A Textualist Approach to Purposivism in the Regulatory Arena

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Kevin M. Stack, *Interpreting Regulations*, 111 **Mich. L. Rev.** 355 (2012).

When I returned from the 2013 AALS Annual Meeting, I discovered Professor Kevin M. Stack's latest article, *Interpreting Regulations*, 111 Mich. L. Rev. 355 (2012), waiting patiently for me. As someone who teaches both Administrative Law and Statutory Interpretation/Legislation, I picked it up with interest; although, given all that has been written about statutory interpretation, I must confess that I really couldn't imagine that there would be anything new to say about interpreting regulations. Yet, I remembered that each year, around the time my students realize that they will certainly be tested with a *Chevron*-like hypothetical on their final exam, I'm asked how to approach the analysis. After they've determined that *Chevron* applies (*Chevron* step zero), that Congress did not have an intent as to the precise issue before the court (*Chevron* step one), and that the agency's interpretation of the statute is reasonable (*Chevron* step two), I have always told them that the final step is simply to apply the regulation to the fact pattern using the traditional tools of *statutory* interpretation. Was my direction wrong? I wondered.

Lest I hold you in suspense, let me explain Professor Stack's thesis immediately. He believes that courts should use regulatory purposivism to interpret regulations. He defines regulatory purposivism in this way: a court should ask whether an interpretation of a regulation is (1) permitted by the regulation's text, *and* (2) consistent with the purposes as stated in the regulation's statement of basis and purpose (and/or text). If a court answers yes to both questions, then the interpretation is "reasonable," "permissible," "plainly" right, at essence, controlling. (If I may digress, I wondered, was he advocating a new two-step deference approach? God forbid!) He suggests that courts should not give meaning to a regulation that the text will not bear, but he adds that neither should courts give a regulation a meaning that the written statement of basis and purpose will not bear. In essence then, he advocates for a text-based approach to purposivism!

To support his approach, Professor Stack initially examines several well-known doctrines that require regulatory interpretation: *Chevron*, *Auer*, and *Accardi*. He concludes that, at least when using these doctrines, courts do not approach regulatory interpretation consistently: sometimes courts use a textualist approach; sometimes they use a purposivist approach; sometimes they turn to the statement of basis and purpose, and sometimes they do not; sometimes they use linguistic canons, and sometimes they do not. One might say that "[t]he hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of [*regulatory* interpretation]."[1]

To support regulatory purposivism, Professor Stack argues that text alone does not sufficiently constrain the interpreter (whether it be the agency or a court), and that text alone fails to provide adequate notice to those regulated. Notably, these are arguments that might apply equally well to statutory interpretation. In any event, Professor Stack notes that regulations are different from statutes in three important ways that support his proffered approach. First, unlike statutes, regulations always contain statements of basis and purpose because APA section 553(c) so requires. The U.S. Constitution has no similar requirement. Second, agencies are required to act rationally under hard look review. Congress can act irrationally should it choose, in part, because hard look review is more demanding than

rationality review. Third, agencies cannot explain their actions post-hoc, pursuant to the *Chenery* doctrine. Congress has no such timing limitation. These three distinctions are relevant to the role of purpose statements in interpretation: The two "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."[2]

Professor Stack likens regulatory purposivism to Hart and Sacks's style of purposivism. He explains that his approach reaps all the benefits of this latter approach, while avoiding the criticisms. The most notable criticism is directed at Hart and Sacks's suggestion that judges should presume that legislatures are comprised of "reasonable persons pursuing reasonable purposes reasonable."[3] Many have noted that legislatures do not always act reasonably. Further, many reject the imbedded idea that judges should independently determine the reason, or purpose, for legislation. But Professor Stack rejects these criticisms, explaining that they are not the defining element of Hart and Sacks's purposivism. He reminds his reader that Hart and Sacks first direct interpreters to consider any "formally enacted statement of purpose."[4] Only when a court determines that such a statement is not useful or is unavailable should a court infer purpose. This step is the one that sends textualists screaming. But as Professor Stack notes, this inferring is to be done with the text and the specific provisions within it in mind. In other words, even purposivists want to understand the meaning of a statute within its whole statutory context, in light of the legal system as a whole. Finally, Professor Stack notes that Hart and Sacks's criticized direction applies only when statutes do not include a formally enacted statement of purpose. Regulations always include such statements.

At bottom, Professor Stack's article offers a new, but familiar, method for interpreting regulations; one that purposivists will certainly embrace, but one that textualists will likely rebuff.

1. *Id*. at 366 (quoting Henry M. Hart & Albert M. Sacks, The Legal Process 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).
2. *Id*. at 380.
3. *Id*. at 362 (quoting Hart & Sacks, *supra* at 1378).
4. *Id*. at 385 (quoting Hart & Sacks, *supra* at 1377).

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