. Cir. 2005) ("To read the regulation's use of the term . . . [in this way] would lead to absurd results . . . This Court will not adopt an interpretation of a statute or regulation when such an interpretation would render the particular law meaningless").

15. Compare, e.g., *Gardebring v. Jenkins*, 485 U.S. 415, 428 n.14 (1988) (concluding that a final rule inadvertently dropped the word "recipient" from the phrase "applicant or recipient," which appeared in the notice of proposed rulemaking, and reading "recipient" back into the final rule in view of the Secretary's comments and the "history of these regulations" (emphasis omitted)), with, e.g., *Home Builders*, 551 U.S. at 659 (declining to read "discretionary" broadly to include all agency actions required by statute because the phrase in the final rule "all actions in which there is discretionary Federal involvement or control" replaced the

the court's construction of the authorizing statute's purposes or congressional intent,<sup>16</sup> or the agency's own justification for the regulation,<sup>17</sup> among other tools.<sup>18</sup> Courts not only lack a consistent approach but also generally invoke one interpretive tool or another without stating reasons for doing so—nor manifesting a compunction to consider how similar interpretive issues have been handled in the past.<sup>19</sup> As a result, little law or considered practice on interpretive methodology applicable to regulations is developing. Indeed, it is hard to avoid the impression that the judiciary does not recognize regulatory interpretation as an aspect of judicial practice, like statutory interpretation, that merits independent and systematic consideration.<sup>20</sup>

This Article develops a theory of regulatory interpretation to address this gap in both interpretive theory and judicial practice. Regulations, it argues, are particularly well suited to a purposive method of interpretation. The Article takes as a starting point that a theory of regulatory interpretation must be grounded in the distinctive character of regulations and the institutions that issue them. Regulations are creatures of administrative law, and distinctive features of that legal context suggest a purposive rather than a textualist approach to interpretation. At the most basic level, to issue a regulation, administrative procedure and judicial doctrine require an agency to publish a detailed explanation of the grounds and purposes of the regulation, called a

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proposed phrase “all actions in which there is Federal involvement or control” (emphasis omitted) (internal quotation marks omitted)).

16. See, e.g., *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401–02 (2008) (rejecting an interpretation of a regulation because it would be in “tension with the structure and purposes” of the authorizing statute); *Coke*, 551 U.S. at 169–70 (invoking congressional intent as a basis for resolving a conflict between the literal reading of two regulations); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 108–09 (1995) (O'Connor, J., dissenting) (refusing to defer to the Secretary's interpretation because it would force the Court “to conclude that [the Secretary] has not fulfilled her statutory duty”); *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (“[A] regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements.” (quoting *Trs. of Ind. Univ. v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980) (internal quotation marks omitted))).

17. See, e.g., *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260–65 (2011) (relying on statement of basis and purpose to construe regulation); *United States v. O'Hagan*, 521 U.S. 642, 673–74 (1997) (construing Securities and Exchange Commission (“SEC”) tender offer rule as a means “reasonably designed to prevent” fraudulent trading on material, nonpublic information in the tender offer context based on SEC's justifications of the rule in its statement of basis and purpose “as a means necessary and proper to assure the efficacy” of the Williams Act); *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (“Although the preamble does not ‘control’ the meaning of the regulation, it may serve as a source of evidence concerning contemporaneous agency intent.”); *Sec'y of Labor, Mine Safety & Health Admin. ex rel. Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1438–39 (D.C. Cir. 1989) (relying on statement of basis and purpose to construe regulation).

18. See, e.g., *Amerada Hess Pipeline Corp. v. Fed. Energy Regulatory Comm'n*, 117 F.3d 596, 601 (D.C. Cir. 1997) (relying on industry experts' definition of “generally accepted accounting principles” in approving agency's construction of its regulation).

19. See *infra* Sections I.A–C (providing account of this practice).

20. See generally Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1909–18 (2011) (examining the uncertain legal status of principles of statutory interpretative methodology).



“statement of basis and purpose,”<sup>21</sup> also referred to as a regulatory “preamble.”<sup>22</sup> Congress, in contrast, faces no analogous requirement to include a statement of purpose in its legislation, and enacts such statements in a minority of statutes.<sup>23</sup> Moreover, when courts judge the validity of regulations, their task is not to determine if there is any conceivable basis for upholding them, as courts do in constitutional review of legislation, but rather to ask whether the agency articulated grounds in its statement of basis and purpose on which the regulations may be upheld.<sup>24</sup> As a result of these doctrines, the text of a regulation and its statement of basis and purpose stand in a unique relationship: together, they constitute the act of regulation, an act that is not complete without either element of this couplet. Based on this premise, it does not make sense to interpret the text of a regulation independently from its statement of basis and purpose.

Now consider a further feature of regulations: like other forms of agency action, a regulation must implement a statute’s aims or goals within prescribed means. To be valid, a regulation must be purposive in the sense that it implements, or carries into effect, the authorizing statute.<sup>25</sup> Here again, the contrast with legislation is sharp. Whereas Congress can select its own ends so long as they are constitutionally legitimate,<sup>26</sup> administrative agencies’ aims are prescribed by statute. Based on the premise that regulations must be purposive in this sense of carrying into effect the agency’s statutory aims, it makes sense to read them in light of their purposes. Bringing these observations together suggests the outlines of an interpretive method: that a regulation should be read in light of its purposes, with the regulation’s text

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21. 5 U.S.C. § 553(c) (2006) (“[T]he agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.”).

22. The term “preamble,” while widely used by courts, the government, and commentators, is misleading. As explained below, these statements typically include highly specific justifications of the choices made by the agency, the alternatives considered, responses to comments, the aims the agency sought to achieve, among many other things, not the spare statement of grounds connoted by the term “preamble.” See *infra* text accompanying notes 200–209. I accordingly use the APA’s term “statement[s] of basis and purpose.” See *supra* note 21 and accompanying text.

23. See *infra* note 197 (documenting infrequent use of statements of purpose in recent Congresses).

24. See Kevin M. Stack, *The Constitutional Foundation of Cheney*, 116 YALE L.J. 952, 960–71 (2007) (documenting settled rule of administrative law that courts uphold agency rules only on grounds provided by the agency at the time the agency issued the rules in its explanatory statements, and contrasting this rule of review to that of constitutional law); see also *infra* Section II.B (examining this requirement).

25. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (“The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by government departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes.”); *infra* Section II.B (providing an account of this feature in relation to constitutional requirements of delegation).

26. *United States v. Comstock*, 130 S. Ct. 1949, 1956–57 (2010) (reaffirming a broad formulation of the Necessary and Proper Clause’s grant of power to Congress to pursue any “legitimate end” through means “plainly adapted to that end, which are not prohibited”) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

and the statement of basis and purpose constituting the privileged interpretive sources.

From these premises grounded in the distinctive character of regulations, this Article builds on Henry Hart and Albert Sacks's classic exposition of a purposive theory in *The Legal Process*<sup>27</sup> to develop the interpretive approach. Seeking a foothold in Hart and Sacks's theory might seem curious given that their approach to statutory interpretation has been under attack for decades.<sup>28</sup> Commentators routinely distill Hart and Sacks's view to the prescription that courts interpret statutes under the presumption that the legislature is "made of reasonable persons pursuing reasonable purposes reasonably."<sup>29</sup> Critics view that presumption as too optimistic a premise for a theory of statutory interpretation.<sup>30</sup>

But this shorthand account neglects Hart and Sacks's emphasis on enacted sources for discerning statutory purpose and their justification for doing so. A rarely noticed but critical element of their approach is that the court's first step in attributing purpose to a statute is to "accept[]" any "formally enacted statement of purpose in a statute,"<sup>31</sup> and only if such a statement is unavailable or unavailing should the court engage in the broader inference of purpose for which their theory is so well known.<sup>32</sup> Once the place of enacted statements of purpose in Hart and Sacks's approach comes into view, it also becomes clear how their theory provides a model for pur-

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27. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

28. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 26–28 (1988) (noting that the "three decades of near hegemony" enjoyed by Hart and Sacks's legal process theory ended with public choice and judicial restraint critiques); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23–24, 29–30 (2006) (suggesting that few judges and scholars embrace the strong purposivism associated with Hart and Sacks's views, which were primary subjects of textualist critiques in the 1980s and 1990s); Robert Post, *Theorizing Disagreement: Reconcepting the Relationship Between Law and Politics*, 98 CALIF. L. REV. 1319, 1333–35 (2010) (noting that Hart and Sacks's legal process approach declined after the 1960s); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1398–402 (1996) (describing public choice theory of the legislature, law and economics, and critical legal studies as all contributing to unseating legal process thought from the 1970s through 1990s).

29. HART & SACKS, *supra* note 27, at 1378.

30. Examples of this reading of Hart and Sacks are legion. See, e.g., Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1122, 1148 (2011) (characterizing Hart and Sacks's theory as based on a presumption that the legislature is made of "reasonable persons pursuing reasonable purposes reasonably" and criticizing that presumption as an unrealistically rosy view of the legislature); Post, *supra* note 28, at 1335 & n.91 (arguing that the legal process school was founded on the presumption that legislatures should be regarded as "reasonable persons who use law to attain reasonable ends," and citing Hart and Sacks's "reasonable persons" passage).

31. HART & SACKS, *supra* note 27, at 1377.

32. See *id.* ("In all other situations, the purpose of a statute has in some degree to be inferred.").

positive regulatory interpretation. An agency's statement of basis and purpose, like a statute's enacted statement of purpose, provides an authoritative statement of purposes issued on behalf of the institution, and thus constitutes a privileged interpretive source. From this perspective, Hart and Sacks's theory may hold its greatest promise with regard to legal sources that they largely overlooked—regulations.

So understood, this regulatory purposivism avoids the significant objections textualists have mounted against purpose-based theories of statutory interpretation. With regard to statutes, textualists have argued that purposive theories require a dubious attribution of a single set of purposes to a multimember body, undermine fair notice, and give courts poor guidance in determining the level of generality of legislative compromise.<sup>33</sup> With regard to regulations, the agency itself, not a subgroup of its members, issues statements of basis and purpose; these statements generally provide detailed explanation of the regulation's provisions and its overall purposes. By relying on these statements along with the regulation's text, purpose is not only coherent but also more easily ascertainable for regulations.

Importantly, this purposive approach to regulatory interpretation—reading a regulation's text in light of the purposes set forth in the statement of basis and purpose and as inferred from the text—justifies a consistent framework for courts to use when interpreting regulations under central administrative law doctrines, including *Chevron*, *Seminole Rock/Auer*, and *Accardi*. When faced with regulatory interpretation under each of these doctrines, the purposive approach makes the critical inquiries whether the interpretation is (1) permitted by the regulation's text and (2) consistent with the regulation's purposes, as set forth in the statement of basis and purpose and the regulation's text. This two-prong framework rationalizes the approach to regulatory interpretation under these administrative law doctrines. It also strikes an appealing balance between deference to the agency and fair notice of the meaning of regulations. On the one hand, it constrains the scope of permissible interpretations of the regulation more narrowly than asking only what constitutes a permissible construction of the text, and accordingly provides greater notice of the regulation's meaning. On the other hand, the approach also grants deference to the agency in the strong form of judicial acceptance of the agency's most elaborate disquisition on the regulation's purposes. By treating the grounds the agency invokes to justify and explain its regulation as creating commitments with respect to the regulation's meaning, this method distinguishes between deference to the agency's interpretive judgments—which it grants—and the agency's flexibility to alter its interpretations in ways inconsistent with the grounds it invoked to justify them—which it constrains.

Developing a theory of regulatory interpretation is not only overdue but also particularly timely. The Supreme Court, the president, and agencies are beginning to struggle more explicitly with regulatory interpretation. Justice Scalia, for instance, recently announced his interest in revisiting *Seminole*

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33. See *infra* Section IV.D (addressing textualist challenges).

*Rock* deference based on John Manning's critique of the doctrine.<sup>34</sup> *Seminole Rock* requires a court to accept an agency's interpretation of its own regulation so long as the agency's construction is not "plainly erroneous or inconsistent with the regulation."<sup>35</sup> While the application of *Seminole Rock* requires interpreting regulations, if *Seminole Rock* were to be overruled, the need for a theory of regulatory interpretation would be all the more pressing. More generally, over the past several years, there has been a lively debate about federal agencies' powers to preempt state law.<sup>36</sup> One central question in that debate is the relevance of an agency's own statement of preemption in a regulation's statement of basis and purpose. Agencies' practice of engaging in so-called "preemption by preamble" has attracted notice,<sup>37</sup> culminating in President Obama issuing a memorandum directing agencies not to include preemptive statements in their preambles.<sup>38</sup> The debate about the import of agency statements on preemption in regulatory preambles has not, however, been grounded in a general approach to regulatory interpretation.<sup>39</sup> Given the prominence of regulations, these issues are leading indications of an unresolved and fundamental issue, not isolated events.

The Article proceeds in five parts. Part I motivates the inquiry by explaining how central doctrines in administrative law—*Chevron*, *Seminole*

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34. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (stating that he would be receptive to reconsidering *Auer* deference and noting that defects of *Auer* are fully explored in Manning, *supra* note 7); *see also* *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (noting that *Auer* deference can "frustrat[e] the notice and predictability purposes of rulemaking," citing Justice Scalia's concurring opinion in *Talk America*).

35. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

36. *See, e.g.*, Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. REV. 695, 699 (2008) (arguing that courts should apply a presumption against agency decision to preempt); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. REV. 727, 767 (2008) (suggesting that a super-strong clear statement rule is required for agencies to preempt on their own authority); Ernest A. Young, *Executive Preemption*, 102 Nw. U. L. REV. 869, 894–900 (2008) (arguing for restricting agencies' power to issue regulations that preempt state law and considering several possible clear statement canons).

37. *Compare* Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2179 (2009) [hereinafter Sharkey, *Federalism Accountability*] (arguing that courts can force agencies to engage in preemption decisions by conditioning deference on whether preemption statements have gone through notice-and-comment procedures), *and* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 256–57 (2007) (suggesting that courts could incentivize agencies to engage with preemption issues by requiring notice-and-comment periods for preemption statements), *with* Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2103–04 (2008) (arguing enforcement of explanation requirements in administrative law provides practical way of enforcing federalism concerns raised by administrative preemption).

38. Memorandum on Preemption, 2009 DAILY COMP. PRES. DOC. 384 (May 20, 2009).

39. *See, e.g.*, Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 496 (2008) (defending agency reference model for courts deciding whether federal regulatory regimes preempt state law, but not distinguishing between agency preemption statements in amicus briefs and preambles for the purposes of making this determination).

*Rock*, and *Accardi*—require courts to interpret regulations, yet courts lack a consistent approach. The central body of the Article, encompassing Parts II, III, and IV, articulates and defends a purposive theory of regulatory interpretation. Part II argues that well-established aspects of American administrative law suggest a purposive approach, Part III provides an account of Hart and Sacks's legal process purposivism, and Part IV shows how Hart and Sacks's theory provides a framework for purposive regulatory interpretation. Part IV also argues that this approach provides an attractive conception of deference, one that induces agency deliberation<sup>40</sup> and responds to textualist critics of purposivism as a theory of statutory interpretation. Part V argues that this purposive technique provides a framework that meets the demands for regulatory interpretation under *Chevron*, *Seminole Rock*, and *Accardi*, and addresses scholarly concerns about the operation of these doctrines. Part V also responds to practical objections that this approach unduly constrains the agency's flexibility and creates unmanageable incentives for manipulation of the content of statements of basis and purpose. In these ways, the Article aims to give jurisprudential consideration to the interpretation of regulations in keeping with their prominent place in our law.

#### I. THE INTERPRETATION OF REGULATIONS: AN OVERVIEW OF THE PROBLEM

In the 1960s and 1970s, agencies increasingly turned to rulemaking to implement their statutory powers.<sup>41</sup> Agency reliance on rulemaking has persisted. Today, the majority of agencies issue their most significant policies through notice-and-comment rulemaking.<sup>42</sup> With the rise of rulemaking, it is hard to deny a naive expectation, perhaps a reflection of a lingering nostalgia for a mechanical jurisprudence, that agency regulations would resolve legal ambiguities, not create them. To be sure, many regulations clarify legal obligations. But regulations are not unique among legal sources for their lack of ambiguity or the obviousness of their interpretation. At times, regulations replicate statutory ambiguities;<sup>43</sup> in other instances, they create

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40. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES 265 (2010) (arguing that judicial review of agency action should induce deliberation).

41. See KERWIN & FURLONG, *supra* note 3, at 13–15 (documenting rise in production of federal rules from 1960s through 1970s); Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1139, 1147 (2001) (summarizing American Bar Association statistics showing that in 1960 agencies published, on average, 41 notices of proposed rulemaking per month, whereas in 1972 the average jumped to 142 per month, and by 1974 it rose to over 190 per month, where it remained for the rest of the decade).

42. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 5 (2008) (suggesting that notice-and-comment rulemaking is central to the definition and implementation of policy).

43. See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) (concluding that, because the regulation repeated critical statutory phrases, the question for the Court was the meaning of the statutes', not the regulation's, terms).

their own.<sup>44</sup> Changed and unforeseen circumstances also unsettle the interpretation of regulations that had appeared to be clear.<sup>45</sup>

Agencies' profuse production of regulations has multiplied the occasions on which courts confront issues of regulatory interpretation. As I explain in this Part, several doctrines of administrative law implicate regulatory interpretation. Courts must interpret a regulation to evaluate its validity under the agency's authorizing statute (*Chevron*), to determine whether to accept an agency's construction of its own regulation (*Seminole Rock*), and to assess an agency's compliance with its own regulation (*Accardi*). Courts, however, have not developed a consistent approach to regulatory interpretation under these doctrines or elsewhere.

This conclusion parallels Hart and Sacks's famous observation about statutory interpretation: "The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."<sup>46</sup> Regulatory interpretation, however, raises a further worry. As I illustrate below, courts typically devote scant attention to justifying their approach to regulatory interpretation in relation to prior decisions and, as a result, little law or consistent practice has emerged.

#### A. *Chevron's Silence*

The *Chevron* doctrine provides a good starting point because it so clearly illustrates how little attention has been devoted to regulatory interpretation. When a party challenges an agency's regulation as violating the agency's authorizing statute, *Chevron* typically provides the framework of review.<sup>47</sup> To review the validity of a regulation under *Chevron*,<sup>48</sup> the court must interpret the regulation. But the *Chevron* doctrine provides no guidance on how a court is to do so.

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44. See, e.g., *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (Thomas, J., dissenting) ("[T]he Secretary has merely replaced statutory ambiguity with regulatory ambiguity."); *Howmet Corp. v. EPA*, 614 F.3d 544, 549–50 (D.C. Cir. 2010) (concluding that the regulation's term "spent material" is ambiguous); *Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1098 (D.C. Cir. 2007) (concluding that the term "removal" in regulation is ambiguous).

45. See, e.g., *MarkWest Mich. Pipeline Co. v. FERC*, 646 F.3d 30, 37 (D.C. Cir. 2011) (concluding that the agency was "[c]onfronted with a scenario that its regulations did not anticipate").

46. HART & SACKS, *supra* note 27, at 1169. Interestingly, a peer of Hart and Sacks's, Professor Frank Newman, reached a very similar characterization of regulatory interpretation by courts in 1947. Newman wrote, "An even more significant product of the failure to use interpretive precedents is a hodgepodge of theories, rules, and cautions, all pertaining to regulations, that can now be exploited by opposing lawyers in almost every dispute." Newman, *supra* note 7, at 525.

47. Recall that by regulations, I primarily refer to rules that are the products of notice-and-comment rulemaking. Under *United States v. Mead Corp.*, 533 U.S. 218, 229–30 (2001), notice-and-comment rules qualify for *Chevron* deference. See also, e.g., *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007).

48. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

To appreciate how application of *Chevron* requires regulatory interpretation, consider the elements of the *Chevron* inquiry. Doctrinally, courts typically frame this inquiry in two steps. In *Chevron*'s first step, the court asks whether the statute clearly addresses "the precise question at issue."<sup>49</sup> In *Chevron*'s second step, the court asks whether the agency's action is "based on a permissible construction of the statute."<sup>50</sup> Commentators have long argued that step one and step two involve the same questions of statutory interpretation.<sup>51</sup> Regardless of whether the *Chevron* doctrine is viewed as having two interpretive steps, as represented in long-standing judicial doctrine, or as a single inquiry into statutory permissibility, the point for our purposes is the same: the reviewing court cannot determine whether an agency has based its regulation on a permissible construction of the statute without interpreting the regulation. An understanding of the regulation—an interpretation of its meaning and application—is required to sensibly ask whether the statute permits the regulation.

An analogy to constitutional review of federal legislation helps to highlight this fundamental point. When a court reviews the constitutionality of federal legislation, it is commonplace that the court must interpret not only the Constitution but also the statute.<sup>52</sup> Likewise, to judge the validity of a

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49. *Id.* at 842.

50. *Id.* at 843.

51. *See, e.g.*, Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT. L. REV. 1253, 1260 (1997) ("The Court initially framed step two as a question of whether the agency's interpretation is 'permissible,' but that phrasing was circular: obviously an interpretation that is not permitted is prohibited." (footnote omitted)); Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 599 (2009) ("The single question is whether the agency's construction is permissible as a matter of statutory interpretation; the two *Chevron* steps both ask this question, just in different ways. As a result, the two steps are mutually convertible."). On this view, *Chevron*'s second step should be abandoned or treated as equivalent to arbitrary and capricious review. *See* Levin, *supra*, at 1296 (concluding that step two should be conceived, as many courts treat it, as arbitrariness review); M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in A GUIDE TO JUDICIAL AND POLITICAL REVIEW OF FEDERAL AGENCIES 85, 101 (John F. Duffy & Michael Herz eds., 2005) (arguing that there are not good reasons to view arbitrariness review and *Chevron* step two as distinct). *But see* Kenneth A. Bamberger & Peter L. Strauss, *Chevron's Two Steps*, 95 VA. L. REV. 611, 623–24 (2009) (arguing that step two analysis includes consideration of an agency's use of legal materials, such as legislative history and canons of construction, that do not fit comfortably in traditional hard-look review). This past term, the Supreme Court tersely endorsed the convergence of step two analysis and arbitrariness review in a case at issue. *See* *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (stating that analysis under *Chevron* step two and under arbitrary and capricious review "would be the same, because under *Chevron* step two, we ask whether an agency interpretation is 'arbitrary or capricious in substance.'").

52. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (engaging in detailed statutory interpretation in order to assess facial constitutionality of an act); *Bellotti v. Baird*, 428 U.S. 132, 148 (1976) ("[I]n the absence of an authoritative construction [of the statute], it is impossible to define precisely the constitutional question presented."). Indeed, in the context of constitutional review, well-established judicial doctrines explicitly mediate between constitutional norms and statutory interpretation. The canon of constitutional avoidance, for instance, prompts a court to avoid an interpretation of a statute that would render the statute unconstitutional, or even to

regulation under an authorizing statute, the court must interpret not only the statute but also the regulation. In both contexts, judging the consistency of the lower-order law with the higher-order law requires construing the lower-order law.

The *Chevron* doctrine, however, is silent on how a court should interpret a regulation. The familiar guidance the *Chevron* doctrine gives on how a court should determine what counts as a permissible reading of the statute—consulting the “traditional tools of statutory construction”<sup>53</sup>—has no analog with regard to how a court should interpret a regulation. Moreover, in the sophisticated literature on how a court should approach statutory interpretation under *Chevron*,<sup>54</sup> the question of how a regulation is interpreted has gone virtually unnoticed.

The dearth of doctrine addressing regulatory interpretation under *Chevron* can be partially explained by the well-established doctrine, attributed to *Bowles v. Seminole Rock & Sand Co.*<sup>55</sup> and *Auer v. Robbins*,<sup>56</sup> that an agency’s construction of its own regulation is “controlling unless ‘plainly erroneous or inconsistent with the regulation.’”<sup>57</sup> Agencies frequently offer

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raise a serious question about its constitutionality. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2929–30 & n.40 (2010). The canon is an explicit acknowledgement of a back-and-forth mediation between statutory interpretation and the constitutional norms. *See Ernest A. Young, The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1387 (2010) (arguing that constitutional avoidance “counsel[s] courts to interpret statutes in light of constitutional values” and therefore helps to “integrate [them] into the broader constitutional structure). By contrast, the *Chevron* doctrine includes no express doctrine of *statutory avoidance* directing courts to interpret ambiguous regulations to avoid a construction that would invalidate them. This gap is all the more notable because both judicial review of the constitutionality of legislation and *Chevron* review can be viewed as reflecting a presumption of the validity of the lower-level law, whether legislation or administrative action. *See Nicholas S. Zeppos, Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 299 (1993) (noting a parallel between Thayer’s presumption of constitutionality and *Chevron*’s approach to judicial review under the Constitution and a statute respectively).

53. *Chevron*, 467 U.S. at 843 n.9; *see also Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (“[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” (quoting *Davis v. Mich. Dep’t of the Treasury*, 489 U.S. 803, 809 (1989)) (internal quotation marks omitted)).

54. *See, e.g., Lisa Schultz Bressman, Chevron’s Mistake*, 58 DUKE L.J. 549, 559–66 (2009) (arguing that functional factors regarding statutory subject matter should trigger interpretive deference, rather than an exclusive focus on statutory text); Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 ADMIN. L.J. AM. U. 187, 207 (1992) (arguing that step two is triggered only when Congress meant to express nothing, not when Congress meant to express something but did so ambiguously); Stephenson & Vermeule, *supra* note 51, at 600–01 (arguing that the inquiry into the permissibility of the agency’s statutory constructions are the same at step one and step two); Peter L. Strauss, “Deference” Is Too Confusing—Let’s Call Them “Chevron Space” and “Skidmore Weight”, 112 COLUM. L. REV. 1143 (proposing that *Chevron*’s first step of assessing whether the agency acts within its delegated area of discretion, or its “*Chevron* space,” is determined by a judge according the agency’s statutory construction “*Skidmore* weight”).

55. 325 U.S. 410 (1945).

56. 519 U.S. 452 (1997).

57. *Auer*, 519 U.S. at 461.



interpretations of their regulations, so the question of regulatory interpretation under *Chevron* often turns on whether the agency's interpretation is permissible under *Seminole Rock*,<sup>58</sup> a doctrine I address in the next Section.

But many evaluations of regulations under *Chevron* do not depend on the application of *Seminole Rock*, whether because an agency interpretation is not available or for some other reason.<sup>59</sup> In those cases, the reviewing court must still adopt an interpretation of the regulation to assess the regulation's permissibility under the authorizing statute. The moment of regulatory interpretation can pass so swiftly as to be barely discernible. Even when the interpretation of a regulation receives explicit attention, an uncanny detachment characterizes the interpretive exercise: courts rely on principles of statutory interpretation without pausing or commenting on the justification for applying those principles to regulations and without situating their approach in relation to other decisions in which courts have construed regulations.

The Supreme Court's 2007 decision in *National Association of Home Builders v. Defenders of Wildlife*<sup>60</sup> provides a good illustration, both because the Court devoted admirable attention to regulatory interpretation and because it did so in complete isolation from any precedent on regulatory interpretation, as if the problem were *sui generis*. In *Home Builders*, the Court had to resolve whether provisions of the Endangered Species Act ("ESA") required the Environmental Protection Agency ("EPA") to consult with the Secretary of Commerce or Interior when the EPA transferred permitting authority over discharges into navigable waters under the Clean Water Act ("CWA") to state authorities.<sup>61</sup> Concluding that the ESA was ambiguous on the point, the Court invoked *Chevron* to guide its review of an agency regulation issued under the ESA stating that the ESA's consultation

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58. See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 277–78 (2009) (“[Under *Chevron*] [w]e look first to the agency regulations, which are entitled to deference if they resolve the ambiguity in a reasonable manner. But [because] the regulations, too, are ambiguous . . . we next turn to the agencies’ subsequent interpretation of those regulations [under *Auer*].” (citations omitted)); *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 387–91 (2003) (resolving *Chevron* challenge by accepting agency’s interpretation of its own regulations under *Auer*). For an argument taking the further step that *Seminole Rock* deference is necessary to *Chevron*’s allocation of interpretive authority to agencies, see Scott H. Angstreich, *Shoring Up Chevron: A Defense of Seminole Rock Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 131–38 (2000).

59. William Eskridge and Lauren Baer’s comprehensive study of deference to agencies’ statutory interpretations suggests that the Supreme Court frequently fails to invoke *Seminole Rock* deference even when an agency’s construction of its own regulation is at issue. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1103–04 (2008) (documenting that *Seminole Rock* is “episodically invoked,” and indeed only in 7.1 percent of eligible cases). Eskridge and Baer’s preferred explanation is consistent with the one in the text above, namely that the court uses other deference options, including *Chevron* deference. See *id.* at 1104 (noting that *Chevron* deference is involved in 20 percent of eligible *Seminole Rock* cases).

60. 551 U.S. 644 (2007).

61. *Home Builders*, 551 U.S. at 650–52.

requirements applied to “all actions in which there is discretionary Federal involvement or control.”<sup>62</sup> The Court then faced two competing constructions of this regulation. Under one construction, the regulation restricted the scope of the ESA’s consultation requirements to instances of discretionary, as opposed to mandatory, federal involvement. Under the other, the regulation merely clarified that discretionary actions were included within the scope of the ESA’s consultation provisions.<sup>63</sup>

The Court adopted the latter interpretation based on the regulation’s text, its procedural history, and the canon against surplusage. As to the regulation’s text, the Court cited a classic administrative law decision, *Citizens to Preserve Overton Park v. Volpe*,<sup>64</sup> and the *Random House Dictionary* to support its interpretation of the word “discretionary.”<sup>65</sup> The alternative construction, the Court reasoned, would have rendered the regulation’s reference to “discretionary” federal involvement “mere surplusage.”<sup>66</sup> The Court cited one of its own decisions applying the presumption against treating statutory terms as surplusage.<sup>67</sup> The regulation’s procedural history, the Court elaborated, also supported this construction: whereas the agency’s proposed version of the regulations had applied the ESA’s obligations to “all actions in which there is [f]ederal involvement or control,” the final regulations changed that language to “all actions in which there is discretionary [f]ederal involvement or control.”<sup>68</sup> All told, the alternative construction of the regulation “would rob the word ‘discretionary’ of any effect, and substitute the earlier, proposed version of the regulation for the text that was actually adopted.”<sup>69</sup>

At one level, the Court’s approach to regulatory interpretation in *Home Builders* has a lot to recommend it. The Court self-consciously confronted two alternative constructions of the regulation raised in its *Chevron* inquiry, and deployed a variety of conventional tools of interpretation. At another level, however, the Court’s analysis reflected no sense of obligation to consider how it had previously handled similar issues of regulatory interpretation. In an age in which federal agencies issue more binding rules of conduct than Congress<sup>70</sup> and a significant portion of the Court’s own docket involves regulatory issues,<sup>71</sup> the Court did not cite a single prior deci-

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62. *Id.* at 665 (quoting 50 C.F.R. § 402.03 (2006)).

63. *Id.* at 668–669.

64. 401 U.S. 402, 415–16 (1971).

65. *Home Builders*, 551 U.S. at 668.

66. *Id.* at 668–69.

67. *Id.* at 669 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

68. *Id.* (citing 48 Fed. Reg. 29,999 (1983) and 51 Fed. Reg. 19,958 (1986) respectively).

69. *Id.*

70. *See supra* note 3.

71. *See The Supreme Court, 2009 Term—The Statistics*, 124 HARV. L. REV. 411, 422 tbl.III (2010) (noting that in the 2009 term, six of forty-nine civil cases from lower federal courts in which the Supreme Court issued a full opinion on certiorari involved review of adminis-

sion on regulatory interpretation as authority for its application of the particular interpretive tools it selected.

*Home Builders* is not an outlier; in the Supreme Court's crowded *Chevron* docket, it is difficult to find occasions in which the Court situates its interpretation of a regulation under *Chevron* with regard to any prior instances of regulatory interpretation.<sup>72</sup> For regulatory interpretation under *Chevron*, each day is a new day. But consistent application of *Chevron* to regulations requires more; it requires an account of how the reviewing court should interpret regulations for the purpose of judging their validity.

### B. Seminole Rock's Inadequacy

The most obvious place to turn for assistance with regulatory interpretation is the long-standing doctrine that an agency's construction of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"<sup>73</sup> This doctrine—referred to as *Seminole Rock* deference and *Auer* deference—does not obviate the need for regulatory interpretation any more than *Chevron* obviates the need for statutory interpretation.

A comparison to *Chevron* helps illustrate this point. *Chevron* obviously requires the reviewing court to construe the statute under which the agency's action is challenged to determine whether the agency's construction of the statute is permissible. An analogous point applies under *Seminole Rock*: the court must construe the regulation to determine whether the agency's interpretation of it is permissible.<sup>74</sup>

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trative actions as principal nonconstitutional issues); *The Supreme Court, 2008 Term—The Statistics*, 123 HARV. L. REV. 382, 393 tbl.III (2009) (in the 2008 term, eight of forty-two); *The Supreme Court, 2007 Term—The Statistics*, 122 HARV. L. REV. 516, 527 tbl.III (2008) (in the 2007 term, three of thirty-eight).

72. See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 278–91 (2009) (upholding an agency's interpretation of its own regulations as reasonable under *Chevron* and *Auer* without providing a justification for its method or citing to precedent); *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165–72 (2007) (upholding an agency's interpretation of regulation under *Chevron* and *Auer* without reliance on any decision construing a regulation to support its analysis).

73. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))).

74. The same confusion as to whether *Chevron* has two interpretive steps, *supra* note 51, has come to roost in the *Seminole Rock/Auer* doctrine. Neither *Seminole Rock* nor *Auer* includes ambiguity as a preliminary doctrinal inquiry. See *Auer*, 519 U.S. at 461; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). In *Christensen v. Harris County*, 529 U.S. 576 (2000), however, the Court articulated the *Auer* inquiry in terms of ambiguity: "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Id.* at 588; see also *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006) (invoking same principle). In *Chase Bank USA, N.A. v. McCoy*, the Court rationalized these strains:

[O]ur statement in *Christensen* that "deference is warranted only when the language of the regulation is ambiguous," is perfectly consonant with *Auer* itself; if the text of a regulation is unambiguous, a conflicting agency interpretation advanced in an amicus brief will necessarily be "plainly erroneous or inconsistent with the regulation" in question.

The *Seminole Rock* and *Auer* line of authority provides some guidance on how a court is to judge whether an agency's interpretation of a regulation is permissible, but judicial practice has not been consistent. In *Seminole Rock*, the Court advised that its "tools . . . are *the plain words of the regulation* and any relevant interpretations of the Administrator."<sup>75</sup> A strain of precedent relies primarily on the plain meaning of the regulation. In *Auer*, for instance, the Court upheld the Secretary of Labor's interpretation of his own regulations based primarily on dictionary definitions of the critical regulatory phrase ("subject to").<sup>76</sup> Likewise, in *Christensen v. Harris County*, on the basis of the text alone, the Court rejected an agency's construction of a regulation.<sup>77</sup> The Court, however, has not offered a justification for this particular emphasis on plain meaning, and courts invoke a much wider range of interpretive tools in determining whether an agency's construction is permissible. The Supreme Court has relied on "the Secretary's intent at the time of the regulation's promulgation,"<sup>78</sup> canons of statutory construction,<sup>79</sup> statutory language and purpose,<sup>80</sup> the consistency of the agency's interpretation over time,<sup>81</sup> the regu-

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131 S. Ct. 871, 882 (2011) (citations omitted).

75. *Seminole Rock*, 325 U.S. at 414 (emphasis added).

76. *Auer*, 519 U.S. at 461 (citing definitions from two dictionaries to support conclusion that the phrase "comfortably bears the meaning the Secretary assigns"); *see also, e.g.*, *Sec'y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (looking to ordinary usage and the *Merriam-Webster Dictionary* definition to determine the meaning of "supervisory").

77. 529 U.S. 576, 586–88 (2000) ("The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency . . . to create *de facto* a new regulation."); *see also Chase Bank*, 131 S. Ct. at 878–80 (finding the regulation ambiguous based on text alone); *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 514 (1994) ("The regulation provides, in unambiguous terms, that the 'costs' of these educational activities will not be reimbursed when they are the result of a 'redistribution,' or shift, of costs from an 'educational' facility to a 'patient care' facility . . .").

78. *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *see also Thomas Jefferson Univ.*, 512 U.S. at 512.

79. *E.g.*, *Long Is. Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) (invoking presumption that "the specific governs the general" and citing statutory authorities in which specific statutory preemption provisions trumped general savings provisions, and specific statutory sentencing provisions trumped general ones).

80. *See, e.g.*, *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 401–02 (2008) (rejecting an interpretation of a regulation because it would be in tension with structure and purposes of authorizing statute); *Coke*, 551 U.S. at 169–70 (invoking congressional intent as a basis for resolving conflict between literal readings of two regulations); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 108–09 (1995) (O'Connor, J., dissenting) (refusing to defer to Secretary's interpretation because it would force the Court "to conclude that [the Secretary] has not fulfilled her statutory duty"); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170–73 (rejecting agency's interpretation on grounds that it defied statutory language and purposes of statutory provisions).

81. *See, e.g.*, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 699 (1991) (deferring to the Secretary's interpretation, as the same "position has been faithfully advanced by each Secretary since the regulations were promulgated"); *Mullins Coal Co. v. Dir., Office of Workers' Comp. Programs*, 484 U.S. 135, 159 (1987) (granting deference and noting that the agency's interpretation "has been, with one exception, consistently maintained through Board

lation's own procedural history,<sup>82</sup> and the consistency with the agency's statement of basis and purpose.<sup>83</sup>

The Supreme Court's recent decision in *Talk America, Inc. v. Michigan Bell Telephone Co.*<sup>84</sup> illustrates some of this methodological variety. In contrast to the emphasis on the plain meaning of a regulation's text, the Court in *Talk America* resolved decisive issues of regulatory interpretation with reference to the explanatory preambles to Federal Communication Commission ("FCC") regulations.<sup>85</sup> In *Talk America*, the Court deferred under *Seminole Rock/Auer* to the FCC's view, set forth in its amicus brief that, under the FCC's regulations, incumbent communications carriers had a duty to provide access to certain facilities ("entrance facilities") for purposes of interconnection at cost-based rates<sup>86</sup> even though incumbent carriers do not have a duty to provide "unbundled" access to those same entrance facilities at cost-based rates.<sup>87</sup>

AT&T argued that the FCC's interpretation was inconsistent with its regulations and therefore not entitled to deference under *Seminole Rock/Auer*.<sup>88</sup> Rejecting AT&T's position,<sup>89</sup> the Court relied extensively on the FCC's explanations in its regulatory preambles as to the scope of the FCC's prior

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decisions"); *Udall v. Tallman*, 380 U.S. 1, 4 (1965) (deferring to the agency and noting that "[s]ince their promulgation, the Secretary has consistently construed both orders not to bar oil and gas leases").

82. See, e.g., *Gardebring*, 485 U.S. at 430 n.14 (drawing inference that term "recipient" includes first-time "applicants" for benefits despite the change in language from "applicant or recipient" in proposed regulation to "applicant" in final regulation on ground that omission of "recipient" was "inadvertently omitted" (emphasis omitted)).

83. See, e.g., *Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261, 287-91 (2009) (invoking agency's statement of basis and purpose to reject claimed inconsistency between agency's actions with its regulations); *infra* text accompanying notes 84-96 (discussing *Talk America*).

84. 131 S. Ct. 2254 (2011).

85. *Talk Am.*, 131 S. Ct. 2254, 2262 (2011). The FCC frequently issues its final rules and their regulatory preambles under the caption of "order" or "report and order." These orders include the FCC's statement of basis and purpose, the final text of the regulations as well as the other elements required for notice-and-comment rulemaking. See, e.g., *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005) [hereinafter *Triennial Review Remand Order*] (includes statement of basis and purpose, text of regulation, and other requirements of notice-and-comment rulemaking); see also *Rulemaking*, FED. COMMUNICATIONS COMM'N, <http://www.fcc.gov/encyclopedia/rulemaking> (last visited Jan. 2, 2012) (noting that the FCC issues and amends rules under the caption "Report and Order").

86. *Talk Am.*, 131 S. Ct. at 2261 (referring to 47 C.F.R. § 51.321(a) (2010)).

87. *Id.* at 2258, 2262 (referring to 47 C.F.R. § 51.319(e)(2)(i) (2005)).

88. Brief for Respondent at 36-38, *Talk Am.*, 131 S. Ct. 2254 (Nos. 10-313 & 10-329) (arguing *Auer* deference is not warranted because including entrance facilities as a method of obtaining interconnection is inconsistent with the regulations and would amount to amendment of them). AT&T had argued that the FCC's regulations that eliminated incumbents' obligations to provide unbundled access to entrance facilities at cost-based rates also eliminated incumbents' obligations to provide access to those same facilities for purposes of interconnection at those rates. *Id.* at 41-48.

89. See *Talk Am.*, 131 S. Ct. at 2262.

regulations.<sup>90</sup> The Court noted that the FCC had “emphasized” in the explanatory preambles of two prior regulations that its unbundling decision “‘d[id] not alter’ the obligation on incumbent [carriers] . . . to provide facilities for interconnection purposes.”<sup>91</sup> Moreover, the Court found that the distinction made in these FCC explanatory materials—between access to entrance facilities for interconnection purposes and unbundled access to those facilities—though unstated in the text of the regulation, “[was] neither unusual nor ambiguous.”<sup>92</sup> For the Court in *Talk America*, judging the consistency of the FCC’s interpretation of its regulations depended on the consistency of its position with the agency’s prior explanations in its statements of basis and purpose.<sup>93</sup> While the Court engaged in textual analysis of the regulations,<sup>94</sup> it unmistakably relied on the FCC’s regulatory preambles to determine whether the agency was entitled to deference under *Seminole Rock/Auer*.<sup>95</sup>

*Talk America*’s reliance on regulatory preambles for the purpose of construing FCC regulations is not itself a problem; on the contrary, one of the central practical aims of this Article is to defend that approach to regulatory interpretation. But *Talk America* illustrates the lack of attention paid to interpretive method under *Seminole Rock*. The Court in *Talk America* did not pause to justify its reliance on the FCC’s regulatory preambles, or distinguish the case from prior decisions resolving *Seminole Rock* determinations on the basis of the regulatory text alone. In the increasing stream of *Seminole Rock* decisions, one strains to discern any greater attention to regulatory interpretation than is apparent under the *Chevron* doctrine.<sup>96</sup>

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90. *Id.* at 2261–63.

91. *Id.* at 2264 (quoting Triennial Review Remand Order, 20 FCC Rcd. 2533, 2611 (2005) and Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers, 18 FCC Rcd. 16,978, 17,204 (2003) [hereinafter Triennial Review Order]). The Triennial Review Remand Order states, “We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) . . . .” 20 FCC Rcd. at 2611. The Triennial Review Order states that “to the extent that requesting carriers need facilities in order to ‘interconnect[] with the [incumbent LEC’s] network,’ section 251(c)(2) . . . expressly provides for this and we do not alter the Commission’s interpretation of this obligation.” 18 FCC Rcd. at 17,204 (alteration in original).

92. *Talk Am.*, 131 S. Ct. at 2264–65.

93. *Id.* at 2265 (“We see no conflict between the *Triennial Review* orders and the Commission’s views expressed here.”).

94. *See id.* at 2262–63 (rejecting AT&T’s argument that exclusion of transport facilities from definition of interconnection, *see* 47 C.F.R. § 51.5 (2011), excludes obligations to provide access to entrance facilities based on inference from regulatory and statutory text).

95. The Court noted, for instance, that the FCC had explained that incumbent local exchange carriers “would be required to ‘adapt their facilities to interconnection’ and to ‘accept the novel use of, and modification to, [their] network facilities.’” *Talk Am.*, 131 S. Ct. at 2261–62 (alteration in original) (quoting *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499, 15,605 (1996)).

96. *See supra* notes 78–83 (citing decisions interpreting regulations with little or no reference to other decisions doing the same). One notable exception is agency preemption, where the Court has devoted energy to citing and distinguishing its own treatment of an issue.

C. *Accardi's Complexity*

The story is much the same under the established doctrine of *United States ex rel. Accardi v. Shaughnessy*,<sup>97</sup> frequently called the *Accardi* principle.<sup>98</sup> The *Accardi* principle requires an agency to follow its own regulations.<sup>99</sup> Application of the *Accardi* principle obviously requires the court to interpret the agency regulations at issue. As Thomas Merrill notes, based on his extensive survey of *Accardi* decisions in the D.C. Circuit, one of the recurring issues in *Accardi* litigation is “the need to determine the meaning of an agency regulation.”<sup>100</sup>

Merrill’s study showed that *Accardi* decisions offer no particular insight or consistent approach to regulatory interpretation. Like decisions under *Chevron* and *Seminole Rock*, Merrill describes the D.C. Circuit’s *Accardi* decisions as “all over the lot” on the recurring issue of how to interpret a regulation.<sup>101</sup>

Sometimes the court defers to the agency’s interpretation of the regulation under the *Seminole Rock* doctrine; sometimes the court insists that the meaning of the regulation is plain and the agency will not be heard to argue to the contrary; sometimes the court stretches a regulation to give effect to its perceived purposes . . .<sup>102</sup>

Indeed, *Accardi* decisions, whether revolving around a *Seminole Rock* inquiry or not, invoke a familiar variety of interpretive tools. Some rely only on plain meaning,<sup>103</sup> while others also look to statutory

*See, e.g., Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1139–40 (2011) (distinguishing treatment of preemption in *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000)).

97. 347 U.S. 260 (1954).

98. Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 873 & n.44 (2009) (noting that the principle is also associated with *Service v. Dulles*, 354 U.S. 363, 388 (1957), and *Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389 (1932)); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 569 & n.1 (2006) (noting that the principle is also widely attributed to *Vitarelli v. Seaton*, 359 U.S. 535 (1959)).

99. *See Accardi*, 347 U.S. at 266–67.

100. Merrill, *supra* note 98, at 589–90 (noting conclusion based on study of *Accardi* litigation in the D.C. Circuit between 1954 and 2005).

101. *Id.* at 590.

102. *Id.* (footnotes omitted).

103. *See, e.g., Singh v. U.S. Dep’t of Justice*, 461 F.3d 290, 296–97 (2d Cir. 2006) (rejecting BIA panel interpretation of INS regulations because regulation “plainly states” that waiver of application may take into account “factors that arose *subsequent* to the alien’s entry” such as marriage to a U.S. citizen (internal quotation marks omitted)); *Exportal Ltd. v. United States*, 902 F.2d 45, 50–51 (D.C. Cir. 1990) (arguing that the APA compels a plain meaning approach to regulatory interpretation and concluding that because the agency “has expressed itself in language that has a plain meaning, we look no further than the text of its rule”); *Union of Concerned Scientists v. Nuclear Regulatory Comm’n*, 711 F.2d 370, 381 (D.C. Cir. 1983) (rejecting agency’s interpretation of term “manner” in its own rule because interpretation “does violence to the language of the rule”).

purpose,<sup>104</sup> regulatory purpose,<sup>105</sup> canons of construction,<sup>106</sup> and regulatory history.<sup>107</sup> These decisions have the same ad hoc quality apparent under *Chevron* and *Seminole Rock*; there is generally little to no self-conscious effort to build on prior decisions that interpreted regulations or to specify how tools of construction relate to one another, much less to justify what makes one tool or another appropriate.<sup>108</sup> Like *Chevron* and *Seminole Rock*, *Accardi* too requires a theory of regulatory interpretation.

#### D. The APA's Neglected Interpretive Mandate

The Administrative Procedure Act ("APA"), moreover, clearly requires courts reviewing agency action to interpret the agency's action, including its rules and regulations. Section 706 directs that the reviewing court "shall . . . determine the meaning or applicability of the terms of an agency action."<sup>109</sup> The same section of the APA on the scope of review—section 706—authorizes "arbitrary" or "capricious" review<sup>110</sup> and provides the statutory foothold for the *Chevron* doctrine.<sup>111</sup> But judicial and scholarly attention to

104. See, e.g., *Holden v. Finch*, 446 F.2d 1311, 1316 (D.C. Cir. 1971) ("[The agency's] reading is at odds with the Congressional purpose, stated in the Hatch Act itself, that the statutory proscription of partisan political activity does not extend to the right of an employee 'to express his opinion on political subjects' . . .").

105. See, e.g., *Leslie v. Att'y Gen.*, 611 F.3d 171, 182 (3d Cir. 2010) ("[The regulation] was manifestly designed to protect an alien's fundamental statutory and constitutional right to counsel at a removal hearing."); *Rotinsulu v. Mukasey*, 515 F.3d 68, 73 (1st Cir. 2008) (affirming agency's interpretation of its regulation based on regulatory intent); *Montilla v. INS*, 926 F.2d 162, 166 (2d Cir. 1991) ("By forcing the alien to state his preference . . . the regulation is clearly designed to force that person to confront this choice."); *Teleprompter Cable Commc'ns Corp. v. FCC*, 565 F.2d 736, 741 (D.C. Cir. 1977) (relying on regulatory purpose in rejecting agency's interpretation of regulation).

106. See, e.g., *Waldron v. INS*, 17 F.3d 511, 517 (2d Cir. 1993) ("We think the INS views [the regulation] too narrowly. [The regulation], in conjunction with [a separate regulation], permits the BIA to reach a meritorious question . . ."); *Chennareddy v. Bowsher*, 935 F.2d 315, 320 (D.C. Cir. 1991) ("[W]e generally apply a new regulation retrospectively on appeal as long as such application does not result in a manifest injustice . . .").

107. See, e.g., *Ohio Power Co. v. FERC*, 954 F.2d 779, 783 (D.C. Cir. 1992) (finding evolution of regulation during rulemaking process weighed against agency's interpretation of "deemed").

108. See, e.g., *Chong v. Dist. Dir., INS*, 264 F.3d 378, 389 (3d Cir. 2001) (relying on text of regulation without further explanation); *Waldron*, 17 F.3d at 517 (same); *Montilla*, 926 F.2d at 166 (same); *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1387–88 (5th Cir. 1979) (same); *Teleprompter*, 565 F.2d at 740–41 (same). But see *Exportal*, 902 F.2d at 50 (rejecting parallel between reading interpretation of statutes and regulations).

109. 5 U.S.C. § 706 (2006); see also *id.* § 551(13) (defining "agency action" to include "the whole or part of an agency rule").

110. *Id.* § 706(2)(A).

111. *Id.* § 706 ("[T]he reviewing court shall decide all relevant questions of law [including interpreting] constitutional and statutory provisions."); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 193–202 (1998) (explaining the difficulty with reconciling *Chevron* with these provisions of APA § 706 and arguing that viewing *Chevron* as an interpretation of general agency rulemaking grants recon-



the task of interpreting agency action, including agency regulations, pales in comparison to that devoted to the *Chevron* doctrine and arbitrariness review. It is time for interpreting the meaning of agency action, including regulations, to take its place alongside the other requirements of section 706 in judicial focus and theory.

## II. THE DISTINCTIVE LEGAL CHARACTER OF REGULATIONS

To develop a theory of regulatory interpretation, it makes sense to begin by identifying distinctive characteristics of regulations. This Part argues that the distinctive legal characteristics of regulations and their place in public law hold implications for the privileged sources of interpretation as well as for the goals of regulatory interpretation—two key elements in a theory of legal interpretation. As to the sources of interpretation, the way in which administrative law binds the text of regulations to their statements of basis and purpose suggests that it does not make sense to interpret the regulation's text independently from its accompanying statement. As to the goal of interpretation, the role of agencies as implementers of established statutory aims suggests that regulations have a purposive character—that is, they prescribe means to implement the ends provided by the statute. Therefore, a primary, perhaps *the* primary, goal for interpretation should be interpreting the regulations in light of their purposes. From these two premises, the later Parts of this Article develop and defend a purposive theory of interpretation.

### A. *The Twofold Character of Regulations*

Regulations—specifically, regulations produced through notice-and-comment rulemaking—are creatures of administrative law. The interaction of three well-established features of American administrative law—the APA, hard-look review, and the *Chenery* principle—gives regulations their distinctive legal character, and suggests that the regulation's text should be read in company with the regulation's statement of basis and purpose.

1. *The Statement of Basis and Purpose.* One of the definitive requirements of notice-and-comment rulemaking under the APA is that the agency incorporate into the regulations it issues “a concise general statement of their basis and purpose.”<sup>112</sup> In general, the failure to issue an adequate statement of basis and purpose renders the agency's action invalid.<sup>113</sup> The requirement to

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cites it with § 706); Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1303 (arguing that *Chevron* and *State Farm* are exemplars of administrative common law, characterized by gradual, precedent-based evolution of the doctrine with tenuous connection to statute).

112. 5 U.S.C. § 553(c).

113. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 853 (D.C. Cir. 1987) (vacating agency rule for failure to provide adequate statement of basis and purpose); *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 920 (D.C. Cir. 1982) (concluding that agency's one-sentence justification for rule was inadequate and ordering that the rule be vacated for failure to provide statement of basis and purpose); see also 1 RICHARD J. PIERCE, JR.,

produce a statement of basis and purpose is such a basic aspect of notice-and-comment rulemaking that it hardly seems remarkable. But despite its quotidian status within administrative law, it does mark an important point of contrast between regulations and statutes. Congress need not provide an authoritative statement of its purposes and grounds to enact legislation under Article I, Section 7 of the Constitution.

2. *The Standard of Rationality.* While the APA's mandate that the agency promulgating rules produce a "concise general statement of their basis and purpose" might have been understood to require only a reference to the statutory authority for the regulation and its ends,<sup>114</sup> the judiciary has long treated it as requiring a detailed statement of the agency's reasoning supporting the choices that the agency made. Judicial review of whether an agency has produced an adequate statement of basis and purpose has been intertwined with review of whether the regulation is "arbitrary" or "capricious."<sup>115</sup> As is familiar to students of administrative law, beginning in the 1960s and 1970s, the judiciary elaborated the "arbitrary" or "capricious" standard of review under the APA into a demanding form of rationality review known as the hard-look doctrine.<sup>116</sup>

Under the leading formulation of this doctrine, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices made.'"<sup>117</sup> The court "consider[s] whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."<sup>118</sup> In addition, the agency may not "entirely fail[] to consider an important aspect of the problem," may not "offer[] an explanation for its decision that runs counter to the evidence before the agency," nor offer an explanation that is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>119</sup> The agency must also relate the factual findings and expected effects of the regulation to the purposes or goals the agency must consider under the statute<sup>120</sup> as well as

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ADMINISTRATIVE LAW TREATISE § 7.1, at 557 (5th ed. 2010) (noting that issuing statement of basis and purpose is part of the three-step procedure required by section 553 of the APA).

114. 1 ADMINISTRATIVE LAW TREATISE, *supra* note 113, § 7.4, at 592.

115. 5 U.S.C. § 706(2)(A).

116. See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 463–74 (1987) (characterizing hard-look doctrine as beginning in late 1960s and early 1970s and as requiring agencies to take a close look at regulatory choices).

117. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

118. *Id.* (internal quotation marks omitted).

119. *Id.*

120. See *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 851–52 (D.C. Cir. 1987) (reversing agency rule as arbitrary and capricious for failure to explain why alternatives were rejected in light of purposes of statute).

respond to salient criticisms of the agency's reasoning.<sup>121</sup> Hard-look review further distinguishes regulations from legislation; it has long been understood as requiring a higher standard of rationality than the minimum rational basis standard of constitutional review.<sup>122</sup>

3. *The Timing Rule*. Operating alongside this demanding standard for agency rationality, and frequently considered an aspect of arbitrary and capricious review, is the requirement that the agency's statement of reasons justifying its action appear at the time the agency acts, not afterwards. The Supreme Court's 1943 decision in *SEC v. Chenery Corp.* provides the classic formulation of this principle: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."<sup>123</sup> The *Chenery* principle has been taken as settled since it was announced and applies to rulemaking as well as other forms of agency action.<sup>124</sup>

This high demand that the agency's action be sustained only on the grounds upon which the agency based its decision is also unique in American public law. Neither constitutional review of federal legislation nor the standards of appellate review of lower court decisions impose this demanding uphold-only-for-the-reasons-given rule.<sup>125</sup> The combination of the searching standard of review defined by the hard-look doctrine and the *Chenery* principle has resulted, as Martin Shapiro observes, in courts holding that "a rule [is] not arbitrary and capricious only when it [is] well reasoned and well supported by facts" set forth by the agency at the time it acts.<sup>126</sup>

121. See *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) ("The requirement that agency action not be arbitrary or capricious includes a requirement that the agency respond to relevant and significant public comments." (internal quotation marks omitted)).

122. See *State Farm*, 463 U.S. at 43 n.9 ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate."); Jack M. Beermann & Gary Lawson, *Reprocessing Vermont Yankee*, 75 GEO. WASH. L. REV. 856, 870 (2007) (noting that by 1978 courts were routinely engaging in more searching review of agency action under hard-look doctrine than required by due process); Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 310 n.50 (2004) (noting that hard-look review states a higher standard of rationality than due process review of legislation, and that all nine justices in *State Farm* so held).

123. 318 U.S. 80, 95 (1943); see also *Chenery*, 318 U.S. at 87 ("[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

124. See Stack, *supra* note 24, at 962–66 (describing grounds of *Chenery's* application).

125. *Id.* at 967–71 (noting that rule of review analogous to the *Chenery* rule does not apply in constitutional review or in appellate review of lower court decisions).

126. Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 185 (1992); see also MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 48–50 (1988) (describing the conjunction of the hard-look standard and *Chenery's* reasoning-giving requirement). The uniqueness of this demand for reason-giving, alongside the Court's characterization of it as a deferential aspect of review, raises a question as to the doctrine's foundation. I offer an account of *Chenery* that explains its difference from rules of review in constitutional law and its scope of application. See Stack, *supra* note 24, at

4. *Implications.* These three requirements—the APA’s procedural requirement that the agency issue a statement of basis and purpose, the arbitrary and capricious review’s standard of rationality, and *Chenery*’s timing rule—not only impose a uniquely high demand for rationality on agency action but also distinctively bind the agency’s rules to the reasoning the agency provides for them in its statement of basis and purpose. Issuing a statement of basis and purpose is not merely a procedural requirement of validity in the way that a majority (or supermajority) vote in the Senate is necessary to enact legislation. Instead, the statement of basis and purpose is one part of the agency’s product in the rulemaking proceeding. Moreover, because a reviewing court can uphold the agency’s rule solely on the basis of the grounds offered in the statement of basis and purpose, the substantive validity of the rule depends on the content of the agency’s statement of basis and purpose.

As a result, the statement of basis and purpose is not only joined to the text of the rule as the other principal product of the rulemaking proceeding, but it also provides the grounds for the validity of the rule. The two—the rule issued and the statement of basis and purpose—form an intertwined couplet; the text without the statement is invalid, and the text is valid only so far as it is justified by the statement. From this perspective, the text of the regulation alone does not constitute the regulatory act. Rather, the regulatory text is one part of the twofold act that also includes the statement of basis and purpose.

Based on the premise that the text of a regulation is one part of a twofold regulatory act, it does not make sense to interpret the text of the regulation independently from its statement of basis and purpose. Once the rules and statements are seen as part of the same regulatory act, the text of the regulation should be read in light of the statement of basis and purpose. Put in terms of the *sources* of review, recognizing this twofold character of regulation clarifies that the regulatory text and statement of basis and purpose should constitute privileged sources for regulatory interpretation. This use fits the Attorney General’s expectations at the time of the APA’s enactment. As the Attorney General’s Manual on the APA states, the required statement of basis and purpose “will be important in that the courts and the public may

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992–1004 (arguing that *Chenery* enforces values attributed to the nondelegation doctrine and arguing that this account explains *Chenery*’s scope of application to agency actions that bind with the force of law). The *Chenery* rule has been long understood to constrain the role of government litigation counsel to posit grounds for the agency’s action. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (“[W]e have declined to give deference to an agency counsel’s interpretation of a statute where the agency itself has articulated no position on the question . . . .”); *State Farm*, 463 U.S. at 50 (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action.”). Elizabeth Magill and Adrian Vermeule argue that consequence best explains the doctrine. See Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 *YALE L.J.* 1032, 1044 (2011) (“*Chenery* is thus best understood . . . as a doctrine that constrains the role of lawyers in formulating agency policies.”).

be expected to use such statements in the interpretation of the agency's rules."<sup>127</sup> (As addressed later, it has many other virtues.)

Specifying the regulation's text and the statement of basis and purpose as privileged sources for interpretation is an important step in developing an interpretive approach, but it does not suggest the goals of interpretation. To gain some purchase on the aims of regulatory interpretation, it is worth stepping back to consider the place of regulations in public law.

### B. *The Institutional Place of Regulations*

Agencies are implementing bodies. Statutes establish agencies' goals and the scope of their powers. The minimum requirement for a constitutionally permissible delegation can be understood as the statute establishing an aim, a goal for the agency, or in the phrasing of the doctrine, an "intelligible principle"<sup>128</sup> to guide the agency's action. Those goals or principles may be set forth at a high level of generality—for instance, setting air standards that "allow[] an adequate margin of safety, [and] are requisite to protect the public health,"<sup>129</sup> or regulating radio broadcasting "as public convenience, interest, or necessity requires."<sup>130</sup> But the statute still establishes the agency's ends—and frequently also permissible means for pursuing those ends. The agency's task then is to implement—to give effect to—those basic goals, consistent with any specification of means in the statute. As Edward Rubin writes, "We create agencies and authorize them to act . . . because we want them to implement our basic commitments—our value choices."<sup>131</sup>

Not only is the agency's role one of implementation, but the validity of its actions also depends on the agency demonstrating an instrumentally rational connection between its chosen means and the ends prescribed by the statute. As noted in the preceding Section, arbitrary and capricious review requires the agency to demonstrate how its actions—including its regulations—further the agency's statutory goals or purposes.<sup>132</sup> This leads to an important characterization: regulations have a purposive character in the sense that they are part of the agency's effort to implement statutory goals or principles, and they are valid only insofar as they are consistent with those goals or principles. That understanding, in turn, suggests a basic orientation

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127. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 32 (1947); *see also* Manning, *supra* note 7, at 689 (noting the same).

128. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 474 (2001).

129. 42 U.S.C. § 7409(b)(1) (2006); *see also* *Whitman*, 531 U.S. at 474–76 (upholding this delegation to the EPA).

130. 47 U.S.C. § 303; *see also* *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 217–18 (1943) (upholding this delegation to the FCC).

131. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 149 (2003).

132. *See* 1 ADMINISTRATIVE LAW TREATISE, *supra* note 113, § 7.4. This requirement has deep roots in thought about administrative governance. As Ed Rubin writes, "According to [Max] Weber, instrumental rationality is the dominant principle of modern bureaucratic government." Rubin, *supra* note 131, at 148.

to their interpretation: if regulations have a purposive character in the sense of functioning to implement the statute, then one aim of interpretation should be to understand the agency's chosen means in light of the purposes or principles it sought to implement.

Putting these implications—for both sources and goals—together reveals the seeds for a method of interpretation. Based on the premise that regulations have a purposive character, the interpreter will approach the regulation trying to make sense of it as having a purpose or purposes. But because of the two-fold nature of the regulatory act, the privileged sources for ascertaining that purpose will be the text of the regulation itself and the agency's statement of basis and purpose. Accordingly, the thrust of regulatory interpretation is purposive, and discerning the regulation's purposes will turn toward the agency's own understanding of those purposes as reflected in the text, and just as importantly, in the regulation's statement of basis and purpose.

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This brief examination of the legal character and role of regulations has suggested elements of a purposive method of interpretation. As a method of interpretation, purposivism has a long pedigree.<sup>133</sup> The shape and limits of a purposive theory have been particularly well developed with regard to statutory interpretation. Indeed, in the last decade, arguments about the merits of purposivism and textualism have dominated debates on statutory interpretation,<sup>134</sup> during which time textualist tenets have had an important impact on judges and scholars.<sup>135</sup> To develop a purposive theory of regulatory interpretation, it makes sense to assess whether a purposive approach could find grounding in premises of purposive theory more generally, while at the same time avoiding the central critiques to which purposive approaches to statutory interpretation have been subject.

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133. See William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1003–05, 1018–21 (2001) (documenting early practices of statutory interpretation in which the courts attended to the mischief the statute sought to remedy); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7–9 (2001) (documenting early English practices of interpreting a statute in light of its spirit and arguing that early understandings of American "judicial power" contradict the view that judges were vested with the power of equitable interpretation).

134. See Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 15–26 (1998) (describing the principal interpretive schools articulated by Supreme Court justices and highlighting points of common ground); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 75 (2006) (describing the remaining differences between textualism and purposivism); Molot, *supra* note 28, at 2–5 (2006) (characterizing the debate as between textualist and purposivists and arguing that little disagreement remains).

135. See Molot, *supra* note 28, at 31–33 (demonstrating textualism's impact on judges and scholars).

## III. LEGAL PROCESS PURPOSIVISM REVISITED

Henry Hart and Albert Sacks's *The Legal Process*<sup>136</sup> remains the common reference point for purposive interpretation in general<sup>137</sup> and for a purposive theory of statutory interpretation in particular.<sup>138</sup> Hart and Sacks's distinctive conception of the rationality of law made their theory an attractive synthesis of legal formalist and legal realist thought.<sup>139</sup> But their theory has come to be defined by one aspect of its commitment to a rational understanding of law—the counsel that judges treat legislation as if it were enacted by reasonable legislators pursuing reasonable purposes.<sup>140</sup>

This Part argues that this conventional reading of Hart and Sacks neglects the scope of their commitments to positive sources for discerning purpose and fails to understand how attention to those positive sources fits within their rationalized conception of law. Once Hart and Sacks's jurisprudential commitments to positive sources—both in their approach to interpretation and its grounding—come into view, it also becomes clear how a purposive approach to regulatory interpretation could build on their theory by making an analogy between a statute's enacted statement of purpose and a regulation's statement of basis and purpose.

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136. HART & SACKS, *supra* note 27.

137. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS*, at li, lii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (noting the centrality of *The Legal Process* materials to purpose-based views of statutory interpretation); Michael Herz, *Purposivism and Institutional Competence in Statutory Interpretation*, 2009 MICH. ST. L. REV. 89, 93 n.16 (2009) (treating Hart and Sacks as touchstone for purposivism); Manning, *supra* note 134, at 86 (2006) (“[T]heir materials have come to represent the canonical statement of purposivism.”). The purposive views of statutory interpretation extend well beyond Hart and Sacks. See, e.g., *infra* note 158.

138. Cf. Young, *supra* note 52, at 1381–83 (noting that legal process principles developed in specific context of statutory construction).

139. See Rubin, *supra* note 28, at 1394–98 (describing legal process as a synthesis of these two traditions). On the one hand, in contrast to legal formalism, legal process scholars, like Hart and Sacks, recognized legal decisionmaking as a creative process, involving an elaboration of basic values. *Id.* On the other hand, in contrast to the realists, these scholars understood law and legal decisionmaking as a rational enterprise. But they had a different conception of rationality than the formalists. As opposed to cogitation about transcendent legal principles, Hart and Sacks, among other legal process thinkers, viewed reason as “informed by an organic relationship among legal rules, social policies, and ethical principles.” Eskridge & Frickey, *supra* note 137, at lxiii; see also NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 205 (1995) (“[Legal p]rocess jurisprudence . . . marks the beginning of American lawyers attempting to explain legal decision-making not in terms of deductive logic or the intuitions of officials, but in terms of reason which is embodied in the fabric of the law itself.”).

140. HART & SACKS, *supra* note 27, at 1378.

### A. The Purposive Technique

In *The Legal Process*, Hart and Sacks provide clear guidance to courts on the aims and “technique”<sup>141</sup> of statutory interpretation. Their approach to statutory interpretation has four basic elements: the court is to (1) “[d]ecide what purpose ought to be attributed to the statute and any subordinate provision of it,” (2) “[i]nterpret the words of the statute immediately in question so as to carry out [that] purpose as best it can,” making sure (3) not to give the words “a meaning they will not bear,” and finally, (4) not to “violate any established policy of clear statement.”<sup>142</sup>

1. *Discerning Purpose*. How a court “attributes” purposes to a statute and its subordinate provisions constitutes “[t]he principal problem in the development of a workable technique of interpretation.”<sup>143</sup> Hart and Sacks’s approach to attributing purposes is frequently taken to be reducible to their counsel that the court should “assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>144</sup> Taking that rationalist, reconstructive attitude as the defining or exclusive way in which Hart and Sacks advise a court to discern purpose exposes their theory to a host of objections. Perhaps most enduring has been a cluster of objections that understand Hart and Sacks’s claim as premised on a naive conception of the legislative and political process. As Robert Post writes, “The persistence of hot and intractable political dispute suggests that, in fact, politics is not inhabited by ‘reasonable persons’ who participate in a shared, intersubjective web of meanings and values.”<sup>145</sup> In a similar vein, based on public choice theory, scholars argue that many statutes are the products of deals to implement special interests and often lack overarching or even specific purposes to serve the public interest.<sup>146</sup> From this perspective, the presumption of a reasonable legislature, when “measured against the true workings of the legislative process . . . is an unreasonably optimistic view.”<sup>147</sup> Further, Richard Posner writes that “the spectrum of respectable opinion on political and social questions has widened so enormously that even if we could assume that legislators intended to bring about reasonable results in all cases, the assumption would not generate specific legal concepts.”<sup>148</sup>

141. *Id.* at 1378 (referring to “technique” for attributing purpose).

142. *Id.* at 1374.

143. *Id.* at 1125.

144. *Id.* at 1378; *see, e.g., supra* note 30.

145. Post, *supra* note 28, at 1335.

146. *See* DUXBURY, *supra* note 139, at 263; Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817–22 (1983) (“But to ignore these [interest groups] runs the risk of attributing to legislation not the purposes reasonably inferable from the legislation itself, but the judge’s own conceptions of the public interest.”); Post, *supra* note 28, at 1335.

147. Manning, *supra* note 134, at 102; *see also* Nourse, *supra* note 30.

148. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 193 (1986).



Reading Hart and Sacks's approach as defined by independent judicial construction of reasonable purposes of legislation, their theory would appear to have little to offer as a foundation for a purposive theory of regulatory interpretation. Based on this reading, their technique for discerning purpose not only confronts an array of practical and theoretical objections, but it also does not make sense of the elements of the purposive approach to regulatory interpretation identified thus far. In particular, it does not provide a reason to accord the statement of basis and purpose a special place in discerning the meaning of the regulation's text. It would rather have the court inquire into the reasonable purposes of the regulation without any particular tether to the agency's public rationalization. But this is not the best reading of Hart and Sacks's theory.

Far from launching the court into a freewheeling reconstruction of a reasonable legislative purpose as the first and primary step of discerning legislative purpose, Hart and Sacks describe the task of attributing purpose to a statute or its provisions as having two sequential steps. The first step in attributing purpose is for the court to consider any "formally enacted statement of purpose."<sup>149</sup> So long as the enacted statement was designed to shed light on interpretation, was consistent with the text, and pertained to the question at issue, the court should "accept[]" the formally enacted statement of purpose.<sup>150</sup> This first step is critical. By "accept[ing]" Congress's own statement of purpose, the court grants a very strong form of deference to Congress's own articulation of the purpose of the statute.

For Hart and Sacks, it is only after the court has determined that such an enacted statement of purpose is not available or not useful that it must "infer" purpose.<sup>151</sup> In particular, once the court has exhausted the prospect of a congressional statement of purpose, it should adopt Hart and Sacks's familiar imaginative attitude, reconstructing a reasonable legislature's solution,<sup>152</sup> as opposed to adopting the stance of a political realist or the "cynical political observer" attending to the "short-run currents of political expedience that swirl around any legislative session."<sup>153</sup>

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149. HART & SACKS, *supra* note 27, at 1377. Such an enacted statement of purpose is part of the text of legislation, frequently enacted along with findings. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 802, 124 Stat. 1376, 1802-03 (2010) (setting forth findings and purposes for Title VIII, Payment Clearing and Settlement Supervision Act of 2010); Prevent All Cigarette Trafficking Act of 2009, Pub. L. No. 111-154, § 1(b)-(c) 124 Stat. 1087, 1087-88 (2010) (setting forth findings and purposes); Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, § 1002, 123 Stat. 1663, 1664 (2009) (setting forth findings and purposes); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 10801-10802, 123 Stat. 991, 1405-07 (2009) (setting forth findings and purposes for subtitle pertaining to Shoshone-Paiute Tribes of Duck Valley Reservation's Water Rights Settlement).

150. HART & SACKS, *supra* note 27, at 1377.

151. *Id.*

152. The court "assume[s], unless the contrary unmistakably appears, that the legislature [is] made up of reasonable persons pursuing reasonable purposes reasonably." *Id.* at 1378.

153. *Id.* at 1378.

But even in this broader task of inferring purpose, the text plays a critical role. As Hart and Sacks explain, when the court must infer purpose, it should be attentive to the fact that purposes can exist at a level of “great generality,” at a level of specificity in which they resolve “specific application[s],” as well as in “hierarchies.”<sup>154</sup> Purposes also pertain not only to the statute as a whole but also to “subordinate provision[s]” within it.<sup>155</sup> The task is to discern *purposes*, plural, for the statute and its provisions, not solely a single overarching purpose. That provision-specific inquiry will necessarily be strongly informed by the text and its varieties, not merely constructing what a rationalized legislature aimed to do.

This is not to deny that this second step of inferring purpose can also require a broad synthesis. Because meaning is the product of context,<sup>156</sup> inferring purpose involves understanding the meaning of the statute in its whole context.<sup>157</sup> And Hart and Sacks understand the relevant context capaciously. While the text of the statute itself is a primary basis for inferring purpose, the context encompasses the state of the law prior to the enactment of the statute, the public understanding of the “mischief” the statute aimed to remedy as well as documents produced during legislative consideration of the statute to the extent they bear on its general purpose.<sup>158</sup> As the law develops so does the context of the statute’s interpretation; the accumulation of fixed judicial and administrative constructions informs the attribution of purpose in context.<sup>159</sup> Moreover, the synthetic demands are broader still because, for Hart and Sacks, “[t]he purpose of a statute must always be treated as including not only an immediate purpose or group of related purposes but a larger and subtler purpose as to how the particular statute is to be fitted into the legal system as a whole,”<sup>160</sup> including constitutional principles.<sup>161</sup>

But what this brief summary reveals is that there is greater variety in the task of attributing purpose under Hart and Sacks’s theory than is frequently acknowledged—and particularly relevant for regulatory interpretation, that the starting point for interpretation is consulting any enacted statement of purpose.

2. *The Dual Function of Text.* While attributing purpose and formulating constructions of the statute to further these purposes launches the interpretive inquiry, Hart and Sacks posit that a court will check its prospective

154. *Id.* at 1377.

155. *Id.* at 1378.

156. *Id.* at 1377, 1379.

157. *Id.* at 1375.

158. *Id.* at 1375, 1379; *see also id.* at 1253–54; Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 379 (1947) (noting that legislative history materials do not cause danger when they are used solely to determine the general purpose of the statute).

159. HART & SACKS, *supra* note 27, at 1379.

160. *Id.* at 1377; *see also* DUXBURY, *supra* note 139, at 261.

161. *See* Young, *supra* note 52, at 1383–86 (arguing that, for legal process thinkers, constitutional values constitute part of the background purposes to which the interpreter should attend); *see also* HART & SACKS, *supra* note 27, at 1378.

constructions against the statute's text. As Hart and Sacks put it, the text of the statute serves a dual role.<sup>162</sup> On the one hand, as we have just seen, it constitutes a central source for inferring purpose. But the text also operates as a separate constraint. Recall that the court "ought never to give the words of a statute a meaning they will not bear,"<sup>163</sup> and may infer a reasonable purpose for the legislation "unless the contrary unmistakably appears."<sup>164</sup> The interpreter is to test the provisional construction to ensure it does not fall beyond what the words will bear, by which Hart and Sacks mean "whether a particular meaning is linguistically permissible."<sup>165</sup>

Hart and Sacks have specific advice as to how a court should do so. To discern the scope of permissible construction, Hart and Sacks recommend a cautious and particular use of dictionaries and canons of construction. Neither dictionaries nor canons of construction, they advise, "should . . . be treated . . . as saying what meaning a word or group of words *must* have in a given context."<sup>166</sup> The assessment of linguistic meaning operates as a negative to rule out interpretations and works "almost wholly to *prevent* rather than to *compel* expansion of the scope of statutes."<sup>167</sup> This check against the text is thus not an invitation to inquire into the best interpretation based solely on the text. It is rather to make sure the construction does not exceed the outer bounds of permissible meaning. This approach to text, as I suggest below, could be incorporated into a theory of regulatory interpretation.

3. *Policies of Clear Statement.* Finally, prospective interpretations must be checked against policies of "clear statement."<sup>168</sup> When a statute impinges on crosscutting policy, the court may have to read it in a way that defeats a particular legislative purpose to protect that policy unless the legislature "speak[s] with more than [the] ordinary clearness" on the issue.<sup>169</sup> These policies concern, for instance, criminal prohibitions not thought to be morally blameworthy,<sup>170</sup> departures from generally accepted policy, and constitutional questions.<sup>171</sup>

Hart and Sacks's purposive interpretation thus involves reflective testing—positing an interpretation based on the best construction of the statute's purpose from a statute's enacted statement of purposes, or more generally, in view of its context, while at the same time checking that

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162. See HART & SACKS, *supra* note 27, at 1375 ("The Double Role of the Words as Guides to Interpretation").

163. *Id.* at 1375.

164. *Id.* at 1378.

165. *Id.*

166. *Id.* at 1191.

167. *Id.* at 1376.

168. *Id.*

169. *Id.* at 1376–77.

170. *Id.* at 1377.

171. See *id.*; see also Young, *supra* note 52, at 1383–86 (suggesting role of background constitutional values for legal process thinkers).

prospective construction against the statute's text to ensure that it is linguistically permissible and comports with background values.

### B. *The Grounds for Purposivism*

To assess whether it makes sense to adapt Hart and Sacks's technique of interpretation to regulations, it is important to understand the grounds on which they justify this technique. *The Legal Process* is more articulate as to the method of purposive statutory interpretation than as to its theoretical justification<sup>172</sup>—not surprising for materials that were assembled for a law school classroom experience.<sup>173</sup> With some reconstruction, however, the jurisprudence that underpins Hart and Sacks's purposive approach becomes clear. What emerges is not only a jurisprudence of striking generality but also one that explains how the privileged place they give to enacted text and statements of purpose is consistent with their underlying commitment to the rational character of law. That commitment to public, authoritative statements of purpose provides a critical building block and analogy for regulatory interpretation.

The starting premise of legal process theory is that law is an institution designed and directed toward solving the basic problems of social cooperation. "Law is a doing of something," Hart and Sacks write, "a purposive activity, a continuous striving to solve the basic problems of social living,"<sup>174</sup> maintaining social order and "maximizing the total satisfactions of valid human wants."<sup>175</sup> Not only does law itself have this fundamental normative aim, but that aim defines all aspects of the legal system. "It can be accepted as a fixed premise," Hart and Sacks posit, "that every statute and every doctrine of unwritten law . . . has some kind of purpose or objective."<sup>176</sup> Hart and Sacks understand these purposes to be rational, as judged by the way in

172. DUXBURY, *supra* note 139, at 207 (noting that principles of legal process jurisprudence are "remarkably difficult to pin down"); Young, *supra* note 52, at 1381 (noting same).

173. See HART & SACKS, *supra* note 27, at cxxxvii (commenting on ambitions for teaching materials).

174. *Id.* at 148; see also *id.* at 104–05 (As "societies are made up of human beings striving to satisfy their respective wants under conditions of interdependence," the purpose of law is to "maximize the total satisfaction of valid human wants."). See also DUXBURY, *supra* note 139, at 254–55 (arguing that legal process's jurisprudential project takes as a given that law aims to maximize human satisfaction); Eskridge & Frickey, *supra* note 137, at xci.

175. HART & SACKS, *supra* note 27, at 104; see also Eskridge & Frickey, *supra* note 137, at liii ("Hart and Sacks went well beyond the traditional law story . . . and told a new one: law is essential to the satisfaction of basic human wants . . . and to the advancement of humankind. Law is or ought to be goal-oriented, rational, and dynamic.").

176. HART & SACKS, *supra* note 27, at 148; see also HART & SACKS, *supra* note 27, at 1124 ("The idea of a statute without an intelligible purpose is foreign to the idea of law and inadmissible."); DUXBURY, *supra* note 139, at 205 (noting that legal process jurisprudence marks the start of American attempts to explain legal decisionmaking in terms of reason embodied in the fabric of the law); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 579 (1992) ("In the legal process framework, all law is purposive. This claim encompassed statutes, as well as other forms of law." (footnote omitted)).

which they further the basic objectives of law and fit into the surrounding legal order.<sup>177</sup> Because law itself has an overriding aim, it makes sense that “[a]ny particular legal directive must be seen and interpreted in light of the whole body of law.”<sup>178</sup>

Hart and Sacks invoke two subsidiary principles to implement their rationalist conception of law and justify their approach to statutory interpretation. The first, the principle of institutional settlement, is a principle of respect for the decisions that follow from institutions with established power to make those decisions acting in accordance with accepted procedures. The principle “expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.”<sup>179</sup> In other words, we treat the enactment of a statute or a judicial decision as binding in view of our acceptance of those institutions having the power to bind through specified procedures.<sup>180</sup> “When the principle of institutional settlement is plainly applicable,” Hart and Sacks write, “we say that the law ‘is’ thus and so, and brush aside further discussion of what it ‘ought’ to be.”<sup>181</sup> But that is really “a statement that . . . a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind ‘ought’ to be accepted as binding.”<sup>182</sup> For Hart and Sacks, this principle of respect for decisions made through established procedures represents a basic response to the problem of coordination in a complex society. “[E]stablishment of regularized and peaceable methods of decision,” as expressed in the principle of institutional settlement, is for Hart and Sacks, “[t]he alternative to disintegrating resort to violence.”<sup>183</sup> Accepting the decisions of duly authorized institutions plays a part in furthering Hart and Sacks’s rational conception of law because of the settlement and coordination functions that the principle serves.

The second principle, reasoned elaboration, describes the process of reasoning that directly appeals to the purposive and rational character of law. Reasoned elaboration applies to all officials,<sup>184</sup> though Hart and Sacks center their exposition on the judge, whether acting in a common law mode or interpreting enacted law. The duty of reasoned elaboration applies only if there is genuine “uncertainty” in the law; “[r]espect for the principle of

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177. See HART & SACKS, *supra* note 27, at 102.

178. Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 965 (1994); see also HART & SACKS, *supra* note 27, at 147 (“[T]he official should interpret [the legal directive] in the way which best harmonizes with more basic principles and policies of law.”).

179. HART & SACKS, *supra* note 27, at 4.

180. *Id.* at 5.

181. *Id.*

182. *Id.*

183. *Id.* at 4.

184. See *id.* at 146–47.

institutional settlement demands this.<sup>185</sup> Once it is clear that uncertainty exists, reasoned elaboration involves a complex reasoning process. The official must, on the one hand, “elaborate the arrangement in a way which is consistent with other established applications of it,”<sup>186</sup> and at the same time, “do so in the way which best serves the purposes and policies it expresses,”<sup>187</sup> including, if there is doubt as to the specific purpose, interpreting it to “best harmonize[] with more basic principles and policies of law.”<sup>188</sup> Whenever there is genuine uncertainty as to the application of the law, reasoned elaboration requires the decisionmaker to directly further the rational policy of the law, subject to the constraint of what has clearly been decided (as required by the principle of institutional settlement).

The principles of institutional settlement and reasoned elaboration explain the structure of Hart and Sacks’s theory of purposive statutory interpretation and the grounds for their two-step approach to discerning purpose. Institutional settlement, not reasoned elaboration, makes the text the primary source for inferring purpose and justifies its checking role to ensure that the posited purpose is a permissible one.<sup>189</sup> Reasoned elaboration intervenes to elaborate the law within the boundaries of what the text permits; it asks the judge to directly implement the grounding values of law—its coherence and rationality—to fit the statute within the existing body of law. But contrary to the common characterization of Hart and Sacks’s approach, reasoned elaboration alone does not explain the legal process’s interpretative technique. It operates only in the interpretive space left open after the operation of the principle of institutional settlement.

These principles also illuminate differences between textualist and legal process purposivist approaches to text. Both theories prioritize text, but do so for different reasons. For contemporary textualists, the priority of text derives from an account of legislative supremacy.<sup>190</sup> Because the text of the statute alone is what passes through the constitutionally prescribed process of bicameralism and presentment, textualists argue that it represents the best reflection of the “scope and limits” of the legislative compromise reached,<sup>191</sup> and thus that textualism provides an appealing conception of legislative supremacy.<sup>192</sup>

For legal process purposivists, the emphasis they place on statutory text follows from more general premises about the character of law. For Hart and Sacks, attention to text is required by the principle of institutional settlement; it is an aspect of recognizing the coordinating role of adherence to the

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. For a summary of Hart and Sacks’s approach to statutory interpretation, see *id.* at 1374–80.

190. See Manning, *supra* note 134, at 99–108.

191. *Id.* at 104.

192. See *id.* at 103–04.

decisions of authorized institutions, which is itself an aspect of the idea that law itself aims to solve the basic problems of social living.<sup>193</sup> This is not to say that legal process purposivism does not provide an account of legislative supremacy. It does. Whether through attention to Congress's enacted statement of purpose or by inferring purpose, the court aims to implement the policy that Congress adopted.<sup>194</sup> But this conception of faithful agency follows from a more general understanding of the nature of law and the role of institutional settlement within it. The very generality of these premises also suggests the possibility for further applications.

#### IV. PURPOSIVE REGULATORY INTERPRETATION

This Part defends a purposive method of regulatory interpretation modeled on Hart and Sacks's approach to statutory interpretation. As to the technique of interpretation, it contends that a regulation's statement of basis and purpose is best understood as analogous to an enacted statement of purpose for legislation. Based on that analogy, the focus of regulatory interpretation is on discerning purpose from the statement of basis and purpose. But because statements of basis and purpose are not only more common but also more detailed than enacted statements of purpose, purposive regulatory interpretation has a different cast than Hart and Sacks's purposivism in the statutory context. As to the grounds for the approach, because administrative law imposes greater demands for rationality on regulations than constitutional law imposes on legislation, there is positive law enforcement for the legal process theory's core presumptions of rationality as to regulations that is lacking as to legislation. But the purposive technique has appeal well beyond legal process premises. The technique, I argue, provides a more attractive conception of deference to the agency than a textualist approach because it uses the grounds the agency provides to justify the regulation as a basis for interpretation, while avoiding many objections that textualists have raised against Hart and Sacks's purposivism as an approach to statutory interpretation.

##### *A. Purposive Regulatory Interpretation: The Technique*

Our initial inquiry into the legal character of regulations suggested, as starting points, that a goal of regulatory interpretation is to implement the purpose or aim of the regulation, and that the privileged interpretive sources are the regulatory text and accompanying statement of basis and purpose. Hart and Sacks's theory provides a model for integrating those elements into a comprehensive interpretive technique. The basic elements of the technique could track those of a purposive approach to statutes: the court's aim is to discern the purpose of the regulation and its provisions, and to interpret the

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193. HART & SACKS, *supra* note 27; *see also* sources cited *supra* note 174.

194. *See* Manning, *supra* note 134, at 71–72 (providing an account of how purposivism provides a conception of legislative supremacy).

regulation to carry out those purposes to the extent permitted by its text while remaining consistent with policies and principles of clear statement.<sup>195</sup>

As to the implementation of this approach, the critical difference between regulations and statutes is how the court discerns purposes. With regard to statutes, Hart and Sacks divided the inquiry into an initial consultation of the enacted statement of purpose, and only when such a statement is lacking or unhelpful, an inference into purpose from a broad range of sources.<sup>196</sup> Statutes, however, are frequently enacted without statements of purpose.<sup>197</sup> As a result, with regard to statutes, the paradigm for discerning purpose for a statute involves inferring purpose from a broad array of sources. This highlights that the critical appraisal of Hart and Sacks has a point: with the majority of statutes enacted without statements of purpose, purposive statutory interpretation will typically require the court to attribute, through broad inferences from the text and policy context, a reasonable aim of the legislation or its provisions.

In contrast, the administrative process generates much more consistent resources, analogous to enacted statements of purpose, for attributing purpose to regulations. With narrow exceptions, agencies must issue statements of basis and purpose for their rule to be procedurally valid,<sup>198</sup> and the standards of judicial review make the agency's reasoning necessary to the validity of their rules.<sup>199</sup> In response to these demands, agencies today issue statements of basis and purpose that are far from mere preambles; they are extremely detailed rationales for, and explanations of, their regulations. These explanations ordinarily include the agency's analysis of the data, how that data supports their regulations, the justification of the agency's choices in view of alternatives, how the regulations meet statutory purposes, and

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195. Hart and Sacks's principle that statutory interpretation must be consistent with policies of clear statement has not been as controversial as other aspects of their theory, or at least current doctrines of statutory interpretation include many substantive canons, presumptions, and clear statement rules that could fit within this general category. *See, e.g.*, LISA SCHULTZ BRESSMAN, EDWARD L. RUBIN, & KEVIN M. STACK, *THE REGULATORY STATE* 239–75 (2010) (providing an overview of substantive canons and clear statement rules). As a result, I do not single this part of their theory out for discussion with regard to regulatory interpretation. For an illuminating argument that the canon of constitutional avoidance has a justification independent of the court–legislative relationship that applies to executive branch actors, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 *COLUM. L. REV.* 1189 (2006).

196. *See* HART & SACKS, *supra* note 27, at 1377. Hart and Sacks write, “In all other situations, the purpose of a statute has in some degree to be inferred,” clearly suggesting the priority of enacted statements of purpose. *Id.*

197. In the 107th, 108th, 109th, 110th, and 111th Congresses, for instance, fewer than 13% of the public laws included an enacted statement of purpose section. Original Research by Kevin M. Stack (on file with author).

198. *See* 5 U.S.C. § 553(c) (2006) (requiring agency rules to be issued with an accompanying statement of basis and purpose).

199. *See supra* text accompany notes 114–126.



engagement with commentators.<sup>200</sup> Moreover, the agency typically provides some explanation as to each regulatory provision or choice. When an agency does not offer a provision-specific justification, the statement typically includes a justification of the purpose at a higher level of generality—as it must for the regulation to be valid.

A run-of-the-mill regulation issued by the Federal Trade Commission (“FTC”) on manipulations in the wholesale fuels market provides an illustration.<sup>201</sup> The regulation makes it unlawful for any person, in connection with wholesale purchases or sales of fuels, to knowingly engage in an act that operates as a fraud or to intentionally fail to state a material fact that renders a statement misleading.<sup>202</sup> At a general level, the FTC justified the regulation as helping to protect the integrity of the market.<sup>203</sup> The FTC devoted the bulk of the statement to providing provision-specific explanations and justifications of each aspect of the regulation, from the definition of the covered fuels and the relevant wholesale market to the standard of liability.<sup>204</sup> As to the regulatory definition of “knowingly” for overtly deceptive conduct, the FTC explained that it adopted the extreme recklessness standard set forth by the Seventh Circuit in the securities context,<sup>205</sup> because “it provides for both effective rule enforcement and clarity to market participants.”<sup>206</sup> In this regard, the FTC advised that because there is a “less well defined” standard of ordinary care in the wholesale petroleum market than in the securities market, “a departure from ‘ordinary care’ is not required” to prove scienter under its rule.<sup>207</sup> Likewise, the FTC justified the “higher scienter standard” of “[i]ntentionally mislead[ing]” to “address concerns that the initially proposed Rule would chill legitimate business activity”<sup>208</sup> and deter voluntary disclosures in particular.<sup>209</sup>

It is not hard to imagine how these provision-specific justifications—clarity for market participants, efficacy of the rule’s enforcement, absence of a

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200. KERWIN & FURLONG, *supra* note 3, at 64–65 (characterizing typical contents of statements of basis and purpose); NAT’L ARCHIVES & RECORDS ADMIN., *supra* note 4, at 2–17 (noting topics to include in statement of basis and purpose); Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 50 (1983) (requiring consideration of technological alternatives to proposed regulation among other reasoned analysis to survive hard-look review).

201. Prohibitions on Market Manipulation, 74 Fed. Reg. 40,686 (Aug. 12, 2009) (to be codified at 16 C.F.R. pt. 317).

202. *Id.* at 40,702 (reproducing issued rule, 16 C.F.R. § 317.3).

203. The FTC wrote that “[b]ecause fraudulent or deceptive conduct within the wholesale petroleum markets injects false information into the market process, it distorts [the] market data . . . . As a consequence . . . economic efficiency declines in the overall economy.” *Id.* at 40,688 (stating that the Commission issued the rule “[f]or these reasons”).

204. *Id.* 40,691–700.

207. *Id.*

207. *Id.*

207. *Id.*

208. *Id.* at 40,693.

209. *Id.*

requirement for showing a deviation from ordinary care, maintaining a difference between the standards for statements and omission, and concerns about chilling voluntary disclosures—could be used by lawyers and courts to understand the scope of the rule’s prohibitions in relation to the rule’s general purposes. And even where a specific justification did not pertain, the more general grounding of the regulation in protecting the integrity of the markets suggests a guidepost for interpretation. This is not to say that these statements eliminate the need for interpretative judgments about how to balance the overall aims of the regulations, the provision-specific justifications, and the text. But in contrast to statutes, it will be a relatively rare case in which the statement of basis and purpose provides no guidance on an interpretive question, either in a specific or more general justification for the regulation.<sup>210</sup>

To the extent that courts and commentators have considered the interpretive role of the agency’s statement of basis and purpose, they have generally seen it as analogous to a legislative committee report<sup>211</sup> or statutory preamble.<sup>212</sup> But the better analogy is to an enacted statement of purpose. In scope and detail, the analogy to legislative committee reports makes a lot of sense (as it does for those who embrace the bearing of committee reports for legislative interpretation). But treating statements of basis and purpose as analogous to legislative committee reports neglects critical differences between these agency statements and legislative reports. Most important is that the agency’s statement of basis and purpose is itself necessary to the validity of a regulation, whereas legislative committee reports are not. Further, whereas legislative committee reports are statements of a subgroup of legislators and not made on behalf of the institution, statements of basis and purpose, like enacted statements of purposes, speak for the agency, not a subgroup or committee.<sup>213</sup>

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210. One circumstance in which the statement of basis and purpose will not provide useful guidance is when it contradicts the text of the regulation, in which case the text of the regulation trumps. *See, e.g.*, *Cuomo v. Clearing House Ass’n*, 129 U.S. 519, 532 (2009) (concluding that a passage in the statement of basis and purpose of the Office of the Comptroller of the Currency “cannot be reconciled with the regulation[.]”).

211. *See, e.g.*, *United States v. Frontier Airlines, Inc.*, 563 F.2d 1008, 1013 (10th Cir. 1977) (“The [agency preamble] is a summary of what, in the legislative process, would be gleaned from the hearings and statements of position which make up the legislative history.”); Noah, *supra* note 7, at 311–12 (arguing that regulatory preambles are not analogous to enacted statements of purpose but are better seen as akin to ratified legislative history).

212. *See, e.g.*, *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (concluding that the same principles govern the import of regulatory preambles and statutory preambles for regulatory and statutory interpretation, respectively).

213. For single-headed agencies, this is obvious: they are issued in the name of the head of the agency or the office vested with power by statute. For multiheaded agencies and commissions, the agency’s statement of basis and purpose still provides the agency’s authoritative statement on the regulation, issued in the agency’s own name, even if it prompts dissenting or concurring statements from one of the agency’s commissioners or board members. *See, e.g.*, *Prohibitions on Market Manipulation*, 74 Fed. Reg. 40,686, 40,702 (Aug. 12, 2009) (concurring statement of Commissioner J. Thomas Rosch) (agreeing with issuing 16 C.F.R. pt. 317 but expressing misgivings about the FTC’s rationale for the rule).

So what does this regulatory purposive technique look like? The central tenet of the approach is to read the text of the regulation in light of the regulation's statement of basis and purpose. The D.C. Circuit's decision in *Secretary of Labor, Mine Safety & Health Administration ex rel. Bushnell v. Cannelton Industries, Inc.*,<sup>214</sup> delivered by then-Judge Ruth Bader Ginsburg, provides a nice illustration. The Secretary of Labor had issued regulations to protect miners with pneumoconiosis, a lung disease, providing that miners with evidence of pneumoconiosis could obtain a transfer to a position with lower dust concentrations.<sup>215</sup> In addition, the regulations protected the miners' compensation, providing that "[w]hensoever" such a miner is transferred "the operator shall compensate the miner at not less than the regular rate of pay received by that miner immediately before the transfer."<sup>216</sup> In the case at issue, the eligible miner had initially been transferred to work as a dispatcher at his mining wage, and then to an inside laborer position at a reduced wage as part of a general realignment due to economic conditions.<sup>217</sup> The question was whether the regulations protected the miner from compensation decreases solely for transfers to meet the respiratory dust standards, as the employer maintained, or for all subsequent transfers, as the Secretary maintained.<sup>218</sup>

The court agreed with the Secretary, finding the Secretary's position "consistent" with the regulations' text ("whenever") and also "fully consonant" with the "administrative history and purposes."<sup>219</sup> The court relied on both the general and more specific purposes set forth in the Secretary's statement of basis and purpose for the regulations. At a general level, the court noted that the Secretary had observed that existing law discouraged eligible miners from claiming protections, and had sought in the regulations to "provide eligible miners with significant additional protections against fears of job security, adverse economic consequences," and other undesirable working and wage conditions.<sup>220</sup> More specifically, as the court noted, the Secretary's statement of basis and purpose had stated that an eligible

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For provocative arguments that legislative history is relevant to statutory interpretation because it is attributable to the institution as a public justification for the legislation, see Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 82-88 (1999), or because Congress can be thought of as incorporating those materials as useful to interpretation when it passes a law, see Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 681 (2012). From these premises, the argument for relying on an agency's statement of basis and purpose as a privileged source in regulatory interpretation is even stronger.

214. 867 F.2d 1432 (D.C. Cir. 1989).

215. *Cannelton*, 867 F.2d at 1434 (characterizing 30 C.F.R. pt. 90).

216. 30 C.F.R. § 90.103(b) (2011), quoted in *Cannelton*, 867 F.2d at 1434.

217. *Cannelton*, 867 F.2d at 1434 (reducing the wage from \$133.28 per eight-hour shift before realignment to \$104.78 per eight-hour shift after realignment).

218. *Id.* at 1436.

219. *Id.* at 1438.

220. See *id.* at 1438-39 (quoting Coal Miners Who Have Evidence of the Development of Pneumoconiosis, 45 Fed. Reg. 80,760, 80,763 (Dec. 5, 1980) (statement of basis and purpose to final rule)).

miner, “‘should not suffer *any* loss in pay *whenever* an operator transfers the miner’ because ‘[i]f any eligible miner perceived that their rate of pay could be decreased upon *any* transfer, the incentive to exercise the Part 90 option would be reduced.’”<sup>221</sup> The court found that these grounds “strongly support[ed]” the Secretary’s reading of the regulations to protect against wage decreases given that existing law already protected the miner’s rate of pay upon initial transfer to less dusty work.<sup>222</sup> The court thus located a reading of the regulations that was both permitted by the text and that carried out the regulations’ purposes, which the court discerned from the regulations’ statement of basis and purpose.

This purposive technique, grounded in the distinctive character of regulations, builds on Hart and Sacks’s model. By treating the agency’s text and the statement of basis and purpose as the focus of interpretation, it respects the principle of institutional settlement. And because statements of basis and purpose are both more consistently produced and more detailed than enacted statutory statements of purpose, purposive regulatory interpretation more frequently dwells on inferences from those statements, and less frequently requires a broader-ranging, independent reconstruction of rational purpose. This technique, I argue in the next Sections, follows from legal process premises but also has broader appeal.

### B. Purposive Regulatory Interpretation: Legal Process Grounds

Based on legal process premises, there is a stronger argument for the purposive technique for regulations than for statutes. As a theory of statutory interpretation, Hart and Sacks’s approach foundered on its counsel that the court act as if the legislature had reasonable purposes and pursued those purposes reasonably in legislation.

What distinguishes regulations from statutes is their governance by administrative law. As the inquiry into the legal character of regulations in Part II revealed, administrative law imposes uniquely high demands of rationality on regulations (along with other forms of agency action). Hard-look review imposes a higher standard of rationality as a condition of validity than the minimum standard applied in constitutional review of legislation.<sup>223</sup> And the *Chenery* requirement that regulations be upheld only on the basis of reasons the agency provided when the regulations were issued imposes a higher standard of reason-giving than applies to statutes or other forms of lawmaking.<sup>224</sup>

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221. See *id.* at 1439 (alteration in original) (quoting 45 Fed. Reg. at 80,766 (statement of basis and purpose to final rule)).

222. *Id.* The purposive approach thus has “some foundation in experience and in the best practice[s] of the wisest judges,” HART & SACKS, *supra* note 27, at 1169, qualities Hart and Sacks sought to achieve in their own approach to statutory interpretation. See *id.*

223. See *supra* text accompanying notes 114–122.

224. See *supra* text accompanying notes 123–126.

In addition, centralized regulatory review, required by executive orders issued by every president since President Reagan, polices the rationality of regulations in a way that does not apply to statutes. Each president's regulatory review executive order has required a detailed assessment of the costs and benefits for significant regulations as well as a cost-benefit analysis of alternative courses of action<sup>225</sup> to the extent that they may be quantified,<sup>226</sup> and a statement of the agency's regulatory objectives and the means it has selected to pursue those objectives.<sup>227</sup> While the practice of regulatory review has been controversial, at least in principle its elements speak directly to the demand that regulations reflect reasonable policy choices within the agency's permissible range of discretion.<sup>228</sup>

Administrative law thus gives the presumption of rationality a foundation with regard to regulations that is lacking for legislation; it provides positive law enforcement of the very qualities of purposeful rationality that Hart and Sacks ascribe to law in general and the legislature in particular. The reasonable legislature may be a wistful abstraction; at the very least, positive constitutional law does not require the legislature to act as reasonable persons pursuing reasonable purposes reasonably. The same is not true for regulations. Administrative law requires regulators to act as reasonable persons, pursuing reasonable purposes within the permissible range of their discretion.<sup>229</sup> By making rational, purposive action a condition for the validity of regulations, administrative law provides positive law enforcement of the legal process presumption of rationality.<sup>230</sup> In short, legal process theorists have reasons to adopt purposive regulatory interpretation.

This argument of relative strength—that, in view of administrative law's high rationality demands, there is a stronger case for regulations satisfying legal process premises than there is for statutes—will not be persuasive to those who view administrative action, like legislation, as best explained by

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225. See, e.g., Exec. Order No. 12,866 § 1(b), 58 Fed. Reg. 51,735, 51,735–36 (Oct. 4, 1993).

226. See, e.g., Exec. Order No. 13,563, § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011) (adopting and supplementing Executive Order 12,866 prescribing as a general principle of regulation that alternatives maximize net benefits); see also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR A-4, at 27 (2003), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/a-4.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf) (providing agency guidance on how to handle costs and benefits that are difficult to quantify).

227. See, e.g., Exec. Order No. 12,866 § 1(b), 58 Fed. Reg. at 51,735–36.

228. See, e.g., *id.*

229. See David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 136–37 (2010) (arguing that the multiple standards of review of agency action amount to a “reasonable agency” standard).

230. Interestingly, to the extent that Hart and Sacks's theory augmented the development of demands for reasoned elaboration in administrative law, their theory provided the grounds for regulations to be even stronger candidates for purposive interpretation than statutes. See, e.g., Werhan, *supra* note 176, at 576–89 (“The legal process approach shaped the traditional model of administrative law and provided the consensus necessary to sustain it[, including the Administrative Procedure Act.]”); cf. G. EDWARD WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 145–47 (1978),

political economy and public choice theory.<sup>231</sup> From this perspective, the fact that the law might make rational justification a condition of validity for regulations in ways that it does not for legislation does not demonstrate the law's efficacy or that regulations are best understood as having rational purposes. These critics, however, are not likely to be persuaded by any justification for an interpretive technique that builds on legal process premises.

### C. Deference and Commitment in Purposive Regulatory Interpretation

This purposive technique of regulatory interpretation, though an adaptation of Hart and Sacks's approach, has appeal independent from legal process premises. It allocates judicial deference to the agency in a manner consistent with fundamental values in administrative law, while also providing a reliable rule-of-law constraint on the regulation's meaning.

Under the purposive approach, the court is not to determine its own best reading of the regulation's text or its own best construction of the regulation's purposes by looking only at the regulation's text. Instead, the court determines the regulation's purpose by discerning the agency's own understanding of that purpose, as reflected both in the regulatory text and the agency's statement of basis and purpose. That allocates a strong form of judicial deference, in the sense of judicial acceptance, to the agency's own authoritative statement of the rationale, objectives, and limits of the regulation.

Allocating deference to this object—the agency's authoritative and deliberative justification for the regulation—has deep grounding in administrative law. As we have seen, the validity of an agency's lawmaking actions depends on the agency's contemporaneous statement of reasons. Likewise, deference to the agency's statutory construction under *Chevron* is premised on the agency working through the regulatory problem and explaining its policy.<sup>232</sup> As reflected in the Supreme Court's decision in *United States v. Mead Corp.*,<sup>233</sup> statutory authority alone is not sufficient to warrant deference under *Chevron*; the agency's reason-giving is a precondition to, and the object of, deference.<sup>234</sup> In other words, the agency's reasoned analy-

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231. See JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 25 (2002) (summarizing political science literature examining congressional, presidential, and other influences over bureaucratic outcomes); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 822 (1991) (“[E]vidence for active political control is so strong . . . [that] future research should turn toward exploring the *determinants* of political control.”).

232. Stack, *supra* note 24, at 1005 (“[A] court should not defer to an agency’s construction of a statute at *Chevron* Step Two unless the agency embraced a construction at the time it acted, not merely in litigation.”).

233. 533 U.S. 218 (2001).

234. *Mead*, 533 U.S. at 228.

sis is the coin by which it pays for (and warrants) deference to its interpretation of the law.<sup>235</sup>

The purposive approach to regulatory interpretation draws on these same principles. In particular, it treats the same statements that are the object of deference under *Chevron* as an authoritative basis for discerning the regulation's purpose. This interpretive approach grants agency deliberation, at least as reflected in statements of basis and purpose, a dual role and reward. Not only is the agency's discursive statement of basis and purpose necessary to the validity of its regulations, but it also provides grounds for interpretation. Indeed, the sources of the regulation's validation form the sources for its interpretation. This feature should be attractive to those who view incentives for agency deliberation as a defining feature of judicial review of agency action.<sup>236</sup>

It also marks a difference between a purposive approach and an approach relying exclusively on the regulation's text. Relying exclusively on the regulation's text as a basis for interpretation isolates regulatory interpretation from foundational administrative law commitments. On a textualist approach, the agency's most considered assessment of the basis for the regulation and its scope is set aside when interpreting the regulation, despite the fact that the same analysis forms the basis of judicial deference to the agency when determining the validity of the agency's regulation under *Chevron* and arbitrariness review. The textualist approach thus makes a sharp distinction between the bearing of the agency's statutory interpretation and policy analysis for assessing the regulation's validity, on the one hand, and the implications of that same analysis for the scope and meaning of the agency's regulation, on the other. In contrast, the purposive approach denies that distinction. It treats the agency's most considered analysis of the regulation as no less entitled to deference when the question is the meaning of the regulation than when the question is the regulation's validity. At the same time, it highlights the dependence of validity determinations on regulatory interpretation.

The purposive approach thus implements respect for the agency's statutory interpretation in a way that a textualist approach does not. Statements of basis and purpose reflect, among other things, the agency's choices about statutory interpretation; these statements typically explain the aims of the regulation and its provisions in light of the agency's reading of the authorizing statute. By reading the regulation in light of the statement of basis and purpose, the purposive approach builds deference to the agency's statutory interpretation into the method of regulatory interpretation. A textualist approach, in contrast, does not incorporate consideration of the agency's

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235. *See id.*

236. Professors Eskridge and Ferejohn, for instance, argue that "the Supreme Court should openly announce deliberation as a plus factor in judicial review." ESKRIDGE & FEREOHNS, *supra* note 40, at 265. The purposive approach to regulatory interpretation dovetails nicely with their view in part because it provides a similar incentive for agency deliberation provided by administrative law's requirements for deliberative statement, and could operate alongside those doctrines.

statutory interpretation into the interpretation of its regulations in this way; the focus instead is the court's construction of the text of the regulation, likely in light of the court's reading of the statute. To the extent that agencies' distinctive approaches to statutory interpretation merit respect from courts, this is an attractive feature of the purposive method.<sup>237</sup>

While the purposive approach grants this strong form of deference to the agency's own account of the purposes of the regulation and reading of its statute, it also holds the agency to those purposes in a way that relying merely on the regulation's text does not. By interpreting the regulation in view of its initial justification, the purposive approach treats the reasons offered to justify a regulation as more than just a time-consuming nuisance necessary to survive judicial review. Instead, it views those reasons as creating commitments regarding the scope of the regulation's application and interpretation by which the agency must adhere.

Understanding the agency's reason-giving as creating commitments has theoretical grounding. As Frederick Schauer explains, the social practice of giving reasons for a decision involves making a commitment, typically to "a principle of greater generality than the decision itself."<sup>238</sup> As Schauer argues, in law, the practice of giving reasons creates a *prima facie* commitment to

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237. Admittedly, this purposive approach to regulatory interpretation does not resolve the puzzle that Jerry Mashaw has called the "paradox of deference," though it may help to manage that paradox. Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 537–38 (2005). A growing literature notices that courts and agencies engage in statutory interpretation differently. See Herz, *supra* note 137; Mashaw, *supra*; Matthew C. Stephenson, *Statutory Interpretation by Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 285 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321 (1990). The difference between agency and judicial approaches to statutory interpretation raises the paradox of how "an authentically deferential judicial posture" in review of agency action is possible. Mashaw, *supra*, at 537.

The purposive approach to regulatory interpretation would ameliorate this paradox. See Mashaw, *supra*, at 541–42 (suggesting other doctrines that mitigate the paradox). At least with regard to interpreting regulations, the purposive approach narrows the gap between agency and judicial approaches by requiring a court to reach its independent construction of the regulation's meaning in view of the agency's statement of the purposes and limits of the regulation. While there is still room for difference between agency and judicial views, that space for disagreement is smaller than if the court were to arrive at its own interpretation of the regulation without an obligation to do so in light of the agency's statement of basis and purpose. Moreover, because the purposive approach is grounded in part in the distinctive legal character of regulations, as defined by administrative law, it has potential to appeal to judges with textualist commitments as to the reading of statutes. Cf. Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329, 363–66 (2007) (questioning whether textualist judges should defer to purposivist agency statutory interpretations or purposivist judges should defer to textualist agency statutory interpretations).

238. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995) (emphasis omitted).



other applications falling within the scope of the reason.<sup>239</sup> There are particularly strong grounds for viewing the reasons an agency offers to justify a regulation in its statement of basis and purpose as creating a *prima facie* commitment to interpretations that fall within the scope of the reasons the agency offered. Most importantly, the agency is required to state these reasons, and knows and intends that the reasons it provides will form the basis for the evaluation of the regulation's validity. The purposive approach recognizes these features of the practice of reason-giving by treating the justifications the agency has explicitly and formally offered for its action as creating a commitment to a principle of greater generality and a basis for interpreting its regulation.<sup>240</sup>

In sum, for a textualist, the grounds offered in the statement of basis and purpose are relevant for judging the regulation's validity, but have no necessary connection to the meaning of the regulation. In contrast to relying solely on the regulation's text, the purposive approach treats the agency's justifications as conditioning, limiting, and guiding how the regulation is to be interpreted.

#### D. Responding to Textualist Challenges

Textualists have mounted significant challenges to purposivism, and in particular to Hart and Sacks's purposivism, as a theory of statutory interpretation.<sup>241</sup> But because regulatory purposivism relies on the agency's own statement of basis and purpose to discern the regulation's purposes, it avoids the central objections that textualists have made to purposivism, including the coherence of purpose, problems of fair notice, and difficulties in ascertaining the generality of purpose.

1. *The Coherence of Purpose.* Relying on public choice theory, textualists argue that legislation frequently lacks a purpose other than that ascertainable in the text. This challenge begins with two basic premises. First, Congress itself is a multimember body.<sup>242</sup> Second, individuals or

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239. *Id.* at 648–51, 656 (defending the commitment model of reason-giving in law and noting that “[h]aving given a reason, the reason-giver has, by virtue of an existing social practice, committed herself to deciding those cases within the scope of the reason in accordance with the reason”).

240. Cf. David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in *COMMON LAW THEORY* 134, 165 (Douglas E. Edlin ed., 2007) (“[T]o require reasons from such [administrative] officials is to imply that they have an important role in interpreting the law, a role that judges with others should respect as long as the officials do a decent job of justifying their decisions.”).

241. There are many ways to isolate the distinction between purposivists and textualists. See, e.g., Molot, *supra* note 28, at 25. Michael Herz argues that textualist challenges to purposivism as an approach to judicial statutory interpretation do not apply with the same force to purposive agency statutory interpretation. See Herz, *supra* note 137. My discussion of textualist objections to purposivism builds on the categories of textualist objections to purposivism that Herz identifies.

242. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (noting that it is difficult “to aggregate individual [legislators’ views] into a coherent collective

groups of legislators frequently have different policy purposes for enacting the legislation. From these two premises, textualists argue that legislation frequently lacks an agreed-upon purpose, and accordingly that an account of statutory interpretation which makes discerning the purpose of a statute a central feature does not provide an attractive account of the judge as a faithful agent of the legislature.

It is important to first notice the limitation of this objection with regard to statutes. The objection addresses the attribution of purpose only where the statute does not include an enacted statement of purpose. When the legislation includes such a statement, it does not make sense to argue that Congress did not have an agreed-upon purpose: the purpose is stated in the text, enacted by the same authorized procedures as the rest of the statutory text. In this light, the objection that “purpose” is an incoherent abstraction with regard to legislation has little force with regard to regulations. For a regulation, the agency’s statement of basis and purpose, like an enacted statement of purpose in a statute, provides an authoritative and public statement of the grounds and purposes of the regulation.<sup>243</sup> To the extent that the court is consulting the statement of basis and purpose, it is not attributing a purpose that the agency has not adopted; rather, it is discerning the duly agreed-upon statement of purpose, just as a court does (or should do) when faced with an enacted statement of purpose. Because the statement of basis and purpose is the agency’s official statement on the grounds of the regulation, it responds comprehensively to the multimember problem.

2. *Discerning Purpose and Fair Notice.* Textualists argue that legislative purpose, even if coherent, is difficult for judges to discern. Especially when there is no enacted statement of legislative purpose, purposivism requires the judge to attribute purpose through a complex operation of synthetic reasoning, evaluating the particular provision against the statute’s text, the background law at enactment, and the law’s ongoing changes and established application. This capacious conception of the context relevant to discerning purpose has bolstered several objections.

At a practical level, textualists suggest that this wide-ranging inquiry ends up producing more judicial errors in discerning Congress’s commands

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choice”); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–13 (2003); Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992).

243. Interestingly, while legal positivism is often associated with a formalist or textualist method of interpretation, see SCOTT J. SHAPIRO, LEGALITY 253 (2011), as Scott Shapiro writes, purposes may have “social sources and hence possess the appropriate positivist pedigree.” *Id.* The reliance on public statements of purpose, such as statements of basis and purpose, presents an especially strong case for purposes having an appropriate positivist pedigree. The purposive approach to regulatory interpretation would appear to be consistent with a jurisprudential theory, like Shapiro’s, that understands legal systems as particular types of institutions for social planning, see *id.* at 171, and looks to the objectives of the planners in light of judgments about competence and character as the source for interpretive methodology. See *id.* at 382.

than consulting only statutory text.<sup>244</sup> Adrian Vermeule presents a version of this challenge that focuses on the use of legislative history, a source that statutory purposivism permits.<sup>245</sup> He argues that the volume of legislative history and its heterogeneity (including many different types of sources at different levels of generality) interact to create distinctive risks of error for time-pressed generalist judges.<sup>246</sup> Legislative history frequently ranges over thousands of pages and includes everything from committee reports and floor statements to committee transcripts, sponsors' statements, studies, and multiple drafts. Ferreting out the salient actors in this wide and varied domain, Vermeule argues, poses a systematic risk of error.<sup>247</sup>

Closely related, the synthetic and creative judgment required to attribute purpose to a statute has long prompted the objection that purposivism makes it difficult to discern whether the judge has "confus[ed] his own policy views with those of Congress."<sup>248</sup> Textualists contend that focusing on a more limited set of sources and statutory text in particular provides a more manageable account of the judicial role and reduces the risk of conflating the judge's preferred outcome and that of the legislature.<sup>249</sup> At stake is not just the capacity of judges to be faithful agents of Congress but also rule-of-law values of fair notice.<sup>250</sup> If purposivism's synthetic demands allow judges too much leeway in attributing legislative purpose, it will undermine the capacity of the regulated to understand their legal obligations.<sup>251</sup>

These objections do not apply with the same force to purposive interpretation of regulation. As we have seen, the purposive approach requires the court to examine the text of the regulation in relation to its statement of basis and purpose. In general, the statement of basis and purpose not only describes the general aim of the regulation, but also the specific rationale for principal choices reflected in its provisions. While there will be instances in which the purposes of the regulation articulated by the agency will conflict, the demands of hard-look review continue to press agencies to provide coherent as well

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244. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 110–11 (2006) (arguing that consulting legislative history increases incidents of judicial error in ways not shared by statutory text).

245. HART & SACKS, *supra* note 27, at 1379 (suggesting that legislative history may be consulted for the light it sheds on the general purpose of the statute).

246. VERMEULE, *supra* note 244, at 107–15 (arguing that volume and heterogeneity of legislative history creates distinct risk of errors of information and errors of evaluation); see also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989) (“[W]hen one does not have a solid textual anchor . . . from which to derive the general rule, its pronouncement appears uncomfortably like legislation.”).

247. VERMEULE, *supra* note 244, at 110–12.

248. Molot, *supra* note 28, at 27 (characterizing this textualist objection to purposivism).

249. Scalia, *supra* note 246, at 1185; Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 79 (2000); see also Molot, *supra* note 28, at 26 (noting that textualists seek to minimize judicial leeway by “emphasizing statutory text over statutory purposes, and by excluding legislative history in particular”).

250. Herz, *supra* note 137, at 101.

251. See VERMEULE, *supra* note 244, at 109.

as specific justifications for the inferences they make to justify their choices. Moreover, in contrast to the multiple types of legislative history, statements of basis and purpose generally appear in a single, highly organized document with a predictable form, like a judicial opinion.<sup>252</sup> Accordingly, even though these statements are often long, judicial reliance on them does not pose the distinctive risk of error that Vermeule argues heterogeneous legislative history creates for judicial interpretation of statutes.<sup>253</sup> To be sure, reliance on the statement of basis and purpose alongside the regulation's text will not eliminate the need for interpretive judgment. But it does structure interpretation around transparent sources and calls on a core capacity of legal judgment, discerning how articulated underlying purposes shape the meaning and application of legal texts. As a result, the search for the purpose of a regulation or its provisions will have a fundamentally different cast than attributing purpose to a statute that lacks an enacted statement of purpose.

3. *The Generality Problem.* One of the strongest objections to purposivism in statutory interpretation is what John Manning has identified as a generality problem. "Giving precedence to semantic context (when clear) is necessary to enable legislators to set the level of generality at which they wish to express their policies."<sup>254</sup> As Manning explains, in the legislative process, to facilitate a statute's passage, legislators may compromise on a statute that does not completely address the perceived mischief or includes exceptions that curtail the statute's operation.<sup>255</sup> By granting precedence to statutory text, the court has a better chance of implementing the legislative compromise at the level of specificity or generality of the policy compromise. In contrast, "[b]y asking what policy a reasonable person would adopt (rather than how a reasonable person would understand the words)," Manning argues, "purposivist judges make it surpassingly difficult for legislators to bargain" over the choice of rules or standards, or the choice of statutory generality or specificity, in the legislative process.<sup>256</sup>

This generality problem has two implied points of reference relevant to its implications for purposive regulatory interpretation. First, it addresses statutes that do not include an enacted statement of purpose. Because Congress frequently does not include such statements,<sup>257</sup> that point of reference encompasses the lion's share of statutes. But when Congress has enacted a statement of purpose, the generality problem loses force. In that case, there will be a genuine question about how the enacted statement influences the

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252. 1 C.F.R. § 18.12 (2012) (specifying organization and format for preambles to final rules); BRESSMAN, RUBIN, & STACK, *supra* note 195, at 427–31 (describing the standard form of statements of basis and purpose).

253. Manning, *supra* note 7, at 663 ("[I]f an agency has complied with its duty of explanation . . . judicial interpretation [will be] easier by giving the courts and the regulated public a somewhat clearer sense of the objectives that a regulation is seeking to achieve.").

254. Manning, *supra* note 134, at 99.

255. *Id.* at 104.

256. *Id.* at 105.

257. *See supra* note 197.

statute's specific provisions at issue, but that will be a question for purposivists and for textualists alike. Both the textualist and the purposivist will endeavor to make inferences from the enacted statement of purpose to the specific statutory provision. That is a sort of generality problem, but not one that particularly afflicts purposivism or textualism. It is just part of the labor of interpretation.

Second, the generality problem addresses the circumstance when a purposivist is interpreting a specific provision in relation to the statute's overriding purpose or policy. For Hart and Sacks's purposivism, as Manning notes, that is a fundamental aspect of statutory interpretation.<sup>258</sup> Hart and Sacks also acknowledge, however, that purposes pertain to specific provisions, and can be so specific as to resolve "a question of specific application" or so highly general as to "openly contemplat[e] the exercise of further judgment by the interpreter."<sup>259</sup> With regard to legislation, the generality problem will be reduced to the extent that purposes are determined (and determinable) at the level of specific provisions, not just as an inference from the statute as a whole.

With these two qualifications of the generality problem with regard to statutes in mind, it is possible to see that the generality problem for purposivism loses much of its force when applied to regulatory interpretation. To begin with, purposive regulatory interpretation is more akin to interpretation of a statute with an enacted statement of purpose. If it makes sense to treat the statement of basis and purpose as a privileged interpretive source, like an enacted statement of purpose in a statute, then purposive interpretation of regulations does not face a distinctive generality problem. The purposivist will need to make inferences from stated purposes to specific provisions, but that work will not be unique to purposivists.

Moreover, at a practical level, as suggested above, statements of basis and purpose are typically much more specific than statutory statements of purpose in articulating the rationales of particular provisions.<sup>260</sup> To the extent that a statement of basis and purpose typically includes both a general statement of the purpose of the regulation as well as provision-by-provision justifications—including goals to be achieved by particular provisions, phrases, and definitions—they will inform the level of generality of the

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258. See Manning, *supra* note 134, at 90; see also HART & SACKS, *supra* note 27, at 1374–78. Recall that Hart and Sacks qualify their approach by permitting only interpretations "to the extent permitted by its language," a feature of their theory which is often given less prominence than it deserves. *Id.*

259. *Id.* at 1377.

260. When examining regulatory interpretation, Manning also imagines a role for statements of basis and purpose. See Manning, *supra* note 7, at 690 (concluding, with qualifications, that consulting statements of basis and purpose can "enhance the clarity of agency decisionmaking and the accuracy of judicial review"). In that respect, Manning's approach and the purposive method that I defend share common ground. Manning appears to be less sanguine, however, about the helpfulness of these statements, and thus, one imagines, about their usefulness in confronting the generality problem. See *id.* (suggesting that hard-look review has undermined the usefulness of statements of basis and purpose as sources of explanation of the regulation).

regulation or its particular provisions. Interpretive work will remain, but again, not a generality problem distinctive to a purposive approach.

This also highlights the best response to the related objection that administrative regulations, like legislation, are best explained by public choice theory. From the perspective of this objection, it is wistful to suppose the efficacy of administrative law in policing the rationality of regulations; political economy, not demands for reasoned elaboration, best explain regulations' content.<sup>261</sup> In the legislative context, the response to the public choice account of the legislature has been to emphasize the legislature's formal enactments as providing the best guidance as to the legislation's scope and limits.<sup>262</sup> The purposive approach to regulation can be defended on the same grounds. Once the regulatory act is seen as involving both the text of the regulation and its accompanying explanatory statement, then even under a public choice conception of regulation, those same materials provide the most reliable guidance as to the meaning and scope of the regulation.

#### E. *Is This Purposivism or Textualism?*

A serious question can be raised about whether this approach to regulatory interpretation is more properly characterized as purposive or textualist.<sup>263</sup> At the level of specification given thus far, the theory fits under both mantles, and provides an example of their common ground.

The definitive commitment of textualism in statutory interpretation is granting precedence to statutory text and its semantic context.<sup>264</sup> For reasons

261. See *supra* note 231.

262. Indeed, this is one of the basic underpinnings of contemporary textualism. See Easterbrook, *supra* note 242, at 547–48; Manning, *supra* note 134, at 104. To the extent that public choice theory shows that the legislative text is a poor proxy for the legislative majority's preferred policy because of vote cycling and other agenda-setting problems, the same may hold true of statements of basis and purpose for multiheaded agencies. With regard to legislation, a response to this line of public choice critique is that legislation possesses authority because it is enacted on behalf of the institution, through its authorized procedures. As Jeremy Waldron explains,

If we think, for example, that ordinary citizens supporting a minority party are bound to respect legislation sponsored by the majority, it is because they owe that respect to *the legislature*, and to the procedures and institutional forms that constitute it, not because they owe it to the majority as such.

JEREMY WALDRON, *LAW AND DISAGREEMENT* 144 (1999). Waldron continues, "The authority of a law is its emergence, under specified procedures, as a '*unum*' out of a plurality of ideas, concerns, and proposals, in circumstances where we recognize a need for one decision made together, not many decisions made by each of us alone." *Id.* The same response holds for statements of basis and purpose, which are also produced as collective and authoritative actions on behalf of the institution.

263. See Gluck, *supra* note 2, at 1832–46 (examining whether state courts' practices of statutory interpretation are better characterized as textualist or purposivist and the stakes of that label).

264. Gluck, *supra* note 2, at 1834; Manning, *supra* note 134, at 91.

particular to American administrative law, I have argued that it makes sense to read the text of a regulation in company with the agency's statement of basis and purpose. In a sense, the suggestion is that both regulatory text and the regulation's statement of basis and purpose count as part of the "text" on which a textualist should center her interpretive inquiry. Where a text states purposes, a textualist will attend to those purposes as part of her commitment to discerning the meaning of the text.

On the reading of Hart and Sacks's theory that I have defended here, this approach is also purposive. It prescribes reading the regulatory text in light of its purposes and focuses that inquiry on the authoritative statement of purposes given by the agency, a focus required by the principle of institutional settlement. If the analogy between enacted statutory purposes and the agency's statement of basis and purpose holds, then reading the regulation in light of that agency statement is exactly what their legal process purposivism would direct.

One point of departure, then, will be the case in which the text of the regulation and the statement of basis and purpose have been well mined by the court but neither sheds light on the interpretive question posed. At that point, both the textualist and the purposivist will likely redouble their efforts as to these sources, and then, cautiously, seek to draw inferences about the meaning from other statutes and regulations.<sup>265</sup> Here a difference may emerge in the character of inferences drawn. For a textualist, the cross-statute and cross-regulatory inferences are likely to be semantic ones; for a purposivist, those inferences would likely have a greater focus on policy context and consistency with broader values.<sup>266</sup> Thus, in cases in which the text and the statement of basis and purpose offer no assistance, the account of purposive regulatory interpretation would need to be specified further and could take more textualist or purposive variants.

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Purposive regulatory interpretation provides a broadly appealing methodology for regulatory interpretation. It recognizes that the regulatory act includes both the text of the regulation and its accompanying explanatory material. It therefore makes sense to understand the scope and limits of the agency's action in view of those materials. By taking the agency's own statements of the purposes of its regulations as privileged interpretive

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265. For an articulation of this as a version of textualism, see Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 51 (2007) ("Rather than purporting to exclude purpose completely where textualist cues point strongly in one direction, a moderate textualist would canvas all contextual sources available before reaching a final conclusion regarding a statute's application in the case at hand."). Like Molot, I think that this could just as easily characterize differences between versions of textualism as the distinction between textualism and purposivism. *See id.* at 51 n.142 (suggesting this point).

266. This illustrates the wisdom of the view that the core distinctions between textualism and purposivism are their different conceptions of context and the types of inferences from context that should be given priority. *See Manning, supra* note 134, at 92–96.

sources, this approach also builds on a deep strain of administrative law's deference to the agency's own reasoned elaboration of its authorizing legislation. At the same time, given the publicity and accessibility of the agency's statements, relying on them augments fair notice as to the regulation's meaning in a way that avoids objections to a purposive approach to statutes.

## V. PURPOSIVISM'S PLACE IN ADMINISTRATIVE LAW

Our starting point was that central doctrines of administrative law—from *Chevron* to *Seminole Rock* and *Accardi*—require a principled approach to regulatory interpretation. This Part argues that the general method of purposive regulatory interpretation described thus far can be adapted to provide an approach to regulatory interpretation under these doctrines and solve the puzzles of regulatory interpretation lurking in them. Specifically, under *Chevron*, *Seminole Rock*, and *Accardi*, courts should ask the same interpretive question: is the proffered interpretation of the regulation one permitted by the regulation's text and also consistent with its purposes as set forth in the regulation's statement of basis and purpose as well as its text? That approach not only provides consistency across these doctrines but has distinctive virtues under each.

### A. Interpreting Regulations Under Chevron

The purpose of the *Chevron* inquiry is to determine whether the agency's statutory construction is a permissible one. By framing the inquiry as one into the permissibility of the agency's statutory construction, the agency's action starts with an important and obvious advantage. Unlike review of a lower court interpretation of a statute, the agency does not have to convince the reviewing court that its interpretation is the best interpretation—that is, the interpretation the court would have adopted in the absence of the agency's construction.<sup>267</sup> The conventional justification for that advantage is that the agency has been delegated interpretive authority by Congress, or should be presumed to have been delegated those powers in view of its comparative expertise and accountability.<sup>268</sup>

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267. A reviewing court, *Chevron* directs, is not to “impose its own construction on [a] statute, as would be necessary in the absence of an administrative interpretation.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted); see also Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 953–72 (2011) (explaining the emergence and entrenchment of the appellate review model of judicial review of agency action).

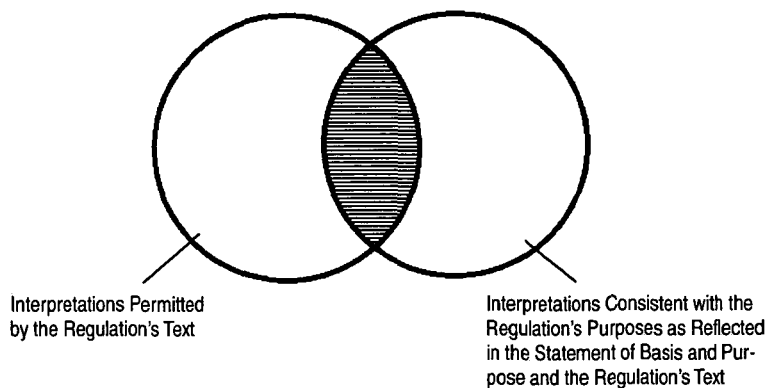
268. *Chevron*, 467 U.S. at 843–44, 865 (noting agencies' greater expertise and accountability than courts as grounds for deference to agencies); Lisa Schultz Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2016 (2011) (noting that the *Chevron* Court justified deference primarily on a theory of delegation but also on grounds of the agency's superior expertise and accountability); Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 870–73 (2001) (arguing that presumption of congressional intent offers best among conventional legal foundations for *Chevron* deference).



If the core of *Chevron* is to grant the agency's construction the advantage of merely having to fit within the realm of permissible constructions of the statute, it makes sense that a similar presumption would apply when interpreting the agency's regulation that is subject to review. Specifically, the deferential grounding of *Chevron* justifies the reviewing court asking if there is (1) a permissible construction of the agency's regulation that is also (2) permissible under the statute.

How could the purposive approach to regulations be adapted to fit under the *Chevron* step just revealed—that is, how should a court determine what is a *permissible* interpretation of the regulation? My suggestion is that interpretations of a regulation are permissible under *Chevron* only if they are (1) permitted by the text of the regulation, and (2) consistent with the regulation's purposes, as set forth in the regulation's statement of basis and purpose and the regulation's text. To illustrate this visually, the court would seek to identify the set of interpretations that fall within the shaded portions of Figure 1.

FIGURE 1



This approach reflects a middle ground. On the one hand, this approach gives the agency more leeway than if a court were to ask what interpretation most effectively carried out the purposes of the regulation, or what interpretations constituted the best or most plausible reading of the regulation's text. The grounds for not adopting these or other more constraining approaches to regulatory interpretation under *Chevron* derive from *Chevron*'s own foundations. If *Chevron* is premised on deference to agency action so long as it is permissible, then the question should be what qualifies as a permissible interpretation of the regulations at issue, not what is the best or most plausible construction of the regulations' text or purposes.

On the other hand, this approach would be more constraining than merely asking if an interpretation is permissible under the regulation's text; the interpretations permitted by the text would be limited further to those consistent with the agency's statement of its purposes. The added consultation

with the rule's statement of basis and purpose thus narrows, as opposed to broadens, the set of permitted interpretations of the regulations. Accordingly, it could exclude some interpretations of the regulations that could be the only interpretations that render it valid under the statute.

Given the deferential grounding of *Chevron*, perhaps the harder question is why should interpretations of the regulation be limited to those consistent with the regulation's purposes, as opposed to allowing all those permitted by the regulatory text. At one level, the justification for imposing this limitation is to prevent a strategic bait-and-switch: it prevents the agency from proffering one set of rationales that provide the basis for validating the regulation and then taking advantage of ambiguities remaining in the regulatory text to interpret the regulation in ways not consistent with the proffered grounds for its validity. Put more positively and more broadly, it recognizes that the reasons the agency offers to justify its regulation create commitments to which the agency owes allegiance. One of the most minimal ways of enforcing that commitment is to require an interpretation of the regulation that is at least consistent with the grounds the agency offered to justify it. Because those grounds are public, interpreting the regulation in light of those grounds should augment notice of the regulation's meaning.

### B. A Solution for *Seminole Rock*

The purposive approach also provides a solution to the puzzle of how a court is to judge when deference under *Seminole Rock* to the agency's interpretation of its own regulation is justified. Like *Chevron*, *Seminole Rock* deference is grounded in an attitude of judicial deference to the agency's expertise, accountability, and a presumption of delegation.<sup>269</sup> The basic premise is that the agency's superiority as a regulator should also grant the agency considerable room in determining the meaning of its own regulations. But, as John Manning has highlighted, *Seminole Rock* deference presents a structural risk that *Chevron* does not. When a court defers to an agency's construction of its own regulation under *Seminole Rock*, it permits the agency to consolidate lawmaking and law-interpreting functions.<sup>270</sup> At a practical level, the doctrine creates incentives for the agency to issue broad and vague regulations and to specify their meaning later, subject only to plainly erroneous review,<sup>271</sup> undermining rule-of-law values of fair notice.

Short of a wholesale abandonment of the doctrine,<sup>272</sup> there are two complementary ways to manage those concerns. The first approach is to

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269. See Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 GEO. WASH. L. REV. 1449, 1459–60 (2011).

270. Manning, *supra* note 7, at 682.

271. *Id.* at 683.

272. See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266 (2011) (Scalia, J., concurring) (stating that he would be receptive to reconsidering *Auer* deference and noting that *Auer's* defects are fully explored in Manning, *supra* note 7). If the Court were to abandon *Seminole Rock/Auer*, the need for a theory of regulatory interpretation will be all the more pressing.

restrict *Seminole Rock*'s scope or domain of application to particular policymaking forms.<sup>273</sup> As Matthew Stephenson and Miri Pogoriler argue, constricting *Seminole Rock*'s domain just as *Mead* has constricted the domain of *Chevron*'s application would enforce the doctrinal bargain that the agency must either "pay me now" in the form of interpretations adopted through transparent and deliberative procedures, or "pay me later" by submitting to a more demanding standard of judicial review.<sup>274</sup> On this view, agency litigation briefs, for instance, would not be eligible for *Seminole Rock* deference,<sup>275</sup> just as they are not eligible for *Chevron* deference.<sup>276</sup> By constricting *Seminole Rock*'s domain, this proposal also corrects the incentives created by current doctrine, which generally denies *Chevron* deference to informal agency interpretations, such as those in agency litigation briefs, but grants deference under *Seminole Rock* to agency interpretations in briefs.<sup>277</sup> Despite this logic, as Stephenson and Pogoriler acknowledge,<sup>278</sup> the Supreme Court has generally accorded *Seminole Rock/Auer* deference to agency litigation briefs, though based on fair notice concerns it has recently recognized an exception to this practice.<sup>279</sup>

A second and independent strategy is to devote more attention to the method of regulatory interpretation by which *Seminole Rock* deference is

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273. Merrill & Hickman, *supra* note 268, at 900 ("*Seminole Rock* deference should at a minimum be subject to the same limitations that apply to the scope of *Chevron* deference."); Stephenson & Pogoriler, *supra* note 269, at 1484–96 (arguing that *Mead*'s logic for constraining *Chevron*'s scope of application extends to *Seminole Rock*).

274. Stephenson & Pogoriler, *supra* note 269, at 1490–91.

275. *Id.* at 1493.

276. See *United States v. Mead Corp.*, 533 U.S. 218, 228–30 (2001) (articulating doctrine under which agency litigation briefs presumptively would not warrant *Chevron* deference).

277. See, e.g., *Williamson v. Mazda*, 131 S. Ct. 1131, 1139 (2011) (relying on Solicitor General's brief as reflecting the Department of Transportation's "fair and considered judgment on the matter"); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (deferring to Secretary's construction of regulations taken for first time in the litigation); *Gardebring v. Jenkins*, 485 U.S. 415, 429–30 (1988) (same). The extent to which the Solicitor General has institutional incentives to represent the agency's construction of the statute is open to question. See Margaret H. Lemos, *The Solicitor General as Mediator Between Court and Agency*, 2009 MICH. ST. L. REV. 185, 187.

278. See Stephenson & Pogoriler, *supra* note 269, at 1493 (noting that the Supreme Court has "frequently extended . . . deference to litigation briefs").

279. In 2011, for instance, the Court concluded that agency amicus briefs qualify for *Seminole Rock* deference, rejecting the argument that under *Mead* and *Christensen* they should not. See *Pliva, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011) (relying on brief of United States); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 883–84 (2011) (rejecting argument that agency amicus brief was not entitled to deference under *Auer*, and according deference to the interpretation contained in the brief). In 2012, in contrast, the Court declined to grant *Seminole Rock/Auer* deference to an agency's position taken in a litigation brief based in part on the concern that doing so would undermine fair notice of the regulation's requirements. See *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–68 (2012) (concluding that "general rule" of granting *Auer* deference to interpretations in litigation briefs did not apply in these circumstances of the case in view of fair notice concerns).

triggered.<sup>280</sup> If the interpretive approach increases the requirements for what counts as a permissible construction of the regulation, deference under *Seminole Rock* will be triggered less often. The question is how to increase these requirements in a way that reduces the distinctive risks created by *Seminole Rock* (as opposed to just imposing an arbitrary reduction, like deferring only to agency interpretations issued in the first half of the month).

One way to do that is to pose the same inquiry into regulatory interpretation under *Seminole Rock* as was just framed under *Chevron*: namely, is the agency's interpretation both (1) permissible under the regulation's text, and (2) consistent with the regulation's purposes as authoritatively established in the regulatory text and statement of basis and purpose? This approach clearly reduces the set of permissible interpretations of a regulation to those that satisfy both of these conditions, as illustrated in Figure 1. But it also does so in a way that enhances fair notice. Regulated parties and regulatory beneficiaries have access to the agency's statements justifying the regulation. By attending to the level of generality of the purposes offered to justify the agency's regulation, these parties can gauge the strength of their arguments that an agency's litigation position is inconsistent with its prior rationales. More generally, by constraining the scope of permissible interpretations, this approach provides more notice of the regulation's meaning than simply looking at what interpretations are textually permissible. It thus reduces the fair-notice risks *Seminole Rock* creates.

At the same time, this approach remains consistent with the basic deferential rationale for *Seminole Rock* in that it allows the agency to determine how to best interpret the regulation within the set of textually permissible constructions. This preserves the agency's discretion to deploy its expertise and heightened accountability within that range.

Adopting a consistent approach to regulatory interpretation under *Chevron* and *Seminole Rock* also has independent value. By making these inquiries parallel, the agency cannot defend its regulations from challenge under *Chevron* based on a constrained interpretation that it abandons under a later *Seminole Rock* challenge. For instance, it could not assert that its regulations only apply to a range ( $x$  and  $y$ ) for the purposes of defending their validity under *Chevron*, and then argue that the regulations have a wider scope (including  $x$ ,  $y$ , and  $z$ ) when their enforcement provokes challenge under *Seminole Rock*. Adopting a consistent approach to regulatory interpretation avoids this problem. Only those interpretations of the regulation that are permitted under *Chevron* would be permissible under *Seminole Rock* and vice-versa.

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280. Manning frames this approach in terms of the standard of review, suggesting that *Skidmore* deference should apply to judicial review of agency interpretations of their own regulations. See Manning, *supra* note 7, at 686–90. I address the first-order interpretative question of how to interpret a regulation assuming that *Seminole Rock* still provides the framework of review. Of course, if *Seminole Rock* were to be abandoned, the general purposivist technique of interpretation sketched in Section IV.A could still apply.

### C. A Middle Ground for *Accardi*

Perhaps the most important issue under the *Accardi* principle is how a court will determine the meaning of the agency's own regulations. Differing views of the *Accardi* doctrine justify opposing approaches. The purposive approach applicable under *Chevron* and *Seminole Rock* provides an appealing middle ground.

On the one hand, it is arguable that the central basis for the *Accardi* doctrine is to provide a mechanism for judicial supervision of the agency, thus enhancing the agency's capacity to make credible precommitments, as Elizabeth Magill suggests.<sup>281</sup> But for *Accardi* to deliver on this promise, the court must approach regulatory interpretation under *Accardi* without giving much leeway to the agency to shift its interpretation of its regulations *ex post*. Otherwise, there would be little force to the judicial monitoring that *Accardi* affords. From this perspective, under *Accardi*, courts should engage in relatively maximalist regulatory interpretation in the sense that they aim to unearth the best, not merely a permissible, reading of those precommitments. Indeed, on this view, *Seminole Rock*'s application under *Accardi* appears to be out of place. *Seminole Rock* allows the agency to pivot to another permissible interpretation,<sup>282</sup> undermining the force of judicial monitoring as well as the scope of the agency's ability to make precommitments.

On the other hand, if the danger in the application of *Accardi* comes from courts imposing their preferred constructions on the agency, as Thomas Merrill worries,<sup>283</sup> then the courts should be limited to the more minimalist inquiry of whether the agency's construction of its regulation is permissible, and the application of *Seminole Rock* deference under *Accardi* becomes critical.<sup>284</sup> On this view, *Seminole Rock* would protect against the possibility of a court using ambiguity in a regulation to require the agency to abide by the court's preferred construction.<sup>285</sup> And *Seminole Rock* deference, "like *Chevron* deference, is a vital part of the complex of understandings necessary to empower agencies to pursue their own policy preferences."<sup>286</sup>

The purposive approach to regulatory interpretation accommodates both sets of concerns. To see this, it is first important to recall that under current law, *Seminole Rock* applies under *Accardi*.<sup>287</sup> As a result, for practical

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281. See, e.g., Magill, *supra* note 98, at 874 (arguing that *Accardi* provides agencies with the capacity to make credible precommitments by permitting third-party enforcement of the agency's compliance with its rules); see also Merrill, *supra* note 98, at 615 (evaluating this possibility).

282. See Merrill, *supra* note 98, at 615 (noting the tension between *Accardi* and *Seminole Rock* on this conception of *Accardi*'s role).

283. See *id.*

284. See *id.* (noting that *Seminole Rock*'s application under *Accardi* makes more sense on this conception of *Accardi*'s danger).

285. *Id.* (noting this risk).

286. *Id.*

287. See *supra* text accompanying note 102.

purposes, the scope of the *Accardi* constraint devolves to the scope of *Seminole Rock*'s constraint. So our inquiry turns on how well the purposivist approach under *Seminole Rock*—whether the interpretation is textually permissible and consistent with the agency's stated purposes—functions under *Accardi*.

The purposive approach, again, strikes a balance. On the one hand, it is more constraining on the agency than simply evaluating whether the agency's action is permitted by the regulation's text. Indeed, if we take up the suggestion that at a general level *Accardi* functions as a precommitment mechanism, the purposive approach provides a further specification by giving an account of which commitments the agency must honor. On the purposive approach, the agency has precommitted to abide not only by the text of the regulations but also by the agency's public and authoritative justifications for them. In essence, on the purposive account, *Accardi* provides third-party enforcement for those commitments.

On the other hand, this approach addresses the concern that *Accardi* may invite judicial overreaching. The primary question the court will be asking is still whether the agency's construction is a permissible one—the *Seminole Rock* question. That doctrinal frame provides some protection against a court imposing its preferred construction on the regulation—at least, that is not what the court is being asked to do. In this way, the adaptation of the purposive approach addresses the concerns motivating different conceptions of interpretation under *Accardi*. It provides a more robust judicial constraint on ex post agency interpretation of its own regulations than merely relying on regulatory text. This enhances the judicial monitoring of agencies. But it still frames the judicial check so that the court is only trying to keep the agency within the scope of permissible readings that are consistent with the central commitments the agency has made in its rulemaking.

#### D. Administrative Flexibility and the Rule of Law

One objection to this account of regulatory interpretation and its use in administrative law is that it constrains the flexibility of the agency. Indeed, it does. Because reasons guide the scope of further application, attention to the agency's reasons for its regulations will reduce its flexibility to subsequently interpret or apply its regulation in ways that might comport with the regulation's text but not its justification. And that reduced flexibility can constrain the scope of an agency's political responsiveness, possibly prompting the ire of appointed agency heads or the president.

While flexibility has its virtues, it also has costs. One party's flexibility can be another's unpredictability. In the context of regulatory interpretation, there are reasons to think that this approach strikes an appealing balance between flexibility and predictability. First, the flexibility constraint on the agency is both modest and subject to agency specification. The purposive approach permits an agency to interpret and reinterpret its rule so long as those interpretations are consistent with the basis and purpose and the rule's text. Because the agency creates the rule's statement of basis and purpose, it

can choose to impose greater or lesser constraints on the rule's scope by the way in which it crafts the statement of basis and purpose.<sup>288</sup> If an agency (or a president) seeks to change policy that would be inconsistent with the prior rule and its statement, the agency has the capacity to do so by conducting a new rulemaking proceeding.<sup>289</sup> To be sure, a notice-and-comment rulemaking can consume a great deal of agency resources.<sup>290</sup> But it still requires the coordination of fewer parties with disparate interest than does legislation, and can be undertaken at the agency's initiative, unlike most shifts in judicial doctrine. If the need for flexibility is truly pressing, the APA gives the agency leeway to issue new rules outside of notice-and-comment procedure.<sup>291</sup> This provides a suitable escape valve where the needs for flexibility are at their height.

At the same time, the benefits of this constraint on agency flexibility are real: by using statements of basis and purpose as privileged interpretive sources, regulatory beneficiaries and regulated parties have more notice of the agency's policy and its scope than they would gain solely from inquiring into permissible constructions of the regulation's text. The requirement of consistency with the statement of basis and purpose contracts, instead of broadens, the set of acceptable interpretations of the rule.

The virtue of the way the purposive approach balances predictability and flexibility can be seen by contrasting it with the so-called "one-bite" rule, which originated in the D.C. Circuit.<sup>292</sup> Under that rule, an agency must initiate a new rulemaking to significantly revise a definitive interpretation of its

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288. In this sense, an agency's statement of basis and purpose could also be used as a form of precommitment strategy. See Magill, *supra* note 98, at 888. The more detailed the statement, the more it will lock in the agency's current view of the regulation's scope and application in subsequent administrations.

289. The flexibility constraint might be thought of as a form of resistance norm. Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1594 (2000) (characterizing "resistance norms" as norms that "yield[] to government[] action" though increasing its costs). It does not prohibit the agency from changing course but forces the agency that seeks to transform its policy in ways not consistent with its statement of basis and purpose to go through notice-and-comment rulemaking, with its attendant costs and publicity. For a more general consideration of the constraints on administrative change and an account of its rule-of-law implications, see Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112 (2011).

290. See KERWIN & FURLONG, *supra* note 3, at 91 (commenting on the resource dependence of agency rulemaking).

291. See 5 U.S.C. § 553(b)(3)(B) (2006) (providing exception to notice-and-comment requirement when agency has good cause to view its procedures as "impracticable, unnecessary, or contrary to the public interest"); see also *supra* note 4 (noting agency use of direct final and interim final rules).

292. See Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547, 561-72 (2000) (tracing development of doctrine and arguing for abandoning it); Jon Connolly, Note, *Alaska Hunters and the D.C. Circuit: A Defense of Flexible Interpretive Rulemaking*, 101 COLUM. L. REV. 155, 160-74 (2001) (same). For an overview of the circuit split over the doctrine, see *United States v. Magnesium Corp.*, 616 F.3d 1129, 1139 (10th Cir. 2010) (reporting that the Third, Fifth, and Sixth Circuits have adopted the D.C. Circuit's rule, with the First and Ninth Circuits taking the contrary position).

own rule, even when that interpretation was issued in the form of nonbinding guidance.<sup>293</sup> The one-bite rule seeks to enhance predictability but does so at a much higher cost than the purposive approach to interpretation. The one-bite rule effectively “locks in” an agency’s interpretation of its rule, subject to revision only through a new rulemaking<sup>294</sup>—and does so regardless of whether a reinterpretation would be permitted by the regulation’s text and consistent with the statement of basis and purpose. As a result, the rule provides a disincentive for agencies to offer guidance on the interpretation of their rules because that guidance will require a notice-and-comment proceeding to revise.<sup>295</sup> Accordingly, it also provides a strong incentive for agencies to handle inquiries about the meaning of their rules in an informal, ad hoc, and decentralized way, or through adjudications.<sup>296</sup>

The purposive interpretive approach, in contrast, focuses reliance interests on the rule’s text and the agency’s original, public justifications, not on every subsequent interpretation the agency issues. As a result, this approach enhances the predictability even before an agency has issued guidance interpreting the rule. Under this interpretive method, moreover, the agency is constrained to issuing interpretations consistent with its original justifications for the rule, which augments notice of the scope of the rule’s application. But, in contrast to the one-bite rule, this interpretive approach does not undermine the agency’s incentive to provide guidance on the agency’s current interpretation of its rules; it just delimits a narrower range for those interpretations. The purposive approach thus has the potential to provide more notice of the regulation’s meaning than the one-bite rule while erecting a more modest constraint on the agency’s flexibility.

#### E. Incentives for Strategic Manipulation

Another potential source of objection is the prospect for strategic manipulation by agencies if courts treated statements of basis and purpose as privileged interpretive sources. Agencies might provide highly detailed statements of basis and purpose with the aim of making their policy resistant to change, issue only obscure statements in the hopes of preserving their future flexibility, or attempt to smuggle policies into statements of basis and purpose. While each of these forms of strategic manipulation is a real risk, existing doctrines of administrative law can manage these risks.

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293. See *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”); *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through a process of notice and comment rulemaking.”).

294. See Connolly, *supra* note 292, at 174 (explaining the “lock in” consequence of the one-bite rule).

295. See *id.* at 170.

296. See Pierce, *supra* note 292, at 571; Connolly, *supra* note 292, at 169–70.



First, in anticipation of courts taking a purposive approach to regulatory interpretation, an agency might attempt to entrench as much policy as possible, for instance, by issuing highly detailed statements of basis and purpose, perhaps in anticipation of a presidential transition.<sup>297</sup> The response to this risk is straightforward: so long as the procedural protections for notice-and-comment rulemaking are enforced, which I address below,<sup>298</sup> this prospect is no more problematic than other pervasive forms of agency entrenchment of policy, and it also carries their benefits.<sup>299</sup> Establishing policy is part of the prerogative of government. Providing a relatively more detailed statement of the purposes of the regulation, with the hope that it will guide its further application, stands on the same footing as other ways in which an agency can establish policies that are equally hard, if not harder, to change, such as in the text of a legislative rule itself.

Second, consider the opposite consequence: the purposive approach to regulatory interpretation could encourage an agency to be less explicit in its statement of basis and purpose in order to preserve its future flexibility. The agency's rule, however, will still have to survive hard-look review and the demand for agency reason-giving. Those administrative law doctrines continue to provide a strong check on this strategic obscurantism. As long as those doctrines continue to operate, the incentive toward obscurantism will be checked by the need to be explicit about the policy adopted and its basis.

Third, as became clear in recent debates over agencies' power to preempt state law, agencies have been tempted to smuggle important policies into their statements of basis and purpose that were not previously subjected to the notice-and-comment process.<sup>300</sup> Here again, the purposive approach depends upon enforcement of the procedural core of notice-and-comment rulemaking: that the public has an adequate opportunity to comment on the agency's proposed policy.<sup>301</sup> Without enforcement of those procedural requirements, the fair notice benefits of the purposivist approach will be diminished.

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297. For a helpful treatment of modes of agency entrenchment prior to presidential transitions, see Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 561, 594 (2003).

298. See *infra* text accompanying notes 302–311 (discussing *Wyeth v. Levine*, 555 U.S. 555 (2009), and the logical outgrowth doctrine).

299. See Mendelson, *supra* note 297, at 599–605, 616–52 (highlighting costs as well as benefits of policy entrenchment prior to presidential transitions).

300. See Sharkey, *Federalism Accountability*, *supra* note 37, at 2132, 2138–42 (describing the FDA's inclusion of a preemption statement in its preamble despite having disclaimed any potential preemptive effect in its notice of proposed rulemaking, and cataloging similar actions by the FDA and the National Highway Traffic Safety Administration); see also Manning, *supra* note 7, at 690 n.372 (warning that overreliance on statements of basis and purpose by courts gives incentives to agencies to “slip” desired policy into statements of basis and purpose rather than including them in the text of regulations).

301. See Manning, *supra* note 7, at 690 n.372 (noting that with judicial reliance on statements of basis and purpose for interpretation, courts should police the availability of these statements for comment on their material aspects).

The FDA's statement on preemption considered by the Supreme Court in *Wyeth v. Levine*<sup>302</sup> provides an excellent illustration of both an agency's temptation to announce new policies in its statement of basis and purpose and an effective judicial response. The FDA took the position in its statement of basis and purpose that its authorizing statute, and thus its regulations, preempted state law governing the content and form of prescription drug labels. The authorizing statute, the FDA surmised in its statement of basis and purpose, establishes "both a 'floor' and a 'ceiling,' so [the] FDA approval of labeling preempts conflicting or contrary State law."<sup>303</sup> The agency, however, had not provided any notice of this interpretation when it issued its notice of proposed rulemaking.<sup>304</sup> Quite the opposite, as the Court in *Wyeth* pointed out, in its notice, the agency had explained that the rule did "not contain policies that have federalism implications or that preempt State law."<sup>305</sup> The states and interested parties were afforded no "notice or opportunity for comment"<sup>306</sup> on the FDA's preemption position included in its statement of basis and purpose. The Court rejected the agency's statement, reasoning that "[t]he agency's views on state law are inherently suspect in light of this procedural failure."<sup>307</sup> *Wyeth* thus reveals that the opportunity to comment applies to important policies set forth in statements of basis and purpose, checking the agency's incentive to include previously undisclosed policy in statements of basis and purpose.<sup>308</sup>

This objection emphasizes an important feature of the purposive account: a condition for reliance on statements of basis and purpose as guides to interpretation is the court's enforcement of notice-and-comment proce-

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302. 555 U.S. 555 (2009).

303. *Wyeth*, 555 U.S. at 575 (quoting 71 Fed. Reg. 3922, 3934–35 (Jan. 24, 2006) (internal quotation marks omitted)).

304. *Id.* at 577.

305. *Id.*

306. *See id.*

307. *Id.*

308. The "logical outgrowth" doctrine also has the resources to enforce disclosure. When an agency is engaged in informal rulemaking, its final rule must be a "logical outgrowth" of the proposed rule published in the § 553(b) notice. *See, e.g., Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991). The logical outgrowth doctrine seeks to ensure meaningful participation in the notice-and-comment process. *See Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994). In making this determination, courts may evaluate whether the agency provided meaningful notice of positions taking in its statement of basis and purpose. *See, e.g., Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (finding a final rule was not a logical outgrowth of the proposed rule when the proposed rule suggested that the agency was considering a minimum air velocity standard for point-feed regulators and the final rule's statement of basis and purpose provided a maximum air velocity); *Pub. Citizen, Inc. v. Mineta*, 427 F. Supp. 2d 7, 16 (D.D.C. 2006) (finding no logical outgrowth when the final rule's statement of basis and purpose established categorical presumptions concerning the confidentiality of information submitted to the agency while the proposed rule contemplated nonbinding presumptions). Policing whether policies in a statement of basis and purpose are a logical outgrowth of an agency's proposals falls within core judicial capacities.

dures. Policing administrative procedure is, however, a core judicial capacity, well honed through years of application under the APA.

#### F. Preemption and the Legal Status of Statements of Basis and Purpose

One further and related worry is whether this methodology grants statements of basis and purpose a legal status they do not warrant. Understanding this objection clarifies the legal status of statements of basis and purpose. It also reveals implications of the purposive approach for the debate over how an agency should express its view that its regulations preempt state law.

As to the legal status of statements of basis and purpose, the purposive approach does not conflate them with the regulation's text. If the statement of basis and purpose contradicts the regulation's text, the text trumps because it is the legally binding aspect of the regulation.<sup>309</sup> But the purposive approach still takes the statement of basis and purpose to be privileged among sources of interpretation other than the text; for instance, as part of the rulemaking product, it is privileged over later-issued policy statements and interpretative rules suggesting the meaning or application of the regulation. Those post hoc statements are at best candidates for deference after the court has concluded, based on analysis of the regulation's text read in light of the statement of basis and purpose, that the regulation permits those constructions.

With this clarification in mind, it is worth addressing the implications of this approach for the debate over the agency's power and means to preempt state law. In debates over regulatory preemption, agency claims of the preemptive effect of their regulations in their litigation briefs, on the one hand, and in their statements of basis and purpose, on the other, have been treated as equivalent.<sup>310</sup> Taking the purposive approach, however, there is an important difference. So long as an agency does not short-circuit the principles of notice-and-comment rulemaking addressed above in discussing *Wyeth*, an agency's explanation of the preemptive effect of its regulations in its statement of basis and purpose should guide judicial construction of the meaning of the regulation. A litigation brief, in contrast, is at best a candidate for deference once the regulation has been found ambiguous as to its preemptive scope.<sup>311</sup>

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309. See *supra* note 200 (discussing *Cuomo v. Clearing House Ass'n*, 557 U.S. 519, 531 (2009)). In *Fertilizer Institute v. EPA*, for instance, the D.C. Circuit rejected the argument that the EPA's interpretation of the term "release" contained in the regulation's statement of basis and purpose was a legislative rule, and therefore was procedurally invalid. See 935 F.2d 1303, 1308 (D.C. Cir. 1991). The court reasoned that "an agency's action is deemed . . . legislative when the agency *intends* to create new . . . duties" and not when an agency's action "has the effect of creating new duties." *Id.* (citation omitted). "Accordingly, the fact that the preamble may affect how parties act does not make the rule legislative . . ." *Id.*

310. See, e.g., Sharkey, *supra* note 39, at 496.

311. Perhaps it should not even be that. See text accompanying notes 98–102 (discussing the view that *Seminole Rock* should not apply to agency briefs among other forms of informal agency action).

There still might be special justification for prohibiting an agency from making claims regarding preemption in their statements of basis and purpose, as President Obama's recent memorandum directs.<sup>312</sup> For instance, that position might be grounded in a special distrust of the efficacy of notice-and-comment protections in the preemption context, or a view that the federalism implications of preemption are so significant as to warrant a clear-statement rule. What is important for the purposive account, however, is that the reasons for marginalizing the agency's statement of basis and purpose are tied to the particulars of agency preemption, not a crosscutting suspicion of these statements as grounds for regulatory interpretation or of the efficacy of notice-and-comment protections.<sup>313</sup>

### CONCLUSION

Over more than a half-century, courts and commentators have been knit in debate over the proper method for interpreting statutes. The "age of statutes,"<sup>314</sup> however, has decisively given way to an era of regulation, with notice-and-comment rules providing a ubiquitous source of law in the contemporary American state. These regulations remain, however, virtually unnoticed guests at the interpretive table. Our central doctrines of administrative law depend on how regulations are interpreted. But how courts do so has triggered little interest, and courts still lack a considered approach. It is time for the interpretation of regulations to take a place in interpretive debates and in the development of administrative law.

To invigorate that debate, this Article argues that the strongest case for legal process purposivism may be as applied to regulations. Administrative law requires production of explanatory materials by agencies when they create regulations. Courts currently use those materials primarily to assess the validity of regulations. But they hold promise for the interpretation of regulations as well. Because agencies must issue these statements for their regulations to be valid, and the validity of regulations depends on the reasons offered to justify them, it makes sense to interpret the text of regulations in light of the justifications provided for them. By using these statements as a privileged source for interpretation, this approach allocates deference to the agency's exercise of reasoned discretion. At the same time, the approach holds

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312. President Obama's memorandum directs the heads of executive departments not to include "in regulatory preambles statements that the department or agency intends to preempt State law through the regulation except where the preemption provisions are also included in the codified regulation." Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies on Preemption (May 20, 2009), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption>. The memorandum prohibits the type of preemptive statement the FDA made in its statement of basis and purpose at issue in *Wyeth*. See *id.*; cf. Sharkey, *Federalism Accountability*, *supra* note 37, at 2179–80 (arguing that courts should force agencies to engage in preemption decisions by conditioning deference on whether preemption statements have gone through notice-and-comment procedures).

313. See Metzger, *supra* note 37, at 2103.

314. See CALABRESI, *supra* note 1, at 1.

the agency to the grounds it offered to justify its actions, augmenting fair notice of the meaning of regulations. This general approach to regulatory interpretation is also adaptable to the need for regulatory interpretation in administrative law. When faced with a regulation in a *Chevron* challenge, as well as in applications of *Seminole Rock* and *Accardi*, the court should ask whether the proffered construction is a permissible reading of the regulatory text and consistent with the agency's justification for it. This additional requirement of consistency with the agency's justification restricts the agency's flexibility to reinterpret its regulations, but does so in the service of fair notice.

This approach also suggests new promise for purposivism. At least as a theory of judicial statutory interpretation, purposivism has been in retreat in the face of textualist critiques. Identifying the scope of legal process purposivism's commitment to positive sources illuminates how it can serve as a model for regulatory interpretation. More important, given the prominence and centrality of regulations in contemporary law, a purposive approach to interpreting regulations constitutes a significant foothold for purposivism, and a new day for Hart and Sacks's theory.

