Decanonization

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Substantive canons of statutory interpretation—policy-based interpretive guidelines and legal principles such as the rule of lenity and the presumption against retroactivity—have guided federal courts for as long as federal courts have existed. Substantive canons have faced criticism in recent years, however, as courts struggle with tensions between their longstanding use and the judiciary's duty to act as a faithful agent for the legislature. The controversy has provoked a surge of scholarship examining the origins and purposes of the substantive canons currently employed by the courts, often aimed at justifying their continued use.

Virtually ignored by academic commentators, however, are canons that courts once invoked with regularity but have since either implicitly or explicitly abandoned. This Article focuses on this understudied set of now-obsolescent rules of statutory interpretation: the canons, in other words, that have become decanonized.

In evaluating four once-favored tools of statutory interpretation—the pro-taxpayer canon, the immigration rule of lenity, the remedial purpose canon, and what this Article terms the mariner's canon—this Article traces their disappearances to three causes: changed economic circumstances, the absorption of a subject-specific interpretive framework by a broader one, and the transformation of the common law system into one dominated by statute.

Far from mere historical curiosities, the decanonized canons help answer vital questions about statutory interpretation in general, and the fate of the substantive canons in particular: How do canons adapt over time? How does a canon become decanonized? And most importantly: once decanonized, can a canon ever be revived?

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INTRODUCTION

Can canons die? Many substantive canons of statutory construction—the policy-based rules and principles that courts use to interpret statutes—have never gone out of fashion.[1] To be sure, some substantive canons, such as the rule of lenity and the Indian canon,[2] have had better and worse years at the Supreme Court, but their canonical status has never been seriously threatened. Yet some substantive canons, after enjoying widespread use for decades or even centuries, can be and have been discarded by the courts—sometimes over several years, sometimes in a single stroke.

Thus one question prompts another: *Why* do canons die? Despite reams of scholarship on the canons of statutory interpretation and the substantive canons in particular, there has been no effort to answer this question in a systematic way. The scholarly gap is all the more puzzling given how controversial the substantive canons have become since the emergence of New Textualism in the late twentieth century.[3] Justice Barrett and Justice Scalia have argued that substantive canons—interpretive guidelines and principles that favor certain policy outcomes—clash with the "honest textualist" commitment to the plain language of the statute.[4] And Justice Kagan has repeatedly castigated self-described textualist judges for their use of substantive canons to reach an interpretation that, in her view, strays from the statutory text.[5]

This Article traces the decline and disappearance of four substantive canons—a process I term *decanonization*. First to disappear was the pro-taxpayer's canon, under which courts resolved ambiguities in tax statutes in favor of the taxpayer. The Supreme Court replaced the pro-taxpayer canon

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1. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RSRV. L. REV. 581, 583 (1990).

2. The rule of lenity instructs courts to interpret ambiguous terms in criminal statutes in favor of criminal defendants. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117–18 (2010). Under the Indian canon, courts interpret ambiguous statutory terms in favor of Native American tribes. *Id.* at 151. Courts have employed both canons for centuries. *See id.* at 128–30, 151–52.

3. "New Textualism"—the term is William Eskridge's—refers to the form of textualism most famously espoused by Justice Scalia. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). New Textualists reject any reliance on legislative history to ascertain a statute's meaning and emphasize the text of a statute rather than its purported purpose. *See id.* at 623–24, 650–56.

4. Barrett, *supra* note 2, at 110; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (Amy Gutmann ed., 1997).

5. *See* Biden v. Nebraska, 600 U.S. 477, 533, 541–548 (2023) (Kagan, J., dissenting); West Virginia v. EPA, 597 U.S. 697, 779 (2022) (Kagan, J., dissenting); Sackett v. EPA, 598 U.S. 651, 712–14 (2023) (Kagan, J., dissenting).

by its mirror image—under which ambiguities are construed in favor of the government—in the 1930s.[6] Next to fall was what this Article terms the mariner's canon, under which courts resolve statutory ambiguities in favor of seamen. Although the mariner's canon has escaped the attention of scholars of statutory interpretation, the Supreme Court once invoked the canon with regularity before it faded out over the late twentieth century.[7] The third and fourth of this Article's compendium of decanonized canons—the canon instructing courts to broadly construe remedial legislation and the canon interpreting ambiguities in immigration laws to favor noncitizens—died slow deaths over the course of the late twentieth and early twenty-first centuries.[8]

A study of these four canons reveals three causes of decanonization. Some canons, such as the pro-taxpayer canon, disappear when the economic circumstances justifying the canon no longer hold.[9] Others are absorbed by a broader interpretive regime—for example, when deference to agency interpretations supersedes courts' own interpretive rules, as seen in the absorption of the immigration rule of lenity by *Chevron* deference.[10] Finally, canons that took shape under the common law, such as the remedial purpose canon, became obsolete as the legal system grew increasingly statute-dominated in the late nineteenth and twentieth centuries.[11] These processes often work in tandem, as can be observed in the decanonization of the mariner's canon during the late twentieth century.[12]

The decanonized canons are not just quaint anachronisms. They have much to tell us about statutory interpretation in general, and the fate of the substantive canons in particular. Indeed, studying the decline of substantive canons takes on special relevance in light of recent findings that, despite predictions of an increasingly textualist court making greater use of substantive canons as an "escape valve," the Supreme Court's use of these canons has actually declined in recent years.[13] And the decline is not spread evenly across the substantive canons. The rule of lenity has remained popular among the Justices, for instance, while several once-well-established canons

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6. *See infra* Section III.A.
7. *See infra* Section III.D.
8. *See infra* Sections III.B–C.
9. *See infra* Section III.A.
10. *See infra* Section III.B. *Chevron* deference was itself jettisoned by the Supreme Court in the 2024 decision *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), *overruling* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
11. *See infra* Section III.C.
12. *See infra* Section III.D.
13. *See* Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 879–90 (2017).

receive barely a mention.[14] In other words, the four canons this Article examines will not the last to be decanonized.

This Article is the first to systematically address how and why courts discard canons of statutory interpretation. Part I summarizes the substantive canons, and Part II explains the history of their increasingly controversial role as interpretive tools. Part III identifies three causes of decanonization, observed through the decline of four now-defunct substantive canons. Part IV investigates the relationship between decanonization and stare decisis in light of Part III's findings, concluding that courts should be wary of giving stare decisis effect to interpretive methodologies such as canon usage. Finally, Part V contends that once a substantive canon has become decanonized, recanonization is extraordinarily difficult—but the recent end of *Chevron* deference may spur the revitalization of some now-neglected substantive canons.

I. WHAT ARE SUBSTANTIVE CANONS?

Canons are interpretive principles that guide a court's analysis of statutes. There are dozens of canons, and they are often grouped into three categories: substantive canons, textual canons, and extrinsic canons.[15]

Substantive canons are policy-based interpretive guidelines and principles.[16] The best-known is the rule of lenity, which instructs courts to interpret ambiguous criminal statutes in favor of criminal defendants.[17] A close second is the canon of constitutional avoidance, which instructs courts to avoid interpreting a statute as unconstitutional if an alternative interpretation is plausible.[18]

Substantive canons differ from what are known as textual canons, which reflect general understandings of how the English language works.[19] The

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14. *See id.* at 856.

15. *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons* (pt. 1), 65 STAN. L. REV. 901, 924–25 (2013); WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATIONS, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 447–49, 1088–1148 (2014). Textual canons are also known as "language" canons or "intrinsic aids." *See* Jarrod Shobe, *Congressional Rules of Interpretation*, 63 WM. & MARY L. REV. 1997, 2006 (2022); ESKRIDGE ET AL., *supra*, at 449.

16. *See* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 382 (4th ed. 2021); JANE C. GINSBURG & DAVID S. LOUK, LEGAL METHODS: CASE ANALYSIS AND STATUTORY INTERPRETATION 238–39 (5th ed. 2020); Krishnakumar, *supra* note 13, at 833.

17. *See supra* note 2; ESKRIDGE ET AL., *supra* note 15, at 448, 494.

18. Krishnakumar, *supra* note 13, at 834, 897; Barrett, *supra* note 2, at 118–19.

19. ESKRIDGE ET AL., *supra* note 15, at 449.

textual canon of *noscitur a sociis* (Latin for "it is known from its associates"), for instance, instructs courts to interpret ambiguous words by reference to their surrounding words and phrases.[20] As an example, in the 2015 case of *Yates v. United States*, the Supreme Court held that even though a fish is technically a tangible object, "tangible object" is less likely to refer to "fish" when used in the context of the phrase "record, document, or tangible object."[21]

Another textual canon, the rule against "surplusage," stands for the principle that no part of a statute should be interpreted to be entirely redundant.[22] Thus 18 U.S.C. § 1344(2), which prohibits obtaining a bank's property by false pretenses, does not require the government to also prove the defendant intended to defraud a bank.[23] This is because, as the Court noted in the 2014 case of *Loughrin v. United States*, § 1344(1) already makes it illegal to defraud a bank.[24] To hold otherwise would make § 1344(2) a "mere subset" of § 1344(1), thereby contravening a "cardinal principle of interpretation: that courts must give effect, if possible, to every clause and word of a statute."[25]

In addition to substantive and textual canons are extrinsic canons, which look outside the statute itself—for example, to agency interpretations, prior court decisions, dictionaries, or more controversially, the statute's legislative history—for clues to statutory meaning.[26]

An example of the Court using all three types of canons can be seen in the case of Mr. Frank Muscarello, who dealt drugs out of his truck while keeping a gun in the truck's locked glove compartment.[27] Muscarello was charged

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20. 2A NORMAN J. SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47:16, Westlaw (7th ed., database updated Nov. 2024) [hereinafter SUTHERLAND].

21. *See* Yates v. United States, 574 U.S. 528, 543–45 (2015) (interpreting 18 U.S.C. § 1519). *But see id.* at 553–54 (Kagan, J., dissenting) (citing DR. SEUSS, ONE FISH TWO FISH RED FISH BLUE FISH (1960)).

22. *See* Liu v. SEC, 591 U.S. 71, 89 (2020) (quoting Parker Drilling Mgmt. Servs., Ltd. v. Newton, 587 U.S. 601, 611 (2019)); 2A SUTHERLAND, *supra* note 20, § 46:6.

23. Loughrin v. United States, 573 U.S. 351, 357–58 (2014) (interpreting 18 U.S.C. § 1344(2)).

24. *See* 18 U.S.C. § 1344(1).

25. *Loughrin*, 573 U.S. at 358 (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)).

26. ESKRIDGE ET AL., *supra* note 15, at 448–49, 1093–98. The dictionary canon is sometimes referred to as a textual canon rather than an extrinsic one. *Compare* Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1474 (2000) (referring to dictionaries as extrinsic aids), *and* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 7 (2006) (referring to dictionary canon as an extrinsic source canon), *with* ESKRIDGE ET AL., *supra* note 15, at 1089 (classifying dictionary canon as a textual canon), *and* 2A SUTHERLAND, *supra* note 20, § 45:14 ("Intrinsic aids derive meaning from the internal structure of the text and conventional or dictionary meanings of the terms used in it.").

27. Muscarello v. United States, 524 U.S. 125 (1998).

with violating 18 U.S.C. § 924(c)(1), which punishes anyone who "uses or carries a firearm" in relation to a drug trafficking crime.[28]

Does keeping a gun in a locked glove compartment constitute *carrying* a firearm? Invoking the substantive canon of the rule of lenity, Justice Ginsburg said no. "Carry" has many meanings, she wrote, and "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant."[29]

Unfortunately for Muscarello, most of the Supreme Court disagreed. Justice Breyer, writing for the majority, invoked textual canons and extrinsic canons to hold that Muscarello "carried" a firearm for purposes of § 924(c)(1).[30] First, Justice Breyer employed the textual canon against surplusage. A different provision of the statute permitted storage of firearms in locked containers under certain circumstances not applicable to Muscarello, so if "carry" didn't already encompass transporting a gun in a locked container, Justice Breyer wrote, then that exception would be "quite unnecessary."[31] Next, Justice Breyer looked to several extrinsic sources—legislative history, dictionaries, and even the Bible—to argue that "carries" is generally understood to include "conveyance in a vehicle."[32] Thus, the Court concluded that Muscarello's conduct fell within § 924(c)(1)'s prohibition on carrying a firearm in relation to a drug trafficking crime.[33]

The Supreme Court's treatment of § 924(c)(1) exemplifies how courts reach decisions by applying canons of statutory interpretation as methods of legal reasoning. Among the most important tools in a judge's toolkit, the canons consist of commonsense conventions, longstanding judicial practices and traditions, and deeply rooted ethical and political norms. And as *Muscarello* illustrates, courts often apply canons in combination to buttress an argument or parry opposing interpretations.

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28. 18 U.S.C. § 924(c)(1).

29. *Muscarello*, 524 U.S. at 148 (Ginsburg, J. dissenting).

30. *Id.* at 137 (majority opinion).

31. *Id.* at 135.

32. *Id.* at 128–34; *see id.* at 129 ("The greatest of writers have used the word [carry] with this meaning.") (quoting, *inter alia*, *2 Kings* 9:28 (King James) ("[H]is servants carried him in a chariot to Jerusalem."); *Isaiah* 30:6 (King James) ("[T]hey will carry their riches upon the shoulders of young asses."); DANIEL DEFOE, ROBINSON CRUSOE 174 (J. Donald Crowley ed., Oxford Univ. Press 1972) (1719) ("With my boat, I carry'd away every Thing."); and HERMAN MELVILLE, MOBY DICK 43 (Univ. Chi. Press 1952) (1851) ("[They] had lent him a [wheelbarrow], in which to carry his heavy chest to his boarding house.")).

33. *Muscarello*, 524 U.S. at 139.

II. THE CANONICAL CONTROVERSY

The lesson of *Muscarello*—apart from "Don't keep a gun in your car when dealing drugs"—is that canons are not always outcome determinative. Indeed, different canons often point in opposite directions.[34] Given canons' frequent inconclusiveness, judges and commentators often criticize the canons as a post-hoc means to justify a preferred outcome.[35]

Substantive canons have come under particular criticism in recent years because unlike textual and extrinsic canons, they do not even purport to be policy-neutral.[36] Instead, substantive canons yield particular outcomes: in the case of the rule of lenity, a defendant-friendly outcome; in the case of the Indian canon, under which ambiguous statutes are interpreted in favor of Native American tribes, a Native-friendly one.[37] Then-Professor Amy Coney Barrett once described the substantive canons as a problem for textualists—those who interpret by focusing on a statute's language, rather than considerations such as public policy or a statute's purpose—because a court applying a substantive canon "uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent" to Congress.[38] Justice Scalia similarly described substantive canons as "a lot of trouble" for the "honest textualist," and argued that substantive canons lead to judicial unpredictability and arbitrariness.[39] But even critics of substantive canons—Justice Scalia and Justice Barrett being no exception—continued, and continue, to use them.[40]

Not all substantive canons are created equal, however. While some enjoy broad—even unquestioned—acceptance by the Supreme Court, others are confined to scattered dissents and concurrences.[41] Still others formerly enjoyed widespread use, but now languish in obscurity.

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34. *See* Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 926 (2016); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

35. *See* ESKRIDGE ET AL., *supra* note 15, at 552, 556; Krishnakumar, *supra* note 13, at 827.

36. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595–96 (1992).

37. *See* Barrett, *supra* note 2, at 151–52, 177.

38. *Id.* at 110; *see also Textualism*, BLACK'S LAW DICTIONARY (12th ed. 2024).

39. SCALIA, *supra* note 4, at 28.

40. *See* Krishnakumar, *supra* note 13, at 901–08 (noting that between 2006 and 2012, every Justice wrote at least one opinion invoking a substantive canon); United States v. Hansen, 599 U.S. 762, 781 (2023) (Barrett, J.) (invoking the substantive canon of constitutional avoidance).

41. *See* Krishnakumar, *supra* note 13, at 901–08.

The sustained scholarly attention to substantive canons suggests the need to provide a systematic look at how and why some canons go out of vogue. In other words, what causes canons to become decanonized?

III. CAUSES OF DECANONIZATION

This Article considers four case studies of now-defunct substantive canons: the pro-taxpayer canon, the immigration rule of lenity, the remedial purpose canon, and the mariner's canon. These case studies reveal three reasons courts abandon substantive canons: changed economic circumstances, the absorption of a subject-specific interpretive framework by a broader framework, and the transformation of a common law regime into a statute-dominated one. When applicable, this Part also contrasts each decanonized canon with a related canon that has survived to show how their usages differ depending on the presence or absence of a key causal factor.

Two threshold considerations are in order. First, the focus is the substantive canons as opposed to textual or extrinsic ones. Because textual canons are drawn from general conventions of English grammar and syntax rather than considerations of policy, they tend to change only insofar as English grammar and syntax change: slowly and largely independently of the legal world.[42] The decanonization of textual canons is more a question of historical linguistics than statutory interpretation and thus outside this Article's scope. As to the extrinsic canons, many do not consider them canons at all.[43] They are guidelines about *what* sources to consult when interpreting a statute rather than *how* to interpret the statute. Analyzing the declining use of certain extrinsic sources—most notably in the past few decades, legislative history—is thus far removed from the question of how and why courts cease to invoke substantive canons.[44]

Second, this Article's analysis of the decanonization process focuses primarily, though not exclusively, on United States Supreme Court decisions. As Anita Krishnakumar and Victoria Nourse put it, the Supreme Court "should be the yardstick by which frequency of use of a particular canon is

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42. *See* Aaron-Andrew P. Bruhl, *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481, 518 (2015).

43. *E.g.*, James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005) (classifying canons as either "language canons" or "substantive canons"); Barrett, *supra* note 2, at 117 (similar dichotomy between "linguistic canons" and "substantive canons").

44. For the flagship work on the late twentieth century turn against legislative history, see Eskridge, *supra* note 3.

measured."[45] The Supreme Court sets the agenda when it comes to the rules of statutory interpretation—an agenda that lower courts tend to follow.[46] To be sure, the Supreme Court's interpretive decisions do not bind federal district or appellate courts in the same way their substantive decisions do.[47] Indeed, a canon sometimes lingers for years or decades in the lower courts after the Supreme Court has implicitly, or even explicitly, dispensed with it.[48] This Part thus mentions lower court decisions when applicable, but it looks first and foremost to how the following four canons have fared before the Supreme Court.

A. Changed Economic Circumstances: The Pro-Taxpayer Canon

Today, statutory provisions conferring tax exemptions and deductions are construed narrowly—that is, against the taxpayer. "[A]n income tax deduction is a matter of legislative grace," explained the Supreme Court in the 1992 case of *INDOPCO, Inc. v. Commissioner*, and thus "the burden of clearly showing the right to the claimed deduction is on the taxpayer."[49] In other words, the Court today embraces an anti-taxpayer canon of statutory interpretation.[50]

But it wasn't always this way. Indeed, the rule used to be the opposite: that ambiguous tax statutes "must be resolved against the government and in favor of the taxpayer."[51] In the 1917 case of *Gould v. Gould*, for example, the Supreme Court held that alimony payments did not count as income for tax purposes, reasoning that "statutes levying taxes . . . are construed most strongly against the government, and in favor of the citizen."[52] And in the 1923 case of *United States v. Merriam*, the Court held that cash bequests to

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45. Anita S. Krishnakumar & Victoria Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 182 (2018) (reviewing WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016), and ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)).

46. *See* Bruhl, *supra* note 42, at 496, 508–13, 537–41.

47. *See infra* Part IV.

48. *See, e.g.*, *infra* notes 55–56 and accompanying text (pro-taxpayer canon); Bruhl, *supra* note 42, at 537 (canon that statutes conferring federal subject-matter-jurisdiction are to be narrowly construed); *see also id.* at 552 ("At least from the perspective of lower courts, a canon remains in the toolkit even if the Supreme Court has not pulled it out for quite some time.").

49. 503 U.S. 79, 84 (1992).

50. *See generally* Jonathan H. Choi, *The Substantive Canons of Tax Law*, 72 STAN. L. REV. 195, 251–54 (2020); 3 SUTHERLAND, *supra* note 20, §§ 63:8, 66:3 (collecting cases); 3A *id.* § 66:9 (collecting cases).

51. United States v. Merriam, 263 U.S. 179, 188 (1923).

52. 245 U.S. 151, 153 (1917).

executors of one's will did not count as income either: "If the words [of the tax statute] are doubtful," Justice Sutherland wrote, "the doubt must be resolved against the government and in favor of the taxpayer."[53] Although a few modern lower-court cases continue to cite the pro-taxpayer canon,[54] and Justice Thomas mentioned it in a 2001 solo concurrence,[55] courts and scholars generally agree that the rule is more or less defunct.[56]

How did the pro-taxpayer canon become decanonized? And what accounts for the reversal?

In *Reading Law*, Justice Scalia and Bryan Garner offer one theory to explain the rise and fall of the pro-taxpayer canon. They speculate that it originated as a rule of lenity for taxpayers.[57] Because deprivation of property was seen as akin to punishment, the tax statute had to clearly authorize the deprivation.[58] On their account, taxpayer lenity met its end in the nineteenth century. During that period, before the Sixteenth Amendment granted Congress the authority to tax income, the tax cases that came before the Supreme Court mostly involved taxpayers arguing that a state government lacked the power to eliminate a desired exemption.[59] In essence, taxpayers would argue that if state law afforded them a tax exemption, the Contracts Clause of the United States Constitution (which prohibited states from passing any law "impairing the Obligation of Contracts"[60]) or principles of federal preemption prohibited the state from withdrawing the exemption.[61] Scalia and Garner argue that the Supreme Court was unwilling to presume

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53. *Merriam*, 263 U.S. at 187–88.

54. *See, e.g.*, Borenstein v. Comm'r, 919 F.3d 746, 752 (2d Cir. 2019) (invoking pro-taxpayer canon); *see also* Edward A. Morse, *Reflections on the Rule of Law and "Clear Reflection of Income": What Constrains Discretion?*, 8 CORNELL J.L. & PUB. POL'Y 445, 479 n.142 (1999) (mentioning two lower court cases from the 1990s that invoke the canon).

55. *See* United Dominion Indus., Inc. v. United States, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) ("[W]e should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter.").

56. *See* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 4.3 (2024); William D. Popkin, *Interpreting Conflicting Provisions of the Nevada State Constitution*, 5 NEV. L.J. 308, 315 (2004); Michelle M. Kwon, *Custom-Tailored Law: When Statutory Interpretation Meets the Internal Revenue Code*, 97 NEB. L. REV. 1118, 1135 (2019); Peter A. Lowy & Juan F. Vasquez, Jr., *Interpreting Tax Statutes: When Are Statutory Presumptions Justified?*, 4 HOUS. BUS. & TAX L.J. 389, 396 (2004); Steve R. Johnson, *The Canon that Tax Penalties Should Be Strictly Construed*, 3 NEV. L.J. 495, 497 & n.22 (2003); Morse, *supra* note 54, at 478 &. n.137.

57. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 359–60 (2012).

58. *See* Morse, *supra* note 54, at 478–79, 479 n.141.

59. *See* SCALIA & GARNER, *supra* note 57, at 360.

60. U.S. CONST. art. I, § 10, cl. 1.

61. *See* SCALIA & GARNER, *supra* note 57, at 360.

that a state waived its own power to tax, much as the Court today presumes against a state's waiver of its own sovereign immunity.[62] Thus emerged the interpretive presumption against taxpayers.

For example, they point to the 1874 case of *Tucker v. Ferguson*, which concerned a Michigan law exempting certain railroad-owned land from taxation.[63] When Michigan removed the tax exemption, railroad bondholders sued, arguing that Michigan's withdrawal of the exemption violated the Contracts Clause.[64] The Supreme Court unanimously rejected the bondholders' argument.[65] "The taxing power is vital to the functions of government," Justice Swayne wrote, and thus any contract that restrains the government's power to tax should have "[e]very reasonable doubt . . . resolved against it . . . . It is in derogation of public right, and narrows a trust created for the good of all."[66] The Court came to the same unanimous conclusion two years later in *West Wisconsin Railway v. Board of Supervisors of Trempealeau County*, which involved a similar challenge to the withdrawal of a railroad tax exemption in Wisconsin.[67]

Scalia and Garner's theory plausibly describes the *origins* of the pro-taxpayer canon as a quasi-rule of lenity. But their account of the canon's *disappearance* is not fully satisfactory. Scalia and Garner explain how the Supreme Court's expansive view of state governments' constitutional power to tax resulted in the Court interpreting the Contracts Clause against taxpayers who challenged states' elimination of tax exemptions, but not why taxation *statutes* themselves came to be interpreted against taxpayers. In other words, theirs is more a principle of constitutional interpretation than statutory interpretation. Indeed, Scalia and Garner's account of the interpretive shift makes little sense otherwise, given that major pro-taxpayer decisions such as *Gould* and *Merriam* occurred decades *after* the Supreme Court's decisions in *Tucker* and *West Wisconsin Railway*.

The more likely cause of the pro-taxpayer canon's disappearance is something less cerebral: the assassination of Archduke Franz Ferdinand in 1914. The enormous costs of World War I sent the public debt of the United States skyrocketing from 2.7% of gross domestic product ("GDP") in 1916

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62. *Id.* at 360–61.

63. *Id.*; *see also id.* at 360–61 n.13 (quoting Tucker v. Ferguson, 89 U.S. (22 Wall.) 527 (1874)).

64. *Tucker*, 89 U.S. at 538–39.

65. *Id.* at 575–76.

66. *Id.* at 575.

67. 93 U.S. (3 Otto) 595 (1876).

to 33% in 1919.[68] These debts made efficient and robust revenue collection essential.[69] The Great Depression and World War II further contributed to the "demise" of tax lenity—that is, the Court's switch from a pro-taxpayer canon of interpretation to an anti-taxpayer one—as the debt-to-GDP ratio soared again to 39% in 1941, then to 121% in 1946, and tax rates rose accordingly.[70] Relatedly, Jon Choi speculates that the New Deal's transformation of the political landscape "toward purposivism and against taxpayers (especially rich ones)" spurred the Supreme Court's shift away from treating taxpayers with solicitude.[71] Reports of widespread tax avoidance by the wealthy during the Great Depression may also have played a role.[72]

To be sure, the decanonization process was not immediate. The Supreme Court continued to cite *Gould* and the pro-taxpayer canon well into the 1930s.[73] But the trend is clear. In 1933, Justice Cardozo's majority opinion in *Burnet v. Guggenheim* responded equivocally to a taxpayer's appeal to the pro-taxpayer canon.[74] "There are many facets to such a maxim," he mused. "The construction that is liberal to one taxpayer may be illiberal to others."[75] In 1935, the Court held in *New Colonial Ice Co. v. Helvering* that tax deductions "depend[] upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."[76] And in 1938, the Court rejected the pro-taxpayer canon in unequivocal terms. "We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer," wrote Justice Stone in *White v. United States*.[77] Rather, "[i]t is the function and duty of courts to

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68. *Historical Public Debt Database*, INT'L MONETARY FUND, https://www.imf.org/external/datamapper/DEBT1@DEBT/FAD_G20Adv/FAD_G20Emg/FAD_LIC/USA [https://perma.cc/GH9E-D9G9].

69. *See* NANCY STAUDT, THE JUDICIAL POWER OF THE PURSE: HOW COURTS FUND NATIONAL DEFENSE IN TIMES OF CRISIS 116–19 (2011).

70. *See id.*; Kwon, *supra* note 56, at 1135–37; *Historical Highest Marginal Income Tax Rates*, TAX POL'Y CTR. (May 11, 2023), https://www.taxpolicycenter.org/statistics/historical-highest-marginal-income-tax-rates [https://perma.cc/LHC7-DJMN]; STAUDT, *supra* note 69, at 2–3, 113.

71. Choi, *supra* note 50, at 253; *see* Likhovski, *The Duke and the Lady:* Helvering v. Gregory *and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 958, 979–82 (2004).

72. Choi, *supra* note 50, at 253.

73. *See, e.g.*, Old Colony R.R. Co. v. Comm'r, 284 U.S. 552, 562 (1932); Hassett v. Welch, 303 U.S. 303, 314 (1938).

74. 288 U.S. 280 (1933).

75. *Id.* at 286.

76. 292 U.S. 435, 440 (1934).

77. 305 U.S. 281, 292 (1938).

resolve doubts."[78] The Court rounded off *White* by quoting *New Colonial Ice*'s "legislative grace" language for the proposition that the burden of showing the applicability of a tax deduction rests with the taxpayer.[79] It is generally agreed that 1938 marked the demise of the pro-taxpayer canon.[80] And by 1943, the Court was citing the "now familiar" rule that the burden of showing the right to a deduction rested with the taxpayer.[81] Never again did the Supreme Court cite *Gould*.

The Court's reversal did not escape contemporary scholars' notice. The 1924 edition of Thomas M. Cooley's tax treatise asserted that ambiguous tax laws should be construed in favor of the taxpayer.[82] But by 1934, Randolph Paul and Jacob Mertens's *The Law of Federal Income Taxation* noted that, in light of new tax laws and higher rates—in particular, the advent of the federal income tax—tax avoidance became much more attractive to high-earning individuals. Thus courts began to meet pro-avoidance interpretations of ambiguous tax statutes with less favor.[83] Others writing in 1939 and 1940 described the pro-taxpayer canon as "moribund" or "discarded,"[84] and a 1943 *Harvard Law Review* article by Erwin Griswold—the Dean of the Harvard Law School and later Solicitor General in the Johnson and Nixon administrations—stated that "for all practical purposes," *White* "ended the influence of *Gould v. Gould*."[85]

The effect of changed economic circumstances can be seen not just in how the Supreme Court's tax jurisprudence changed, but how a related canon—the "fresh start" canon of bankruptcy law—did not. The Court has long construed bankruptcy law with an eye to giving the "honest but unfortunate debtor" a fresh start.[86] As the Court put it in the 1915 case of *Williams v.*

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78. *Id.*

79. *Id.*

80. JASPER L. CUMMINGS, JR., THE SUPREME COURT'S FEDERAL TAX JURISPRUDENCE 45–46 (2d ed. 2016).

81. Interstate Transit Lines v. Comm'r, 319 U.S. 590, 593 (1943).

82. Likhovski, *supra* note 71, at 981–82 (citing 2 THOMAS M. COOLEY, A TREATISE ON THE LAW OF TAXATION 1128–29 (Clark A. Nichols ed., 4th ed. 1924)).

83. *See id.* at 982 (citing RANDOLPH E. PAUL & JACOB MERTENS, JR., THE LAW OF FEDERAL INCOME TAXATION 37–38 (1934)); Choi, *supra* note 50, at 253.

84. Randolph E. Paul, *Five Years with* Douglas v. Willcuts, 53 HARV. L. REV. 1, 2 (1939); Harry J. Rudick, *The Problem of Personal Income Tax Avoidance*, 7 LAW & CONTEMP. PROBS. 243, 265 (1940).

85. Erwin N. Griswold, *An Argument Against the Doctrine That Deductions Should Be Narrowly Construed as a Matter of Legislative Grace*, 56 HARV. L. REV. 1142, 1143 (1943); *see also* Louis S. Goldberg, *The Supreme Court and the Federal Income Tax Since Pearl Harbor: A Study in Trends of Decision*, 33 IOWA L. REV. 22, 25 (1947) (discussing the decline of the *Gould* approach).

86. *See, e.g.*, Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

United States Fidelity & Guaranty Co., the Code's purpose is "to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunates."[87] Unlike the taxpayer canon, however, the fresh start canon is alive and well.[88] This is because neither debtors' circumstances nor the government's policy towards them has changed enough to undermine the canon's justification. Because debtors—but not taxpayers—are accorded just as much solicitude today as they were in the early twentieth century, the fresh start canon survived, while the taxpayer canon did not.

At the end of the day, the reason for the pro-taxpayer canon's demise is straightforward. In the midst of several national crises, abstract considerations of property rights and government overreach took a backseat to maintaining the public fisc. Justice Cardozo's 1932 opinion in *Woolford Realty Co. v. Rose* came closest to articulating this view outright.[89] In holding that a corporate taxpayer was not entitled to deduct the loss of an affiliate, he noted that "[e]xpediency"—that is, the government's practical considerations in collecting tax revenue—"may tip the scales when arguments are nicely balanced."[90] In short, the Court decanonized the pro-taxpayer canon to accommodate more pressing needs: winning the war and keeping the economy afloat.

B. Eaten by a Bigger Rule: The Immigration Rule of Lenity

New economic circumstances are not the only way to decanonize a rule of interpretation. A substantive canon can also be absorbed by a more comprehensive interpretive regime. Before the Supreme Court ceased deferring to agency interpretations of law under *Chevron v. National Resources Defense Council*, *Chevron* deference was one such instance of this process.[91] *Chevron*, in effect, shifted the mantle of interpreting ambiguous statutes from the judiciary itself to the agency charged with administering the statute. *Chevron* explains the decanonization of the immigration rule of lenity, under which the judiciary resolved ambiguities in deportation statutes in favor of noncitizens.

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87. 236 U.S. 549, 554 (1915).

88. *See* Marrama v. Citizens Bank of Mass., 549 U.S. 365, 366 (2007) (invoking the fresh start canon); Grogan v. Garner, 498 U.S. 279, 286–87 (1991) (same); *see also* ESKRIDGE ET AL., *supra* note 15, at 1109 (citing *Marrama* as an example of the fresh start canon).

89. 286 U.S. 319 (1932).

90. *Id.* at 330.

91. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), *overruling* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

The immigration rule of lenity traced its origin to another substantive canon: the criminal rule of lenity (often known simply as the "rule of lenity"), which provides that penal statutes should be construed in favor of criminal defendants.[92] Due process and fair notice concerns undergird the criminal rule of lenity, as well as the idea that Congress, not the Judiciary, is the branch that should formulate federal criminal law.[93] The Supreme Court extended the criminal rule of lenity to noncriminal deportation proceedings in the mid-twentieth century, reasoning in the 1948 case of *Fong Haw Tan v. Phelan* that "deportation is a drastic measure and at times the equivalent of banishment or exile."[94] Thus, it "will not assume that Congress meant to trench on [the petitioner's] freedom beyond that which is required by the narrowest of several possible meanings of the words used."[95] Contributing to the canon's adoption may have been the desire of some Justices to reduce barriers for immigrants to participate in the American political process.[96]

The immigration rule of lenity had its heyday from the 1950s to the 1980s, when the Supreme Court invoked it on several occasions to narrowly construe deportation statutes. For example, in the 1964 case of *Costello v. I.N.S.*, the Court considered whether a statutory provision providing for deportation of "[a]ny alien" who "at any time after entry is convicted of two crimes involving moral turpitude" required the deportation of Costello, who had been a naturalized citizen (thus not an alien) when he was convicted of two crimes, but was subsequently denaturalized (and thus returned to alien status).[97]

Finding the statute ambiguous, the Court ultimately sided with Costello.[98] If "the language of [the statute] itself and the absence of legislative history continued to leave the matter in some doubt," wrote Justice Stewart for the

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92. Matthew F. Soares, *Agencies and Aliens: A Modified Approach to* Chevron *Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 933 (2014).

93. *See* Barrett, *supra* note 2, at 118, 178.

94. 333 U.S. 6, 10 (1948).

95. *Id.* As Patrick J. Glen argues, the Supreme Court possibly adopted the immigration rule of lenity one year earlier, albeit in more oblique language, in *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947) ("We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme."). *See* Patrick J. Glen, *Interring the Immigration Rule of Lenity*, 99 NEB. L. REV. 533, 540 (2021).

96. *See* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 522 (2003); David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 480 & n.6 (2007).

97. 376 U.S. 120, 121 (1964) (quoting § 241(a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204).

98. *Id.* at 125.

majority, "we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the petitioner."[99] The immigration rule of lenity was more than window dressing during this era. Indeed, the canon influenced the outcome of many deportation cases.[100] For this reason, an immigration casebook from the 1980s described the canon as "[t]he most important rule of statutory interpretation peculiar to immigration."[101]

The terrain shifted in 1984 when the Supreme Court decided the landmark administrative law case of *Chevron v. National Resources Defense Council*.[102] *Chevron* set forth a comprehensive two-step deference regime for evaluating an agency's interpretation of a statute. First, the reviewing court asks whether Congress has directly spoken to the precise question, and if so, to give effect to Congress's unambiguously expressed intent.[103] If the reviewing court finds Congress's intent ambiguous, however, the court moves to step two: determining whether the agency's interpretation of the ambiguous statute is reasonable. If so, the court must defer to the agency's construction. If not, the court interprets the statute itself.[104]

Although *Chevron* concerned the Environmental Protection Agency's interpretation of the Clean Air Act, nothing in *Chevron*'s language limited it to the environmental context. As a result, *Chevron* deference swept across the administrative landscape, including—as relevant here—judicial review of immigration agencies' interpretations of deportation statutes.[105]

During the ensuing decades, lawyers struggled to reconcile *Chevron* deference with the immigration rule of lenity. On the one hand, *Chevron* required courts to adopt reasonable agency interpretations of ambiguous statutes. On the other, the immigration rule of lenity counseled courts to adopt a noncitizen-friendly interpretation of ambiguous statutes. Inevitably, the two canons clashed whenever an agency—usually, the Bureau of Immigration Appeals ("BIA")—interpreted an immigration statute unfavorably to immigrants.[106] This was no theoretical conflict. As Brian Slocum points out,

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99. *Id.* at 128.

100. *See* Slocum, *supra* note 96, at 521. *But see* Glen, *supra* note 95, at 536 (arguing that the immigration rule of lenity "has *never* done significant work in interpreting the immigration laws").

101. STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 156 (1987); *see also id.* at 156–57 nn.95–98 (collecting cases).

102. 467 U.S. 837 (1984).

103. *Id.* at 842–43.

104. *Id.* at 843–44.

105. *See* Jennifer Safstrom, *An Analysis of the Applications and Implications of* Chevron *Deference in Immigration*, 34 GEO. IMMIGR. L.J. 53, 54 (2019).

106. *Id.* at 67; Rubenstein, *supra* note 96, at 481, 501–04; Soares, *supra* note 92, at 933–34.

"in almost all deportation cases that reach federal court, courts are reviewing agency determinations interpreting statutory provisions contrary to the noncitizen's interest."[107]

Courts and scholars sought to resolve the tension in various ways. Some argued for applying the immigration rule of lenity within the *Chevron* framework at step one, step two, or both.[108] In contrast, the Second Circuit proposed adopting the immigration rule of lenity only if, at step two, the court found the agency's interpretation to be unreasonable and "none of the other canons of statutory construction [are] capable of resolving the statute's meaning."[109] In other words, the immigration rule of lenity did not just take a backseat to *Chevron* under the Second Circuit's approach. It became a "rule of last resort."[110] Other courts come out all over the place—in 2007, David Rubenstein identified nine different approaches contemplated by the federal courts of appeals.[111]

By the early twenty-first century, *Chevron* appeared to have prevailed, with its generalized deference regime effectively decanonizing the subject-specific immigration rule of lenity. The 2012 case of *Holder v. Martinez Gutierrez* was emblematic of the Supreme Court's approach—at least, before *Loper Bright* abrogated *Chevron*. In *Martinez Gutierrez*, two noncitizens sought to invoke a statutory provision permitting cancellation of removal if they met certain residency requirements.[112] Both had been brought to the United States as minors.[113] They challenged the BIA's determination that their length of residency did not include the period that their parents resided in the country.[114] The Court deferred to the BIA under *Chevron* with no mention of the immigration rule of lenity.[115]

Indeed, the Supreme Court's most recent mention of the immigration rule of lenity, *Pugin v. Garland* (2023), only dealt with the canon in the

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107. Slocum, *supra* note 96, at 539.

108. *See* John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of* INS v. Ventura, 18 GEO. IMMIGR. L.J. 605, 623–26 (2004) (analyzing immigration rule of lenity at *Chevron* step one, but not step two); Slocum, *supra* note 96, at 575–78 (step two); Soares, *supra* note 92, at 947–49 (both steps); David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for* Chevron*'s Step Two*, 93 MICH. L. REV. 1105, 1131 n.110, 1134 (1995) (both steps).

109. Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198 (2d Cir. 2007); *accord* Oppedisano v. Holder, 769 F.3d 147, 153 (2d Cir. 2014). This is also David Rubenstein's proposed approach. *See* Rubenstein, *supra* note 96, at 504–19.

110. *Oppedisano*, 769 F.3d at 153.

111. Rubenstein, *supra* note 96, at 502–04.

112. Holder v. Martinez Gutierrez, 566 U.S. 583 (2012).

113. *Id.* at 589–90.

114. *Id.* at 590.

115. *Id.* at 597–98; *see also* I.N.S. v. Aguirre-Aguirre, 526 U.S. 415 (1999).

hypothetical.[116] Even then, the Court carved an exceedingly narrow path to its application, which it then declined to follow: "[E]ven assuming that the rule of lenity can be invoked in this particular civil immigration context, the rule applies only if after seizing everything from which aid can be derived, there remains grievous ambiguity."[117] Finding no ambiguity in the statute, the Court concluded that it had "no basis for resorting to the rule of lenity."[118]

Justice Sotomayor's dissent chided the majority for giving short shrift to the immigration rule of lenity.[119] But far from buttressing the canon, her dissent underscored how long it has lain fallow. The two Supreme Court cases she offered as support of the canon's relevance dated to 1987 and 1948.[120] Even in the 1987 case, *I.N.S. v. Cardoza-Fonseca*, the Court had held that "ordinary canons of statutory construction" sufficed to resolve the case absent recourse to the immigration rule of lenity.[121]

Contrast the immigration rule of lenity with the canon from which it sprung: the criminal rule of lenity. The canonical status of the criminal rule of lenity has never seriously been questioned and the rule continues to enjoy widespread acceptance in the federal courts.[122] Why did the criminal rule of lenity survive while the immigration rule of lenity fell by the wayside? The divergence presents a puzzle. After all, the same concerns of due process and fair notice animate both canons. The separation-of-powers considerations that justify criminal lenity likewise apply to the immigration rule of lenity, given that Congress has plenary power over rules of immigration and naturalization.[123]

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116. 599 U.S. 600, 610 (2023).

117. *Id.* at 610 (internal quotation marks omitted).

118. *Id.*

119. *See id.* at 631–32 (Sotomayor, J., dissenting).

120. *Id.* at 631 (first citing I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); and then citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

121. 480 U.S. at 449. To be sure, a more recent case, *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), appeared to invoke the immigration rule of lenity more directly. *See id.* at 320. But the extent to which it did so is debated, *see* Glen, *supra* note 95, at 567, which is perhaps why Justice Sotomayor did not mention it.

122. *See* Intisar A. Rabb, Response, *The Appellate Rule of Lenity*, 131 HARV. L. REV. F. 179, 181 (2018) (responding to Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018), and recognizing the rule of lenity's "special status, broad authority, and widespread validity"). *But cf.* Wooden v. United States, 595 U.S. 360, 377 (2022) (Kavanaugh, J., concurring) ("[B]ecause a court must exhaust all the tools of statutory interpretation before resorting to the rule of lenity, and because a court that does so often determines the best reading of the statute, the rule of lenity rarely if ever comes into play."); Joel S. Johnson, *Ad Hoc Constructions of Penal Statutes*, 100 NOTRE DAME L. REV. 73, 78–79, 109, 119–20 (2024) (arguing that since 2013, the Supreme Court has narrowly construed penal statutes without firmly relying on the rule of lenity).

123. *See* Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

One answer is that in interpreting criminal law, the Supreme Court would not defer to the Executive under *Chevron*. Indeed, the Court "ha[s] *never* held that the Government's reading of a criminal statute is entitled to any deference."[124] In sum, the criminal rule of lenity has never been in danger of being supplanted by a competing deference regime—unlike the immigration rule of lenity, which exists in the domain of civil law.

In sum, the immigration rule of lenity has been decanonized, more honored in the breach than the observance. This is in part thanks to *Chevron*, which filled the gap that the canon once occupied.[125] As Part V explores, however, the end of *Chevron* deference may herald the immigration rule of lenity's comeback.

C. Statutorification: The Remedial Purpose Canon

The remedial purpose canon instructs courts to interpret remedial legislation liberally—that is, expansively—to help address the defects that prompted their enactment.[126] The canon dates to late sixteenth-century England and received William Blackstone's imprimatur in his eighteenth-century treatise *Commentaries on the Laws of England*, which distinguished statutes that are merely "declaratory" of the common law from those that are "remedial of some defects therein."[127] Whereas the rule of lenity required courts to interpret penal statutes narrowly, in favor of the defendant, Blackstone called for liberally construing the terms of remedial statutes.[128]

Despite its ancient roots, the remedial purpose canon has provoked frequent criticism and in its application often raises more questions than answers. For one thing: what makes a statute "remedial"? We know that a

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124. United States v. Apel, 571 U.S. 359, 369 (2014) (emphasis added); *see also* Gonzales v. Oregon, 546 U.S. 243, 264 (2006) (noting that the Attorney General is not entitled to *Chevron* deference); Crandon v. United States, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.").

125. *See* Glen, *supra* note 95, at 533.

126. 3 SUTHERLAND, *supra* note 20, § 60:1.

127. 1 WILLIAM BLACKSTONE, COMMENTARIES *86 (emphasis omitted); *see* 3 SUTHERLAND, *supra* note 20, § 60:1.

128. 1 BLACKSTONE, *supra* note 127, at *86–88; *see id.* at *87 ("There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.").

"remedial" statute can't be "penal,"[129] but Blackstone's penal/remedial dichotomy offers scant practical help. Taking it literally, as Scalia noted, leads to the unworkable proposition that every non-criminal statute requires a liberal interpretation.[130] Yet courts and scholars have been unable to agree on consistent limiting criteria.[131] Thus, the remedial purpose canon has appeared in dozens of areas of law from consumer protection to pregnancy discrimination, with little consistency in its application.[132]

For another: what is a "liberal" construction? Many laws have multiple purposes that may clash with each other. Thus, construing a statute expansively in one respect may construe it narrowly in another. Consider, for example, the Uniformed Services Former Spouses' Protection Act ("USFSPA"), a federal law governing divorces between military servicemembers and their spouses. In the 1989 case of *Mansell v. Mansell*, the Supreme Court refused to apply the remedial purpose canon to USFSPA, reasoning that in passing the statute, Congress was concerned not only with the economic plight of military spouses after divorce, but also with protecting the interests of military members.[133] The remedial purpose canon provides little guidance to courts in these circumstances.

Notwithstanding its drawbacks, the remedial purpose canon enjoyed frequent use in the courts throughout the nineteenth and twentieth centuries.[134] For example, in the 1879 case of *Jones v. Guaranty & Indemnity Co.*, the Supreme Court considered whether a statute permitting an oil company to mortgage its property to pay past debts also permitted it to mortgage its property to fund future operations.[135] Because the statute was "remedial," the Court held that it should be "construed liberally with reference to the ends in view. . . . Here the object of the authorization is to enable the company to procure the means to carry on its business."[136] Thus,

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129. *See id.* at *87–88 (contrasting "remedial" statutes with "penal" ones, which "must be construed strictly").

130. *See* Scalia, *supra* note 1, at 585.

131. *See id.* at 583, 586; Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENV'T L. REV. 199, 234–35 (1996).

132. 3 SUTHERLAND, *supra* note 20, § 60:2.

133. 490 U.S. 581, 594–95 (1989); *see* Watson, *supra* note 131, at 252–53.

134. *See* 3 SUTHERLAND, *supra* note 20, §§ 60:1, 60:2 (collecting cases); G.A. ENDLICH, A COMMENTARY ON THE INTERPRETATION OF STATUTES § 108, at 142–44, § 329, at 454–55, § 332, at 458–60 (Jersey City, Frederick D. Linn & Co. 1888) (same); THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 258, 292, 319, 326, 335–38, 359–63, 366 (New York, John S. Voorhies 1857) (same).

135. 101 U.S. 622 (1879).

136. *Id.* at 626.

even though the terms of the statute did not expressly allow for it, the Court upheld the company's right to borrow prospectively.[137]

And in the 1924 case of *Miller v. Robertson*, the Supreme Court held that a breach-of-contract claim for damages qualified as a "debt" for purposes of the Trading with the Enemy Act ("TEA").[138] The Court rejected the idea that the term "debt" was limited to its common law meaning, reasoning that the relevant TEA provision "is highly remedial and should be liberally construed to effect the purposes of Congress and to give remedy in all cases intended to be covered."[139]

Today, however, the remedial purpose canon has gone to seed. The last time the Supreme Court uncritically cited the canon was 2011, when the Court invoked the remedial purpose of the Fair Labor Standards Act ("FLSA") to extend the statute's anti-retaliation protections to workers who raise oral—not just written—complaints.[140] Less than one decade later, the Court reversed course and rejected the canon's applicability to the FLSA in the 2018 case of *Encino Motorcars v. Navarro*. "Because the FLSA gives no 'textual indication' that its exemptions should be construed narrowly," wrote Justice Thomas, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation."[141] At present, scholars generally describe the canon as disfavored or defunct.[142]

So what accounts for the remedial purpose canon's near-disappearance? Recall the distinction between penal statutes (criminal) and remedial statutes (everything else). At first glance, the two categories appear to encompass the whole of the law. When Blackstone wrote the *Commentaries* in the late eighteenth century, however, statutes constituted only a small part of the English and American legal systems, which were both dominated by judge-made common law.[143]

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137. *Id.* at 625–27.

138. 266 U.S. 243 (1924). *See generally* Trading with the Enemy Act, ch. 106, § 9, 40 Stat. 411, 419 (1917) (codified as amended at 50 U.S.C. § 4309).

139. *Miller*, 266 U.S. at 248–49.

140. Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1, 13 (2011); *see* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 110–11 (2018).

141. Encino Motorcars, LLC v. Navarro, 584 U.S. 79, 88–89 (2018) (quoting SCALIA & GARNER, *supra* note 57, at 363).

142. *See, e.g.*, Brian M. Saxe, *When A Rigid Textualism Fails: Damages for ADA Employment Retaliation*, 2006 MICH. ST. L. REV. 555, 588 n.212; Mendelson, *supra* note 140, at 78, 110–11; Bruhl, *supra* note 42, at 523.

143. *See* Stephen R. Alton, Book Review, 44 AM. J. LEGAL HIST. 462, 463 (2000) (reviewing WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999)); William J. Brennan, Jr., *Introduction* to FUNDAMENTALS OF AMERICAN LAW 1, 3 (Alan B. Morrison ed., 1996).

But in the early-to-mid-twentieth century, the primary source of law in the American legal system shifted from judge-made law to legislature-made law—that is, from common law to statutory law.[144] The United States Code swelled from two volumes to twenty-nine between 1928 and 1988 as Congress passed a profusion of statutes covering areas previously governed by the common law.[145] This process of "statutorification"—a term coined by Judge Guido Calabresi—transformed federal court dockets.[146] In a notable lecture, Justice Frankfurter once explained that 40% of the cases before the Supreme Court were common law actions in 1875. That figure shrunk to 5% in 1925 and to virtually 0% by 1947.[147]

Another victim of statutorification—apart from the common law—was the remedial purpose canon itself. Blackstone's pronouncement that all statutes are "either *declaratory* of the common law, or *remedial* of some defects therein"[148] makes little sense in an era when the federal courts interpret statutes without reference to the common law. Courts thus began applying the remedial purpose canon inconsistently, or not at all. The contrast is particularly notable when comparing it to similar canons concerning classes of statutes unaffected by statutorification. Consider, again, the criminal rule of lenity. Because there are no federal common law crimes (that is, federal criminal law has always been a creature of statute[149]) statutorification never undermined the rule of lenity as it did with the remedial purpose canon.

Thus, by 2014, the Supreme Court rejected the remedial purpose canon's use on the ground that "almost every statute might be described as remedial

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144. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982); GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977).

145. Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CALIF. L. REV. 101, 105 (2000); *see also* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 260–63 (1977); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 779–80 (2012).

146. *See* CALABRESI, *supra* note 144, at 44 ("The statutorification of American Law can in one sense be dated from the New Deal.").

147. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947).

148. 1 BLACKSTONE, *supra* note 127, at *86.

149. *See* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1(c), at 99 (3d ed. 2024). Although a few states retain some common law crimes, most have abolished them as well. *See* Pettit v. Walshe, 194 U.S. 205, 218 (1904) ("There are no common-law crimes of the United States, and, indeed, in most of the states the criminal law has been recast in statutes, the common law being resorted to in aid of definition."); *see also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 64–65 (1993) (describing the "retreat" of "[t]he concept of the common-law crime . . . throughout the nineteenth century").

in the sense that all statutes are designed to remedy some problem."[150] Simply put, courts no longer saw a need to apply a special canon of interpretation to statutory law when statutory law was no longer special.

D. All Three Causes: The Mariner's Canon

The mariner's canon instructs courts to resolve statutory ambiguities or doubts in favor of the seaman. Decisions invoked the canon date back to the Jeffersonian era. Indeed, the mariner's canon enjoys one of the oldest historical pedigrees of any canon of statutory interpretation, originating from the judicial practice of treating seamen as favored "wards" of the admiralty courts during the Middle Ages.[151]

Justice Story, riding circuit in 1823, explained the common law courts' centuries-old special treatment of seamen in a case concerning whether a shipowner had to compensate a sailor who became sick during a voyage.[152] The Justice answered yes, and his rationale was the seed of what was eventually to blossom into the mariner's canon.[153] "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour," he wrote in *Harden v. Gorden*.[154] "They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence."[155] To be sure, Justice Story

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150. CTS Corp. v. Waldburger, 573 U.S. 1, 12 (2014). A similar fate has arguably befallen the so-called derogation canon, which counsels for narrowly construing statutes that depart from the common law. *See* 3 SUTHERLAND, *supra* note 20, § 61:1. For accounts of the derogation canon's origin, use, and decline in an age of statutes, see Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 CALIF. L. REV. 201, 218–34 (2023); and Anita S. Krishnakumar, *The Common Law As Statutory Backdrop*, 136 HARV. L. REV. 608, 614–620, 641 (2022).

Although most law is statutory rather than judge-made, there are still instances where Congress passes laws in direct response to judicial *interpretations* of statutes. These are known as congressional overrides. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 332 n.1 (1991). To the extent the remedial purpose canon has continued relevance in our age of statutes, the closest analogue to an expansive interpretation of so-called remedial acts of Congress is arguably an expansive interpretation of congressional overrides—one of the few remaining places, in other words, where Congress is seen as "remedying" judge-made law. I leave a more searching analysis to a future piece.

151. *See* 2 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 26:4 (5th ed. 2024); Martin J. Norris, *The Seaman as Ward of the Admiralty*, 52 MICH. L. REV. 479, 480 (1954).

152. Harden v. Gordon, 11 F. Cas. 480, 481 (C.C.D. Me. 1823) (Story, J.).

153. *See, e.g.*, Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (citing *Harden*); Garrett v. Moore-McCormack Co., 317 U.S. 239, 246 (1942) (same); Wilder v. Inter-Island Steam Nav. Co., 211 U.S. 239, 246–47 (1908) (same).

154. *Harden*, 11 F. Cas. at 483.

155. *Id*.

supplemented his unflattering characterization with more positive reasons, pointing to the "great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation."[156] But the primary purpose of treating seamen as wards, Justice Story made clear, was paternalistic. Seamen "are unprotected and need counsel; . . . they are thoughtless and require indulgence; . . . they are credulous and complying; and are easily overreached."[157]

Story didn't reach this conclusion from a poor view of sailors' innate faculties. Like soldiers, seamen were expected to render complete obedience when on the high seas on pain of being clapped in irons and fed on bread and water—a punishment once provided for by federal statute.[158] Being accustomed to the shipmaster's "dominion and influence," Justice Story reasoned, makes seamen less equipped to scrutinize the terms of their contracts.[159] Subsequent courts expanded on Justice Story's reasoning: "The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman," noted Justice Stone in *Socony-Vacuum Oil Co. v. Smith*, a 1939 Supreme Court decision invoking the courts' special care for seamen.[160] Indeed, their lack of power and sophistication explains why courts treated even foreign seamen as wards.[161]

Justice Story's opinion concerned the interpretation of a contract between seaman and shipmaster. Following Justice Story's lead, courts placed a special burden on shipmasters to demonstrate that seamen signed their contracts without coercion and with full knowledge of their rights.[162] Thus applied, the wardship theory is analogous to the (non-statutory) interpretive

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156. *Id.*

157. *Id.* at 485.

158. *See* Act of Dec. 21, 1898, ch. 28, § 19, 30 Stat. 755, 760 (codified as amended at Rev. Stat. § 4596 ("For continued willful disobedience to lawful command . . . at the option of the master, placed in irons, on bread and water, with full rations every fifth day, until such disobedience shall cease.")).

159. *Harden*, 11 F. Cas. at 485.

160. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 430–31 (1939); *see also* Robertson v. Baldwin, 165 U.S. 275, 282–83 (1897) ("From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract.").

161. *See, e.g.*, D'Amico Dry Ltd. v. Primera Mar. (Hellas) Ltd., 756 F.3d 151, 157 (2d Cir. 2014); Sfiridas v. Santa Cecelia Co., S.A., 265 F. Supp. 252, 254 (E.D. Pa. 1966); Lodakis v. Oceanic Petroleum S.S. Co., 223 F. Supp. 771, 773 (E.D. Pa. 1963).

162. Norris, *supra* note 151, at 487–88; 78A C.J.S. *Seamen* § 9 (2024), Westlaw; *see, e.g.*, Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942) ("[T]he burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights.").

principle of *contra proferentem*: that contracts are construed against the drafter.[163] But over time, courts began broadening the wardship theory to relax the normally stringent procedural requirements of federal litigation as applied to seamen. Courts give them great leeway to amend their pleadings,[164] permit them to intervene even if their applications were untimely or did not comply with the rules for filing,[165] and prioritize the prompt resolution of their claims.[166] Courts also afford seamen a generous interpretation of their pleadings analogous to the longstanding principle of lenient treatment of *pro se* litigants—parties who represent themselves in court without aid of counsel.[167] Indeed, courts' solicitude for seamen often extends beyond what they afford *pro se* litigants.[168]

But how did the special treatment of seamen become a canon of *statutory* interpretation? Maritime law in the United States operates as judge-made federal common law, which Congress can modify or supplement by statute.[169] Common law doctrines concerning seamen's rights include the ancient maritime doctrine of maintenance and cure, under which shipowners had a duty to care for seamen who became injured or fell ill on the voyage.[170] Courts relied on the wardship theory and the accompanying maxim that "[w]hen there are ambiguities or doubts, they are resolved in favor of the seaman" to expand the remedies available in common-law maintenance and cure actions.[171] The twentieth century saw, for example, the Supreme Court extending shipowners' duty to provide maintenance and cure beyond the end

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163. *See* 11 WILLISTON ON CONTRACTS § 32:12 (4th ed. 2024) (explaining the *contra proferentum* maxim of contract interpretation); *see also* 28 *id.* § 70:232 ("Releases signed by mariners can be torpedoed if they are secured without an informed consent.").

164. *E.g.*, Korthinos v. Niarchos, 175 F.2d 730, 733 (4th Cir. 1949); The Montezuma, 19 F.2d 355, 355 (2d Cir. 1927); *see also* Norris, *supra* note 151, at 494 ("The pervasive influence of the wardship theory can be readily seen in the matter of pleadings. Unlike the common-law courts admiralty may gloss over defective pleadings in order not to deprive a seaman of his right.").

165. *E.g.*, Isbrandtsen Marine Servs., Inc. v. M/V Inagua Tania, 93 F.3d 728, 731–34 (11th Cir. 1996); Pinnacle Three Corp. v. M/V Majesty, No. 07–20159–CIV, 2007 WL 9709707, at *2 n.1 (S.D. Fla. May 9, 2007).

166. *E.g.*, Brabazon v. Belships Co., Ltd., Skibs, A/S, 198 F.2d 928, 928 (3d Cir. 1952).

167. *E.g.*, Rashidi v. Am. President Lines, Ltd., No. CIV. A. 94–1029, 1994 WL 382637, at *1 (E.D. La. July 19, 1994) (construing complaint generously to include causes of action not properly alleged).

168. *E.g.*, Ahmed v. Am. S.S. Mut. Prot. & Indem. Ass'n, 640 F.2d 993, 996 (9th Cir. 1981) (remanding to allow seaman to make an argument not raised in district court).

169. 1 THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 5:1 (6th ed. 2024); 14A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3671 (4th ed. 2023).

170. *See* 1 SCHOENBAUM, *supra* note 169, § 6:28; John J. Walsh, *The Changing Contours of Maintenance and Cure*, 38 TUL. MAR. L.J. 59, 60–63 (2013).

171. Vaughan v. Atkinson, 369 U.S. 527, 532 (1962).

of a voyage, and even to situations when the seaman's illness or injury was unrelated to his work aboard the ship.[172]

As the common law of admiralty began to be supplemented by federal statute in the early twentieth century,[173] courts adapted as well. No longer just a lodestar in courts' development of common law, solicitude for seamen began to be treated as a substantive canon of statutory interpretation: what this Article terms the *mariner's canon*. For example, a 1908 Supreme Court case held that a statute prohibiting "attachment" and "arrestment" of seamen's wages also protected against post-judgment proceedings in aid of execution, even though the statutory text, "considered literally," makes no reference to it.[174] Worried about the prospect of companies garnishing seamen's wages then "turning [them] ashore with nothing in [their] pocket," the Court drew from the reasoning in Justice Story's *Harden* opinion to hold that "this statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to effecting the protection intended to be extended to a class of persons whose improvidence and prodigality . . . has made them . . . 'the wards of the admiralty.'"[175]

In the 1920s, Congress passed two landmark pieces of maritime legislation: the Merchant Marine Act of 1920 (the "Jones Act"), which among other things permits recovery for sailors' injury or death resulting from an employer's negligence,[176] and the Longshore and Harbor Workers' Compensation Act of 1927 ("LHWCA"), which does the same for longshoremen and harbor workers.[177]

Shortly thereafter, courts began to apply the mariner's canon to these new statutes. For example, the Supreme Court invoked the mariner's canon in *The Arizona v. Anelich* to hold that shipowners could not evade Jones Act suits by arguing that seamen assumed the risk of injury when they signed up for service.[178] The Court later extended its assumption-of-risk holding to when the seaman's own negligence caused the injury, again invoking the mariner's

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172. Warren v. United States, 340 U.S. 523, 530 (1951); Farrell v. United States, 336 U.S. 511, 515–17 (1949); Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 734–36 (1943); Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528–30 (1938).

173. *See* Isbrandtsen Co. v. Johnson, 343 U.S. 779, 784 (1952) ("Congressional legislation now touches nearly every phase of a seaman's life.").

174. Wilder v. Inter-Island Steam Navigation Co., 211 U.S. 239, 246 (1908).

175. *Id.* at 246–48 (quoting Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (Story, J.)).

176. Merchant Marine Act of 1920, ch. 250, § 33, 41 Stat. 988, 1007 (codified as amended at 46 U.S.C. § 30104).

177. Longshore and Harbor Workers' Compensation Act of 1927, ch. 509, 44 Stat. 1424 (codified as amended at 33 U.S.C. §§ 901–950).

178. The Arizona v. Anelich, 298 U.S. 110, 123 (1936).

canon.[179] By 1980, the Court relied on what it now termed "a settled canon of maritime jurisprudence" to reject the argument that either the Jones Act or the Death on the High Seas Act ("DOHSA") preempted certain loss-of-society claims available at common law.[180] Other examples abound.[181]

Recent years have seen far greater judicial reluctance to employ the mariner's canon, thanks in part to the statutorification of maritime law. The advent of comprehensive legislation makes courts averse to adding their own substantive gloss, as if seamen's remedies were still primarily governed by federal common law. That was the reasoning of the Supreme Court in 1990 when it rejected a claim to supplement the statutory remedies set forth in the Jones Act. "Maritime tort law is now dominated by federal statute," the

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179. Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 430–33 (1939).

180. Am. Exp. Lines, Inc. v. Alvez, 446 U.S. 274, 281–86 (1980); *see* Death on the High Seas Act, Pub. L. No. 66–165, 41 Stat. 537 (1920) (codified as amended at 46 U.S.C. §§ 30301–30308).

181. *See, e.g.*, U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971) (holding that the Labor Management Relations Act of 1947's arbitration provision does not abrogate 46 U.S.C. § 596, which permits seamen to sue for wages in federal court); *id.* at 355–56 ("The federal courts remained as the guardians of seamen, the agencies chosen by Congress, to enforce their rights—a guardian concept which, so far as wage claims are concerned, is not much different from what it was in the 18th century. . . . [W]hile an arbitrator in the area may have expertise, for 180 years federal courts have been protecting the rights of seamen and are not without knowledge in the area."); Cox v. Roth, 348 U.S. 207 (1955) (holding that Jones Act claim survived death of tortfeasors); *id.* at 209 ("But where seamen covered by the Jones Act work aboard vessels owned by individuals, literal application of the words of the [Federal Employers' Liability Act] would result in the denial of recovery against the personal representative of the tortfeasor. This, we feel, would frustrate the congressional purpose of the benefit and protection of seamen who are peculiarly the wards of admiralty.") (quotation marks omitted); Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) (interpreting the Shipping Commissioners Act of 1872 to prohibit shipping company from deducting medical expenses from sailor's wages); *id*. at 782 ("Whenever congressional legislation in aid of seamen has been considered here since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen."); Warner v. Goltra, 293 U.S. 155 (1934) (extending Jones Act's definition of "seaman" to cover shipmasters); *id.* at 162 (invoking mariner's canon); Cortes v. Balt. Insular Lines, 287 U.S. 367 (1932) (holding that Jones Act permitted recovery for death resulting from shipmaster's failure to provide proper medical care); *id*. at 377–78 (invoking mariner's canon); Bainbridge v. Merchants' & Miners' Transp. Co., 287 U.S. 278 (1932) (holding that seaman did not need to furnish a prejudgment bond for Jones Act suit); *id.* at 282 ("Seamen have always been regarded as wards of the admiralty, and their rights, wrongs, and injuries a special subject of the admiralty jurisdiction. The policy of Congress, as evidenced by its legislation, has been to deal with them as a favored class. In the light of and to effectuate that policy, statutes enacted for their benefit should be liberally construed.") (citations omitted); Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942) (holding, for purposes of both Jones Act and common law maintenance and cure claims, that "the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."); *id*. at 246–48 (invoking the mariner's canon).

Supreme Court declared in *Miles v. Apex Marine Corp.*, "and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them."[182]

The 2019 case of *Dutra Group v. Batterton* is another example of the consequences of statutorification.[183] *Batterton* concerned whether a seaman could recover punitive damages against a shipowner after his hand was crushed between a vessel hatch and a bulkhead. In ruling against the seaman, the Court held that "[w]hen exercising its inherent common-law authority, 'an admiralty court should look primarily to . . . legislative enactments for policy guidance.'"[184] Finding no authority in the Jones Act or DOHSA for punitive damages, the Court refused to find it in the common law.[185] "[W]ith the increased role that legislation has taken over the past century of maritime law," the Court concluded, "we think it wise to leave to the political branches the development of novel claims and remedies."[186]

The statutorification of maritime law took place a few decades before another now-familiar seismic shift in the legal landscape: the emergence of *Chevron* deference. As explained above, the broad and trans-substantiative nature of *Chevron* deference spelled the death or desuetude of many subject-specific canons.[187]

Did *Chevron* contribute to the decanonization of the mariner's canon? It's hard to say for sure. Complicating the analysis is the fact that so few cases were candidates for both *Chevron* deference and the mariner's canon. Unlike immigration cases, which nearly always come to the courts of appeal from the BIA, maritime lawsuits face no threshold agency. Instead, injured mariners can bring their cases directly to federal trial courts.[188] Another factor

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182. 498 U.S. 19, 36 (1990); *see* 1 SCHOENBAUM, *supra* note 169, § 4:1, at 255 ("[G]eneral maritime law, which was of overwhelming importance in the early history of the U.S., is less important today. Federal legislation is now the dominant source of substantive admiralty law.").

183. 588 U.S. 358 (2019).

184. *Id.* at 360 (quoting *Miles*, 498 U.S. at 27).

185. *Id.* at 372–74, 373 n.8 (2019). *But see id.* at 384 n.5 (Ginsburg, J., dissenting) (citing *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404, 424 n.12 (2009), for the proposition that the Court has not yet determined whether punitive damages are available under Jones Act).

186. *Id.* at 374 (majority opinion). The Court came to a similar conclusion in *Miles v. Apex Marine Corp*. *See* 498 U.S. 19, 27 (1990) ("We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection. . . . In this era, an admiralty court should look primarily to these legislative enactments for policy guidance.").

187. *See supra* Section III.B; *see also infra* note 253 (listing other canonical victims of *Chevron*).

188. *See* 28 U.S.C. § 1333(1) ("The district courts shall have original jurisdiction, exclusive of the courts of the States, of: . . . Any civil case of admiralty or maritime jurisdiction, saving to

is that the mariner's canon was already on the road to decanonization when the Court decided *Chevron*.[189]

Accordingly, *Chevron*'s impact on the mariner's canon is tougher to discern, but lower court decisions indicate that it contributed to at least some displacement of the mariner's canon. Although at least one court applied both canons to a case,[190] it appears that most applied *Chevron*, when *Chevron* was still good law, without mentioning the mariner's canon.[191]

The most significant culprit in the mariner's canon obsolescence, however, is changed economic circumstances. Recall that the original impetus for the mariner's canon was paternalistic. The courts give them special solicitude because they are "friendless," "thoughtless," and "unprotected," in Justice Story's words.[192]

But seamen of the twenty-first century bear little resemblance to the seamen of the nineteenth. No longer do they face the danger of being clapped in irons and fed on bread and water for disobeying a captain's orders. "Today, most seamen are union members," wrote the Second Circuit in the 2003 case of *Ammar v. United States*.[193] "[M]ost seamen are no longer 'friendless'; rather, they have gained strength through collectivity, and they are a well-organized work force with sophisticated leaders who constantly press for better working conditions, pay, and benefits, as well as increased job security."[194] "The need for judicial intervention to protect seamen," the court concluded, "has been substantially lessened."[195]

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suitors in all cases all other remedies to which they are otherwise entitled."). The "saving to suitors" clause allows seamen to bring certain claims in state court if they prefer. 1 SCHOENBAUM, *supra* note 169, § 4:2.

189. *Compare* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *with* Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990).

190. In *Saipan Stevedore Co. Inc. v. Director, Office of Workers' Compensation Programs*, the Ninth Circuit employed *Chevron* and also broadly construed the LHWCA. 133 F.3d 717, 722–23 (9th Cir. 1998).

191. For example, in *Reich v. Bath Iron Works*, the First Circuit deferred to the government's interpretation of the LHWCA under *Chevron* without mentioning the mariner's canon. 42 F.3d 74, 76 (1st Cir. 1994). The Ninth Circuit did the same in *Todd Shipyards v. Director of the Office of Workers Compensation Programs*. 139 F.3d 1309 (9th Cir. 1998). And in *Lake Pilots Association v. United States Coast Guard*, the District Court for the District of Columbia invoked *Auer* deference, *Chevron*'s equivalent for agency interpretations of regulations (rather than statutes), without mentioning the mariner's canon. 257 F. Supp. 2d 148, 171 (D.D.C. 2003).

192. Harden v. Gordon, 11 F. Cas. 480, 483, 485 (C.C.D. Me. 1823) (Story, J.).

193. Ammar v. United States, 342 F.3d 133, 146 (2d Cir. 2003).

194. *Id.*

195. *Id.*

Although solicitude for mariners lives on in the common law,[196] its status as a canon of statutory interpretation has all but evaporated. The combination of statutorification, *Chevron*, and mariners' improved economic circumstances collectively made courts unwilling to continue bending ambiguous statutes to favor those at sea.

These causes of decanonization worked in tandem. Recall *Batterton*'s rejection of the applicability of the mariner's canon by relying in part on the protections afforded by the Jones Act and DOHSA.[197] The Court didn't just invoke statutorification; it also considered the passage of the statutes themselves as evidence that seamen have outgrown the need for special treatment. Sailors today are not "as isolated nor as dependent on the master as their predecessors from the age of sail," the Court wrote. "In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law."[198]

In other words, if seamen had the political clout to get Congress to pass sailor-protective statutes like the Jones Act, perhaps the judiciary could take its thumb off the scale and trust the political process to work things out. At the end of the day, the decline of the mariner's canon is the story of one branch's solicitude for seamen giving way to another's.

IV. DECANONIZATION AND STARE DECISIS

Stare decisis is the legal principle that courts should adhere to prior judicial decisions when the same questions come before them.[199] In other words, like cases should be treated alike.

The Supreme Court has described stare decisis as "a foundation stone of the rule of law."[200] Accordingly, it does not overturn settled judicial decisions lightly (three recent landmark cases notwithstanding).[201] The Court has

196. Indeed, to this day, the courts develop common law maritime doctrine with an eye to the welfare of seamen. For example, the Supreme Court in 2019 expanded shipowners' common law duty to warn seamen of certain hazards by invoking maritime law's "longstanding solicitude for sailors." Air & Liquid Sys. Corp. v. DeVries, 585 U.S. 446, 456 (2019).

197. *See supra* notes 183–86 and accompanying text.

198. Dutra Grp. v. Batterton, 588 U.S. 358, 377 (2019).

199. *See Stare decisis*, BLACK'S LAW DICTIONARY (12th ed. 2024).

200. Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 798 (2014)).

201. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), *overruling* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022), *overruling* Planned Parenthood of Se. Pa. v. Casey, 505 U.S.

previously employed a four-factor test to determine when to disregard stare decisis and overturn a precedent: (1) whether the precedent has proven practically unworkable; (2) whether the precedent has engendered substantial reliance interests; (3) whether related principles of law have rendered the precedent "no more than a remnant of abandoned doctrine;" and (4) whether facts have changed enough that the precedent is no longer justified.[202] The Court puts more weight on stare decisis in statutory (as opposed to constitutional) cases, and sometimes offers the four-factor test in three- or five-factor flavors, but the gist is the same.[203]

Stare decisis is ordinarily understood to apply to substantive questions of law: Does the Civil Rights Act permit affirmative action in college admissions?[204] Can a patent holder charge royalties for the use of his invention after the patent has expired?[205] Do minimum-resale-price-fixing agreements violate the Sherman Antitrust Act?[206]

Some commentators have argued for giving stare decisis effect to interpretive methodology, including canons of statutory interpretation, as well.[207] For example, suppose the Supreme Court holds that legislative history may not be consulted to determine a statute's meaning. Giving stare decisis effect to this methodological decision would thereafter prevent judges from considering legislative history.[208] But even proponents of this approach do

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833 (1992); Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023), *overruling* Grutter v. Bollinger, 539 U.S. 306 (2003).

202. *Planned Parenthood*, 505 U.S. at 854–55, *overruled by Dobbs*, 597 U.S. 215.

203. *See* Janus v. AFSCME, 585 U.S. 878, 917 (2018) ("Our cases identify factors that should be taken into account in deciding whether to overrule a past decision. Five of these are most important here: the quality of [the past decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision."); Ramos v. Louisiana, 590 U.S. 83, 121–22 (2020) (Kavanaugh, J., concurring) ("*First*, is the prior decision not just wrong, but grievously or egregiously wrong? . . . *Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? . . . *Third*, would overruling the prior decision unduly upset reliance interests?"); *see also Kimble*, 576 U.S. at 456 ("[*S*]*tare decisis* carries enhanced force when a decision . . . interprets a statute.").

204. *See Students for Fair Admissions, Inc.*, 600 U.S. at 227.

205. *See Kimble*, 576 U.S. at 447.

206. *See* Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 879 (2007).

207. *E.g.*, Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1870 (2008); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*, 108 COLUM. L. REV. 681, 687 (2008).

208. Foster, *supra* note 207, at 1901, 1903.

not contend that stare decisis currently applies to interpretive methodology in the same way it applies to substantive questions of law.[209]

The previous Part illustrates that stare decisis's inapplicability to interpretive methodology is, if not incorrect, at least overstated. Indeed, there are significant parallels between the three causes of decanonization and the four factors courts use to overrule substantive decisions. Courts have found it practically unworkable to apply the remedial purpose canon to a body of law that now consists almost entirely of statutes. Likewise, until *Chevron*'s overruling in the 2023–2024 Supreme Court Term, *Chevron* deference was a principle of law that rendered the immigration rule of lenity, if not "no more than a remnant of abandoned doctrine,"[210] at least out-of-place in an agency-dominated framework. And the decline of both the pro-taxpayer canon and the mariner's canon exemplify the courts' willingness to discard an interpretive principle when facts have changed enough that the precedent is no longer justified.

It would be a mistake, however, to apply methodological stare decisis to the use of interpretive canons. Evan Criddle and Glen Staszewski argue that methodological stare decisis conflicts with the judiciary's role as a faithful agent of Congress and that interpretive methods, being reflective of public values, should change as those values change.[211]

The latter factor, normative flexibility, cautions against applying stare decisis to the substantive canons in particular. Canons serve many purposes, among them faithful agency (tools to better ascertain what Congress intended) and norm enforcement (a means of advancing certain public values). A canon may advance one purpose while undercutting another. The rule of lenity, for example, advances the ancient and widely held value that "it is better that ten guilty persons escape than that one innocent suffer."[212] But nobody contends that Congress always intends to choose the more

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209. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1765 (2010); Foster, *supra* note 207, at 1866, 1875; Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2144 (2002).

210. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

211. Evan J. Criddle & Glen Staszewski, *Against Methodological Stare Decisis*, 102 GEO. L.J. 1581, 1587, 1590, 1592–93 (2014).

212. 4 BLACKSTONE, *supra* note 127, at *352; *see* Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U. L. REV. 171, 199 (2012).

defendant-favorable interpretation of ambiguous criminal provisions. If anything, the opposite is true.[213]

To be sure, some substantive canons may serve as tools of faithful agency. Eidelson and Stephenson offer as an example the presumption against interpreting statutes to have extraterritorial reach, reasoning that "given what are mutually understood to be the ordinary concerns or objectives of lawmakers," restricting a statute's scope to the United States is the context "'under discussion' when Congress speaks about what is allowed or forbidden."[214] And Justice Barrett has—albeit controversially[215]—defended the major questions canon as a "tool for discerning—not departing from—the text's most natural interpretation."[216] But most substantive canons serve a norm-enforcing function, and the four decanonized canons analyzed here are no exception. The pro-taxpayer canon and the immigration rule of lenity grew out of solicitude for taxpayers and immigrants, respectively—better to err in these groups' favor than against them. The remedial purpose canon emerged from the perception that a broad construction of nonpenal statutes best "suppress[es] the mischief and advance[s] the remedy."[217] And the mariner's canon, of course, aimed to help the "friendless" and "unprotected" seaman.[218] When each of these norms disappeared or transformed, so did the canon that it undergirded.

Substantive canons' close links to norms also explains the incrementalism of the decanonization processes: canons don't burn out, they fade away. Shifts in norms take decades, and the judiciary takes time to catch up. As the underlying norm justifying the canon fades from public life, the Supreme Court makes less frequent use of the canon, narrows its applicability, or weakens its force. Eventually, the Court ceases to mention the canon altogether. Even then, unless expressly abrogated by the Supreme Court,[219]

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213. *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1383 (2014); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2194–96 (2002).

214. Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 540 (2023); *see also* Brian G. Slocum & Kevin Tobia, *The Linguistic and Substantive Canons*, 137 HARV. L. REV. F. 70, 81–96 (2023) (providing empirical evidence that some substantive canons may reflect a text's ordinary meaning).

215. *See, e.g.*, Eidelson & Stephenson*, supra* note 214, at 541–44.

216. Biden v. Nebraska, 600 U.S. 477, 508 (2023) (Barrett, J., concurring).

217. 1 BLACKSTONE, *supra* note 127, at *87.

218. Harden v. Gordon, 11 F. Cas. 480, 483 (C.C.D. Me. 1823).

219. *See* Aaron-Andrew P. Bruhl, *Understanding the Mechanisms of Interpretive Change*, 103 N.C. L. REV. 1083, 1108, 1131 (2025).

the decanonized canon often lingers in dissenting opinions or the lower courts for decades.[220]

Another factor is that methodological decisions do not affect reliance interests to the same extent ordinary legal decisions do.[221] This explains why the Court rarely considers reliance interests when changing its interpretive approach.[222]

The lack of reliance on substantive canons further counsels against giving them stare decisis effect. Recall that whether a precedent has engendered substantial reliance interests is one of the Court's inquiries when determining whether to apply stare decisis. Considering reliance interests makes sense; people should be able to make plans and arrange their affairs without undue fear that their background assumptions will be swept away tomorrow.[223] Not every judicial decision gives rise to reliance interests, however. As Chief Justice Rehnquist once wrote: "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules."[224]

And if stare decisis counts for little in procedural and evidentiary cases, it counts for still less in the purely interpretive context. Individuals and businesses may rely on the Supreme Court's settled interpretation of the Jones Act—for instance, that shipowners may not invoke the assumption-of-risk defense in Jones Act suits—when contracting, investing, or assembling a crew. But even though the mariner's canon contributed to the Court's decision, the parties' reliance interests attach not to the canon itself, but to the substantive rule. Indeed, the Supreme Court's 2024 decision in *Loper*

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220. The extent to which lower courts follow the Supreme Court's methodological decisions, including its embrace or rejection of interpretive canons, is analyzed at length by Aaron-Andrew P. Bruhl in *Communicating the Canons: How Lower Courts React When the Supreme Court Changes the Rules of Statutory Interpretation*, 100 MINN. L. REV. 481 (2015).

221. *See* Jonathan Remy Nash, *When Is Legal Methodology Binding?*, 109 IOWA L. REV. 739, 750 (2024).

222. Foster, *supra* note 207, at 1870. *But cf.* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 410 (2024) (considering, but ultimately rejecting, the reliance argument against overruling *Chevron*); Kisor v. Wilkie, 588 U.S. 558, 629–30 (2019) (Gorsuch, J., concurring in the judgment) (applying reliance analysis in determining whether the Court should overrule *Auer*).

223. *See* William N. Eskridge, Jr., *Reliance Interests in Statutory and Constitutional Interpretation*, 76 VAND. L. REV. 681 (2023); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 404 (2022) (joint opinion of Breyer, Sotomayor, and Kagan, JJ., dissenting) ("The Court adheres to precedent not just for institutional reasons, but because it recognizes that stability in the law is 'an essential thread in the mantle of protection that the law affords the individual.' So when overruling precedent 'would dislodge [individuals'] settled rights and expectations,' *stare decisis* has 'added force.'") (citation omitted).

224. Payne v. Tennessee, 501 U.S. 808, 828 (1991).

Bright took pains to emphasize that although "*Chevron* is overruled," the Court was "not call[ing] into question prior cases that relied on the *Chevron* framework."[225] After all, the substantive holdings in cases that relied on *Chevron* deference "are still subject to statutory *stare decisis* despite [the Court's] change in interpretive methodology."[226]

Thus, although intriguingly similar to the Court's approach to overturning precedent, the decanonization process has fewer guardrails. This is not necessarily a bad thing. Canons are not statutes. Rather, canons are guidelines for how to interpret statutes themselves—"rules about rules," to borrow William Eskridge's term.[227] And among the canons, the substantive canons have the least staying power, justified in their use only insofar as they continue to promote public values. Accordingly, it makes little sense to afford substantive canons the same level of permanence as statutes.

V. HOW TO REVIVE A CANON

Just as surely as some canons die, however, others are born—or come back from the dead.

Consider the First Congress canon, which provides that if the First Congress did *x*, then *x* is probably constitutional.[228] Although the Court first invoked the canon as early as 1803, it suffered from long periods of disuse, but has reemerged with the Court's turn towards originalist methodology.[229]

The First Congress canon is an extrinsic canon—not a substantive one—and thus outside the scope of this Article's analysis. But what about the substantive canons? Once one is decanonized, can it ever return to the Court's good graces? That is what this Part sets out to answer.

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225. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

226. *Id.* at 416. Justice Gorsuch's concurrence likewise distinguished between judicial holdings and judicial methodology. *See id.* at 426 (Gorsuch, J., concurring) ("[I]t would be a mistake to read judicial opinions like statutes . . . . If *stare decisis* counsels respect for the thinking of those who have come before, it also counsels against doing an 'injustice to [their] memory' by overreliance on their every word.") (quoting Steel v. Houghton, 1 Bl. H. 51, 53 (C.P. 1788)).

227. William N. Eskridge, Jr., Book Review, *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).

228. Or in the Supreme Court's words: "the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." Myers v. United States, 272 U.S. 52, 175 (1926). The term "First Congress canon" is Michael Bhargava's. *See* Michael Bhargava, Comment, *The First Congress Canon and the Supreme Court's Use of History*, 94 CALIF. L. REV. 1745 (2006).

229. Bhargava, *supra* note 228, at 1748, 1757–62.

This Article has identified three causes of decanonization: changed economic circumstances, statutorification, and absorption of a subject-specific interpretive framework by a broader one—the main example being *Chevron*. Could reversing each process bring decanonized canons back into use?

Consider changed economic circumstances. The Great Depression and the world wars accentuated the need for robust revenue collection just as widespread tax avoidance made the Court less inclined to view taxpayer litigants with special solicitude.[230] Similarly, the substantial improvement in sailors' circumstances during the twentieth century prompted the Court to question why it continued to tip the scales in their favor.[231]

In contrast, courts continue to invoke substantive canons to aid groups to which they remain sympathetic—those who, in their view, are economically or politically marginalized. The Indian canon tilts the interpretation of ambiguous statutes in favor of Native Americans.[232] The criminal rule of lenity, the fresh start canon, and the veteran's canon do the same for criminal defendants, "honest but unfortunate debtors," and veterans, respectively.[233]

So perhaps the rule is this: groups that remain in need of help get to keep their canons, while groups that no longer need the interpretive boost—whether because their economic circumstances have improved significantly or, relatedly, because they have become politically powerful enough to fend for themselves—no longer merit one.

Could this process work in reverse? Today there are many who would benefit from a judicial thumb on the scale. William Eskridge and Matthew Christiansen have thus proposed a "meta canon," whereby "close statutory cases ought to be resolved in favor of interests not well represented in the legislative process."[234] Cass Sunstein and Einer Elhauge likewise argue for resolving statutory ambiguities in favor of disadvantaged groups.[235]

This approach has a certain appeal, particularly for subscribers to John Hart Ely's representation-reinforcing theory of democracy. Ely argued that courts must actively monitor and correct distortions in the democratic system. Specifically, courts should intervene when discrete and insular minorities are

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230. *See supra* Section III.A.

231. *See supra* Section III.D.

232. *See* 3 SUTHERLAND, *supra* note 20, § 59:4.

233. *See* discussion *supra* note 2 (criminal rule of lenity and Indian canon); *supra* notes 86–88 and accompanying text (fresh start canon); Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 441 (2011) (veteran's canon).

234. Christiansen & Eskridge, *supra* note 213, at 1324.

235. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 483 (1989); Elhauge, *supra* note 213, at 2209–10.

denied full access to the political process.[236] (The phrase "discrete and insular minorities" first arose in *United States v. Carolene Products*, the landmark Supreme Court case that established greater scrutiny for legislation affecting disfavored groups. Ely sought to justify *Carolene Products* through his representation-reinforcing theory.[237])

The representation-reinforcing approach to canons is unlikely to get anywhere on the Supreme Court, however. One reason why can be found in a recent concurrence by Justice Barrett. In the 2023 case of *Biden v. Nebraska*, the Court applied the major questions canon, which presumes against Congress having delegated "question[s] of deep 'economic and political significance'" to agencies, to block the Department of Education's student loan debt-forgiveness plan.[238] The major questions canon is controversial: in the 2022 case of *West Virginia v. EPA*, Justice Kagan derided it as a newly formulated "get-out-of-text-free" card.[239]

In her *Biden v. Nebraska* concurrence, Justice Barrett sought to defend the major questions doctrine against Justice Kagan's attack. The major questions doctrine was nothing new, Justice Barrett argued. It has appeared in several Supreme Court decisions dating back to the 1980s—and possibly even the 1890s.[240] Nonetheless, Justice Barrett acknowledged the "significant tension" that substantive canons pose to textualism.[241] She thus made clear that "even

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236. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 102–03 (1980).

237. *Id.* at 75–77, 151–54.

238. 600 U.S. 477, 501, 505–06 (2023) (quoting King v. Burwell, 576 U.S. 473, 485 (2015)). In recent years, the Supreme Court tends to invoke the major questions doctrine as a clear statement rule. That is, the Court assumes that Congress has not delegated major questions to agencies unless Congress has unambiguously done so. *See, e.g.*, *id.* at 506; West Virginia v. EPA, 597 U.S. 697, 722–32 (2022); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) (per curiam); Ala. Ass'n of Realtors v. HHS, 594 U.S. 758, 764 (2021) (per curiam); Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); *see generally* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 268–76 (2022) (describing the development of the major questions doctrine as a clear statement rule). Justice Barrett, however, sees the major questions doctrine as a "common sense," contextual interpretive presumption rather than a clear statement rule. *See Biden*, 600 U.S. at 501, 510–22 (Barrett, J., concurring). But the precise formulation of the major questions doctrine—whether a stronger clear statement rule or a milder interpretive presumption—does not matter for purposes of this Article. In then-Professor Barrett's own words: "The choice to denominate a canon as a 'clear statement' rule is of little consequence; what matters is the effect of the canon on the statutory text." Barrett, *supra* note 2, at 167.

239. West Virginia, 597 U.S. at 779 (Kagan, J., dissenting); *see also id.* at 766 ("The majority claims it is just following precedent, but that is not so. The Court has never even used the term 'major questions doctrine' before.").

240. *Biden*, 600 U.S. at 516 & n.3 (Barrett, J., concurring) (citing, *inter alia*, ICC v. Cincinnati, N.O. & T.P. Ry. Co., 167 U.S. 479, 494 (1897)).

241. *Id.* at 509 (quoting Barrett, *supra* note 2, at 123–24).

assuming that the federal courts have not overstepped by adopting such canons in the past," she was "wary of adopting new ones."[242] Her position in this respect is consistent with her long-held view that "extraconstitutional values like fairness and equity do not justify departures from the most natural reading of a statute."[243]

Justice Barrett's *Nebraska v. Biden* opinion was a solo concurrence, but several other Justices have expressed similar skepticism about adopting new canons or invoking representation-reinforcing ones.[244] In the 2024 veterans-benefits case of *Rudisill v. McDonough*, Justice Kavanaugh wrote separately to argue that "judges have no constitutional authority to favor or disfavor one group over another in the spending process."[245] In an explicit rejection of the "pro-veteran canon," a substantive canon that construes benefits statutes in favor of servicemembers, he noted that courts "do not apply a low-income-families canon, a healthcare-for-seniors canon, or a local-law-enforcement canon to favor those groups."[246] "[A]ny canon that construes benefits statutes in favor of a particular group," he concluded, "appears to be inconsistent both with actual congressional practice on spending laws and with the Judiciary's proper constitutional role in the federal spending process." Justice Kavanaugh's concurrence, joined by Justice Barrett and in relevant part by Justices Thomas and Alito,[247] bodes ill for proposals like Eskridge's and Sunstein's as well as substantive canons actually in use, such as the Indian canon.

More broadly speaking, the representation-reinforcing theory has been around for over forty years. Academics have been proposing representation-reinforcing substantive canons for almost as long. Yet not one Justice has

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242. *Id.* at 509 n.2.

243. Barrett, *supra* note 2, at 168; *see also id.* at 163 ("[I]nvocation of a specific substantive canon does not justify a departure from a statute's plain language any more than does the invocation of a more general concern for equity.").

244. *See, e.g.*, Arizona v. Navajo Nation, 599 U.S. 555, 572 (2023) (Thomas, J., concurring); Small v. United States, 544 U.S. 385, 399, 400–01 & nn.5–6 (2005) (Thomas, J., joined by Scalia & Kennedy, JJ., dissenting); Jennings v. Rodriguez, 583 U.S. 281, 301–02 (2018) (Alito, J., joined by Roberts, C.J., Thomas, Kennedy, & Sotomayor, JJ.); *see also* Rehaif v. United States, 588 U.S. 225, 247 n.2 (2019) (Alito, J., dissenting) ("The text alone does not explain why the word 'knowingly' would 'leapfro[g]' over the middle element, which is perhaps why the majority does not adopt the novel 'grammatical gravity' canon.").

245. 601 U.S. 294, 317 (2024) (Kavanaugh, J., joined by Barrett, J., concurring).

246. *Id.* at 318.

247. *Id.*; *see also id.* at 329 (Thomas, J., joined by Alito, J., dissenting) ("[S]ubstantive canons such as the veteran's canon rest on uncertain foundations. I share Justice Kavanaugh's concern that the veteran's canon appears to have developed almost by accident, and no explanation has been provided for its foundation. I question whether this purported canon should ever have a role in our interpretation.") (internal quotation marks and citations omitted).

endorsed a novel representation-reinforcing canon. In short, one doubts that the Supreme Court will begin fashioning new substantive canons that favor marginalized groups.

What about the other two causes of decanonization: statutorification and *Chevron*? What would those look like in reverse?

Reverse statutorification is a lost cause. The contemporary world of statutes shows no signs of reverting to the common law. At the Founding, each branch of government was understood to jealously guard its domain.[248] The principle holds true today. If for some reason Congress soured on an omnibus statute like the Jones Act, it would repeal and replace it with new legislation rather than return policymaking authority to unelected judges. In short, statutorification is a one-way ratchet.

Chevron, however, is a different story. Recall *Pugin v. Garland*, the 2023 case in which the Supreme Court declined to apply the immigration rule of lenity after expressing doubts that the canon retains any force at all.[249] On its face, *Pugin* exemplifies the immigration rule of lenity's displacement by *Chevron*.

But *Pugin* is just as notable for what it *didn't* say. Even as *Pugin* declined to apply the immigration rule of lenity, the Court also failed to mention *Chevron*. This was no accident. The Supreme Court had not applied *Chevron* deference since 2016.[250] And it finally abrogated the once-dominant deference doctrine in last Term's *Loper Bright* decision, holding that "[t]he deference that *Chevron* requires of courts reviewing agency action cannot be squared" with the Administrative Procedure Act.[251]

What does *Chevron*'s end mean for the substantive canons? Many of them survived *Chevron*—the criminal rule of lenity is one example.[252] But *Chevron*'s victims included not only the immigration rule of lenity, but other substantive canons as well.[253] And in recent years, the attitude on the Supreme

248. *See* THE FEDERALIST NO. 51 (James Madison).

249. *See* 599 U.S. 600, 610 (2023); *supra* text accompanying notes 117–18.

250. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 406 (2024).

251. *Id.* at 396.

252. *See supra* text accompanying notes 122–24.

253. *See supra* Section III.B (discussing the immigration rule of lenity); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1737 n.38 (2010) ("*Chevron* subsumed a number of deference regimes . . . that were previously applied in specific substantive areas."); Watson, *supra* note 131, at 254–55 ("The courts have generally agreed that, in such circumstances [when the agency advances a narrow interpretation of a remedial statute], the *Chevron* rule constrains judicial reliance on the remedial purpose canon.").

Court towards substantive canons at large has been one of increasing skepticism.[254]

But statutory interpretation after *Chevron* may give some of these now-neglected canons room to flourish again. Under *Chevron*, it was the reviewing court's responsibility to first determine whether a statute is ambiguous (Step One) before it proceeded to consider the reasonableness of the agency's interpretation (Step Two). Without *Chevron*, the court may continue to consult the agency's views, but its interpretation is more or less *de novo*.[255] When the Court no longer defers to the BIA when it comes to interpreting immigration statutes, for example, perhaps we will begin to see it employ the immigration rule of lenity once more. Indeed, this may be what the Court hinted at in *Loper Bright* when it wrote that "*Chevron* gravely erred . . . in concluding that the inquiry is fundamentally different just because an administrative interpretation is in play. The very point of the traditional tools of statutory construction—the tools courts use every day—is to resolve statutory ambiguities."[256]

One can already observe a similar process with the revival—or birth, depending on your perspective—of the major questions canon. The Supreme Court recently invoked the canon to terminate the Centers for Disease Control and Prevention's nationwide eviction moratorium,[257] the Occupational Safety and Health Administration's vaccine mandate for large employers,[258] and the Environmental Protection Agency's nationwide cap on carbon dioxide emissions.[259] As discussed above, the major questions doctrine also contributed to the Court's decision to block the Department of Education's student loan forgiveness program.[260]

Recall that Justice Barrett sought to locate the major questions doctrine in Supreme Court decisions dating back forty years or longer.[261] But even

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254. *See supra* notes 241–47 and accompanying text.

255. *See Loper Bright*, 603 U.S. at 394 ("The APA . . . incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions. In exercising such judgment, though, courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. Such interpretations 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance' consistent with the APA." (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

256. *Loper Bright*, 603 U.S. at 401.

257. Ala. Ass'n of Realtors v. HHS, 594 U.S. 758, 764 (2021) (per curiam).

258. Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 117 (2022) (per curiam).

259. West Virginia v. EPA, 597 U.S. 697, 722–32 (2022).

260. *See supra* text accompanying note 238; Biden v. Nebraska, 600 U.S. 477, 500–07 (2023).

261. *See supra* text accompanying note 238; *Biden*, 600 U.S. at 509–10 (Barrett, J., concurring).

adopting Justice Barrett's account of the canon's history leaves an unexplained gap. Why did no Supreme Court decision in the two decades after 1980 invoke the major questions canon, despite significant growth in the administrative state during the late twentieth century?[262] In other words, even if the major questions doctrine was not a twenty-first century invention, why was it a twenty-first century resurrection?

Chevron again supplies the answer. The major questions canon—and its close relative the nondelegation doctrine, which holds that excessive congressional delegation of agency authority violates separation-of-powers principles[263]—clashed with *Chevron*'s principle of deferring to an agency as long as the agency's interpretation is reasonable.[264] Indeed, the Court in *Loper Bright* cast the major questions canon as a way for the judiciary to limit *Chevron*'s scope.[265] The Court has likewise avoided striking down statutes for delegating too much legislative authority to the Executive branch, although it came close in, again, 1980.[266] Thus some *Chevron*-era commentators observed that delegation analysis writ large had been "subsumed" by *Chevron* deference.[267]

How the tables have turned. In none of the pre-*Loper Bright* major questions cases discussed above—*Biden v. Nebraska*, *West Virginia v. EPA*, *NFIB v. OSHA*, and *Alabama Association of Realtors v. HHS*—did the

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262. *See* David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CALIF. L. REV. 1125, 1135 (1999) (noting "the explosive growth in the number of federal environmental, health, and safety laws and regulations during the last three decades"); West Virginia v. EPA, 597 U.S. 697, 741 n.2 (2022) (Gorsuch, J., concurring) (similar).

263. *See* Sohoni, *supra* note 238, at 290–91; *see also* Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring) ("[T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine. . . . Both are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.").

264. *See* 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 11:34.15 (3d ed. 2024); Aditya Bamzai, *Judicial Deference and Doctrinal Clarity*, 82 OHIO ST. L.J. 585, 602 (2021).

265. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 405 (2024).

266. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion) (adopting a narrowing interpretation instead of one that "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional" (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935))); *id.* at 675 (Rehnquist, C.J., concurring in the judgment) ("I have no doubt that the provision at issue, standing alone, would violate the doctrine against uncanalized delegations of legislative power.").

267. *E.g.*, Aaron R. Cooper, *Sidestepping* Chevron*: Reframing Agency Deference for an Era of Private Governance*, 99 GEO. L.J. 1431, 1449 (2011); Olivier Sylvain, *Wireless Localism: Beyond the Shroud of Objectivity in Federal Spectrum Administration*, 20 MICH. TELECOMM. & TECH. L. REV. 121, 170 (2013).

majority opinion mention *Chevron*.[268] Just as *Chevron* had once thought to displace delegation analysis, now delegation analysis has displaced *Chevron*. The Court accomplished this reversal by reviving the major questions doctrine rather than the nondelegation doctrine itself, but the outcome—applying an interpretive presumption against sweeping administrative action instead of deferring to the agency—is the same.[269]

It remains to be seen whether the Supreme Court's (re-)embrace of the major questions doctrine will affect its use of other substantive canons. Perhaps a more robust major questions doctrine will mean less need for other substantive canons that counsel against broad agency authority, examples of which include the presumptions against retroactive application of statutes and against federal preemption of state law.[270] Thus understood, these canons are merely examples of what Cass Sunstein terms the "American nondelegation doctrine": that "[e]xecutive agencies cannot make certain kinds of decisions"—that is, decisions that the substantive canons presume against—"unless Congress has explicitly authorized them to do so."[271] This approach would subsume those substantive canons into the major questions inquiry.

Once a canon has become decanonized, the road back is narrow. Changed circumstances are unlikely to result in the Court adopting a new substantive canon or bringing back a decanonized one.[272] And statutorification is not a process that is likely to be reversed.[273] Only time will tell whether any decanonized canons will find a place in the Supreme Court's post-*Chevron* interpretive world.

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268. *See* Biden v. Nebraska, 600 U.S. 477 (2023); West Virginia v. EPA, 597 U.S. 697 (2022); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109 (2022) (per curiam); Ala. Ass'n of Realtors v. HHS, 594 U.S. 758 (2021) (per curiam).

269. *Cf. Nat'l Fed'n of Indep. Bus.*, 595 U.S. at 125 ("Whichever the doctrine [nondelegation or major questions], the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people.'" (quoting Antonin Scalia, *A Note on the Benzene Case*, REGUL.: AEI J. ON GOV'T. & SOC'Y, July–Aug. 1980, at 27)). As Mila Sohoni points out, "a sufficiently robust major questions doctrine greatly reduces the need to formally revive the nondelegation doctrine. . . . The new major questions doctrine enables the Court to effectively resurrect the nondelegation doctrine without *saying* it is resurrecting the nondelegation doctrine." Sohoni, *supra* note 238, at 265–66, 293.

270. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330–35 (2000).

271. Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1182 (2018).

272. *See supra* text accompanying notes 230–44.

273. *See supra* text accompanying note 248.

VI. CONCLUSION

Courts abandon substantive canons of statutory interpretation for a variety of reasons. Some are internal to the judiciary, for example, by adopting a deferential posture to agency interpretations. Reasons for decanonization may also be external: changed economic circumstances made taxpayers and seamen less sympathetic to the courts, and courts abandoned interpretive principles like the remedial purpose canon that had emerged against a common law backdrop as statutes supplanted the common law.

This Article has shown not only how canons die, but how difficult it is for them to come back once decanonized. In an era when the Supreme Court is reluctant to recognize new substantive canons, particularly representation-reinforcing ones, hopes for new interpretive presumptions favoring marginalized groups are unlikely to be realized. But even as many of the same scholars and advocates bemoan the end of *Chevron* deference, it is *Chevron*'s overruling that may spell the beginning of a new flourishing of the substantive canons—and perhaps, for many now-neglected canons, a road to recanonization.