



## ARTICLE

**The Substantive Canons of Tax Law**

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**Abstract.** Anti-abuse doctrines in tax law have traditionally been formulated as multifactor tests that weigh the facts of the taxpayer's case but ignore the tax statute at issue. This approach has proven problematic: Some judges import statutory considerations regardless, creating inconsistency and confusion, and some scholars criticize the doctrines as antitextual judicial inventions. These challenges undermine important barriers against abusive tax schemes.

This Article argues that anti-abuse doctrines should be considered substantive canons of construction: interpretive presumptions that can be rebutted by statutory text or purpose. Doing so would resolve apparent arbitrariness in the doctrines' application as simply the rebuttal of presumptions and reconcile the substantive canons to textualists as constitutionally permissible background norms. It would also provide a framework to test the validity of disputed doctrines and allow them to be more flexible and intuitive.

Although many scholars have studied substantive canons and anti-abuse doctrines separately, this Article connects the two. It also catalogs the substantive tax canons based on existing case law, serving as a resource for future academics, practitioners, and judges.

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**Table of Contents**

Introduction .....	197
I. Problems with the Status Quo .....	201
A. Inconsistency .....	201
B. Tension with Textualism.....	206
II. The Substantive Canon Framework .....	209
A. What Are Substantive Canons? .....	210
B. Anti-Abuse Doctrines as Substantive Canons .....	214
C. Applying the Framework .....	216
1. <i>Historic Boardwalk Hall</i> .....	216
2. <i>Gitlitz</i> .....	218
3. <i>Benenson</i> and <i>Summa Holdings</i> .....	221
D. Codified Canons: Section 7701(o).....	225
III. The Case for Substantive Tax Canons .....	228
A. Substantive Canons Serve as Background Norms.....	228
B. Substantive Canons Make Statutes More Flexible and Intuitive .....	237
C. Substantive Canons Complement Purposivism.....	239
D. The Evolution of Substantive Tax Canons.....	242
Conclusion.....	245
Appendix: Catalog of Substantive Tax Canons.....	247

## Introduction

The Internal Revenue Code<sup>1</sup> is notoriously complicated, but life is even more so. Congress cannot anticipate every possible application of its tax legislation, and taxpayers inevitably combine disparate provisions of the Code to produce unforeseen shelters and loopholes. Courts have articulated a variety of doctrines to combat this threat, such as the doctrine that transactions lacking economic substance should be disregarded,<sup>2</sup> and the doctrine barring taxpayers from taking two tax deductions from a single transaction.<sup>3</sup> These doctrines (the “anti-abuse” doctrines<sup>4</sup>) have conventionally been articulated as straightforward rules that do not involve statutory text or purpose.<sup>5</sup> The economic substance doctrine, for example, is a two-factor test that turns solely on the economic effect of<sup>6</sup> and business justification for<sup>7</sup> a transaction, regardless of the tax statute at issue.

The conventional treatment encounters two major problems. First, many judges decline to apply the anti-abuse doctrines in a manner too contradictory to the underlying statute—for example, most courts do not apply the economic substance doctrine to deny incentive tax credits (such as renewable energy credits), even when the incentive tax credits fail its two-factor test.<sup>8</sup> But because there is no consistent theory to weigh mushy statutory purpose against a rigid common law rule, judges strike a haphazard balance between the two in

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1. Hereinafter “the Code.”
  2. See I.R.C. § 7701(o) (2018) (codifying the common law economic substance doctrine); *IES Indus., Inc. v. United States*, 253 F.3d 350, 353 (8th Cir. 2001) (applying the economic substance doctrine, as part of the sham transaction doctrine); *Rice’s Toyota World, Inc. v. Comm’r*, 752 F.2d 89, 91-92 (4th Cir. 1985) (same).
  3. See *Charles Ilfeld Co. v. Hernandez*, 292 U.S. 62, 68 (1934) (“In the absence of a provision of the [applicable act] definitely requiring [a double deduction], a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers.”); see also *infra* Appendix A.4. But see *infra* Part II.C.2.
  4. This Article specifically deals with judge-made anti-abuse doctrines, and not statutory or regulatory anti-abuse rules. See, e.g., Treas. Reg. § 1.701-2 (2019). For the sake of brevity, I do not call them “judicial anti-abuse doctrines,” as some others do.
  5. See, e.g., BORIS I. BITTKER ET AL., *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 1.03 (West 2019); MICHAEL J. GRAETZ ET AL., *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 518-31 (8th ed. 2018); Leandra Lederman, *W(h)ither Economic Substance?*, 95 IOWA L. REV. 389, 414-17 (2010) (describing and criticizing the evolution of the economic substance doctrine from a tool for facilitating legislative intent to a tightly defined set of rules); Shannon Weeks McCormack, *Tax Shelters and Statutory Interpretation: A Much Needed Purposive Approach*, 2009 U. ILL. L. REV. 697, 700 (“[Courts] have assumed inappropriate transactions can be identified by using traditional anti-abuse tests that do not consider the purposes of the laws.”).
  6. I.R.C. § 7701(o)(1)(A).
  7. *Id.* § 7701(o)(1)(B).
  8. See *infra* Part I.A.

their quest for sensible results.<sup>9</sup> Sometimes courts tweak the doctrines in nonsensical ways, and sometimes they reject the doctrines altogether.<sup>10</sup> This has created confusion and inconsistency as to how and when the anti-abuse doctrines apply.<sup>11</sup>

Second, the anti-abuse doctrines have come under attack in an increasingly textualist world.<sup>12</sup> The rise of modern textualism<sup>13</sup> has inspired accusations that the anti-abuse doctrines violate separation of powers principles and are generally illegitimate.<sup>14</sup> This, in turn, has encouraged opportunistic taxpayers

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9. See McCormack, *supra* note 5, at 715, 717; *infra* Part I.A.

10. See, e.g., Sacks v. Comm’r, 69 F.3d 982, 991-92 (9th Cir. 1995) (declining to apply the economic substance doctrine “where Congress has purposely used tax incentives to change investors’ conduct”); Historic Boardwalk Hall, LLC v. Comm’r, 136 T.C. 1, 26-27 (2011) (tweaking the economic substance doctrine to permit transactions producing tax effects alone), *rev’d on other grounds*, 694 F.3d 425 (3d Cir. 2012).

11. See *infra* text accompanying notes 32-36.

12. Textualists generally emphasize the primacy of statutory text over legislative purpose, especially by excluding legislative history as evidence of statutory meaning. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 126-29 (describing the rise of textualism over the past thirty years, including its influence on purposivist judges).

13. See, e.g., Gitlitz v. Comm’r, 531 U.S. 206, 219-20 (2001) (applying textualist interpretive methodology); Summa Holdings v. Comm’r, 848 F.3d 779, 788-89 (6th Cir. 2017) (same); IES Indus., Inc. v. United States, 253 F.3d 350, 356 & n.5 (8th Cir. 2001) (same); ACM P’ship v. Comm’r, 157 F.3d 231, 265 (3d Cir. 1998) (McKee, J., dissenting) (same); Coltec Indus., Inc. v. United States, 62 Fed. Cl. 716, 756 (2004) (same), *vacated*, 454 F.3d 1340 (Fed. Cir. 2006); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (“The new textualism is the most interesting development in the Court’s jurisprudence (the jurisprudence of legislation) in the 1980s and is well worth understanding.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 9 (2001) (“In recent years, the textualists’ legislative process critique has palpably affected Supreme Court decisionmaking.”).

14. See, e.g., Gitlitz, 531 U.S. at 219-20; Coltec Indus., 62 Fed. Cl. at 756 (“[T]he use of the ‘economic substance’ doctrine to trump ‘mere compliance with the Code’ would violate the separation of powers.”); Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 20-26 (2004) (observing the prevalence of textualism in modern tax scholarship and its challenge to anti-abuse doctrines); Brian Galle, *Interpretative Theory and Tax Shelter Regulation*, 26 VA. TAX REV. 357, 369 (2006) (“[A]s textualism has become more prevalent over the past two decades, the [economic substance] doctrine has been subjected to ever-increasing skepticism from textualist-minded courts.”); Amandeep S. Grewal, *Economic Substance and the Supreme Court*, 116 TAX NOTES 969, 970 (2007) (“[T]he Court should affirm its prior holdings and instruct the lower courts that the casual disregard of statutory language in favor of judicial tests is inappropriate.”); Linda D. Jellum, *Codifying and “Miscodifying” Judicial Anti-Abuse Tax Doctrines*, 33 VA. TAX REV. 579, 589-90 (2014) (discussing textualists’ criticisms of anti-abuse doctrines); Allen D. Madison, *The Tension Between Textualism and Substance-over-Form Doctrines in Tax Law*, 43 SANTA CLARA L. REV. 699, 702 (2003) (“[Th]is article concludes from this analysis that the substance-over-form doctrines discussed here are no longer appropriate in tax cases.”). See generally John F. Coverdale, *Text as Limit: A*  
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to undertake questionable transactions in the hope that the doctrines may not apply.<sup>15</sup>

This Article addresses both of these problems by integrating the anti-abuse doctrines into a framework already well known to legislation scholars.<sup>16</sup> It argues that these doctrines should be understood as substantive canons of construction, used by judges as rebuttable presumptions of meaning in interpreting the Code.<sup>17</sup> Reconceptualizing the anti-abuse doctrines as presumptions resolves the apparent arbitrariness in their application<sup>18</sup> by allowing courts to integrate them with considerations of statutory text and purpose.<sup>19</sup>

This Article further argues that these substantive tax canons are justifiable as *background norms* familiar to drafters of statutes (especially the staff experts actually responsible for the bulk of the drafting<sup>20</sup>), regulators, courts, and practitioners, and that the anti-abuse doctrines therefore underlie the best reading of the Code. Substantive canons that serve as background norms are inherently neither textualist nor purposivist<sup>21</sup> and have been accepted by

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*Plea for a Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501 (1997) (arguing for textualism in the interpretation of tax statutes).

15. See *infra* Part I.B.

16. See, e.g., James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1268-70 (2009) (empirically investigating substantive canons); 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, 940-49 (2013) (same); Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 832-35 (2017) (summarizing scholarly discussion of substantive canons).

17. Some scholars have distinguished between “interpretation” and “construction” of statutes. See generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). This Article makes no such distinction and instead uses the two terms in their colloquial, interchangeable sense.

In addition, although most of the substantive tax canons discussed in this Article act as presumptions, some also act as weaker tiebreakers to resolve statutory ambiguity. See *infra* Appendix.

18. See *infra* Part I.A.

19. See *infra* Part II.B.

20. See *infra* Part III.A; *infra* notes 201-02 and accompanying text.

21. In contrast to textualists, purposivists emphasize statutory purpose and use legislative history as evidence of that purpose. See, e.g., *Comm’r v. Engle*, 464 U.S. 206, 217 (1984); *Norfolk S. Corp. v. Comm’r*, 104 T.C. 13, 37 (“[W]here the statute is ambiguous, we may look to its legislative history and to the reason for its enactment.”), *modified on other grounds*, 104 T.C. 417 (1995), *aff’d*, 140 F.3d 240 (4th Cir. 1998). The seminal case in this tradition was *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998). Classic purposivists include Henry Hart and Albert Sacks. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958)

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theorists of many different methodological stripes.<sup>22</sup> Moreover, by providing an objective criterion for validity (widespread acceptance as a background norm), the framework adjudicates among the many rules that have been proposed as anti-abuse doctrines.<sup>23</sup> The substantive tax canons discussed in this Article can be investigated by conducting surveys as to common knowledge of disputed canons, or by conducting historical research into their longevity and prevalence. Reconsidering anti-abuse doctrines as substantive canons also provides flexibility in interpretation, rather than forcing Congress to avoid absurdities by hard-coding statutory exceptions to the doctrines. This helps the

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(founding the “legal process” school of purposivism). Much of the analysis of purposivism in this Article would apply to intentionalism as well, although I focus on purposivism since it is by far the more popular methodology.

22. Supporters include Justice Scalia, Bryan Garner, Abbe Gluck, John Manning, and Cass Sunstein. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 30-31 (2012) (arguing that certain canons of construction are “so deeply ingrained, [they] must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text”); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 187 (2017) (“The broadest legitimating principle for our current interpretive regime is that the rules do a decent job of reflecting congressional practice, or, viewed slightly differently, that they are a set of shared norms against which we all draft and interpret legislation.”); Gluck & Bressman, *supra* note 16, at 913 (describing how both textualists and purposivists routinely use substantive canons); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 81-82 (2006) (“[U]nstated exceptions or qualifications may form part of the background against which lawyers understand the workings of a given category of statute. Textualists also rely on . . . some substantive (policy-oriented) canons that have come to be accepted as background assumptions by virtue of longstanding prescription.”); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 413, 459 (1989) (defending canons of construction, including substantive canons, as “background principles” and arguing that canons of construction are “inevitable” as a descriptive matter); Anita S. Krishnakumar & Victoria F. Nourse, *The Canon Wars*, 97 TEX. L. REV. 163, 181 (2018) (reviewing WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* (2016)) (“[S]ubstantive canons are thought to reflect background norms established in the Constitution, the common law, or some other element of the legal system.”).
23. Appendix B of WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (6th ed. 2020) lists hundreds of canons of construction, but only three relating to tax law. This Article argues that the list of tax canons ought to be much longer, including many doctrines that have traditionally been treated as conventional common law and not as canons of construction. It also finds relatively little basis for two of the three canons advanced by Eskridge and his co-authors. Compare *infra* Appendix A.7 (discussing the presumption that IRS assessments are correct as a non-canon), and *infra* Appendix A.9 (discussing the presumption that tax valuation statutes follow the majority approach as a non-canon), with ESKRIDGE ET AL., *supra*, at 1171 (listing both presumptions as canons).

anti-abuse doctrines to serve their ideal role as intuitive guidelines in unforeseen fact patterns.<sup>24</sup>

Ironically, many of the anti-abuse doctrines were initially understood as tools of statutory interpretation, arising as courts strove to interpret ambiguous<sup>25</sup> early tax statutes.<sup>26</sup> But as the anti-abuse doctrines were formalized and transformed from broad intuitions into specific multifactor tests, their original spirit was lost.<sup>27</sup> Judges and regulators given multifactor rules tend to apply those factors mechanically, to the exclusion of statutory context that might dictate an alternative result.<sup>28</sup> While this can sometimes laudably increase taxpayer certainty, here it has expunged critical nuance in the doctrines' application.

Part I of this Article describes the history of the anti-abuse doctrines and problems with the status quo. Part II explains substantive canons in general and applies the framework to the anti-abuse doctrines. Part III normatively defends substantive canons as background norms, explaining how they are flexible and intuitive guidelines useful both to textualists and purposivists. The Appendix provides additional evidence for the anti-abuse doctrines' status as background norms, based on a review of relevant tax cases. It serves as a catalog of substantive canons in tax law, illustrating the development of the canons and providing an additional resource for readers.

## **I. Problems with the Status Quo**

Criticisms of the anti-abuse doctrines generally fall into two categories: first, that the doctrines are inconsistently applied; second, and more recently, that the doctrines inappropriately contravene statutory text. This Part summarizes both of these claims in turn.

### **A. Inconsistency**

Courts have long struggled to reconcile the anti-abuse doctrines with statutory context and have often enforced them inconsistently as a result. This is most apparent with the three most famous anti-abuse doctrines, familiar to virtually all tax practitioners and scholars: (1) the substance-over-form doctrine (requiring that transactions be taxed in accordance with their

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24. *See infra* Part III.B.

25. This Article uses “ambiguous” and “ambiguity” in their colloquial senses, without distinguishing between ambiguity and vagueness.

26. *See infra* notes 50-51 and accompanying text.

27. *See infra* Part I.A.

28. *See infra* notes 52-53 and accompanying text.

substance rather than their form);<sup>29</sup> (2) the step transaction doctrine (“requir[ing] that the interrelated steps of an integrated transaction be analyzed as a whole rather than treated separately”),<sup>30</sup> and (3) the economic substance doctrine.<sup>31</sup> Each one aptly illustrates the courts’ struggle to balance judge-made rules against statutory meaning.

The substance-over-form doctrine has frequently been criticized as inconsistently applied. The Code contains a number of provisions that are solely a matter of form, including the various elections that permit taxpayers to choose between cash or accrual methods of accounting,<sup>32</sup> accelerated or straight-line depreciation,<sup>33</sup> and the fiscal or calendar year.<sup>34</sup> And there are circumstances where courts have concluded that form actually trumps substance: Section 71(c) of the Code, for instance, has been interpreted to require taxpayers to specifically “ earmark ” child support payments for which they wish to receive a tax exemption, meaning that substantive qualification for the tax exemption is insufficient.<sup>35</sup> In their leading textbook, Boris Bittker and Lawrence Lokken complain that “it is almost impossible to distill useful generalizations from the welter of substance-over-form cases”<sup>36</sup>—as indeed it is, if we take these cases as reflecting a static legal rule not dependent on nuances of the underlying statutes.

Likewise, courts and the Internal Revenue Service (IRS) have been uneven in their application of the step transaction doctrine, apparently out of deference to congressional intent.<sup>37</sup> For example, the Code does not tax shareholders on the contribution of assets to a corporation in exchange for

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29. *See, e.g.*, *Gregory v. Helvering*, 293 U.S. 465, 469 (1935); *United States v. Phellis*, 257 U.S. 156, 168 (1921); *Estate of Weinert v. Comm’r*, 294 F.2d 750, 755 (5th Cir. 1961).

30. BORIS I. BITTKER & LAWRENCE LOKKEN, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 4.3.5 (West 2019). For examples of cases applying the step transaction doctrine, see *True v. United States*, 190 F.3d 1165, 1174-76 (10th Cir. 1999); and *Associated Wholesale Grocers v. United States*, 927 F.2d 1517, 1521-22 (10th Cir. 1991).

31. *See supra* notes 2, 5-7 and accompanying text.

32. I.R.C. § 446(c) (2018).

33. *Id.* § 168(b)(5).

34. *Id.* § 441.

35. *Comm’r v. Lester*, 366 U.S. 299, 305-06 (1961).

36. BITTKER & LOKKEN, *supra* note 30, ¶ 4.3.3.

37. Rev. Rul. 2017-09, 2017-21 I.R.B. 1244, 1246 (limiting the doctrine’s reach to situations where the taxpayer’s chosen form would violate some “compelling” policy or the “intent” of the Code (citing *H.B. Zachry Co. v. Comm’r*, 49 T.C. 73 (1967); *Makover v. Comm’r*, 26 T.C.M. (CCH) 288 (1967); and Rev. Rul. 78-330, 1978-2 C.B. 147)); BITTKER & LOKKEN, *supra* note 30, ¶ 4.3.5 (“The step transaction doctrine is usually enunciated as a general principle, but the courts may be more ready to apply it to some provisions than to others, implicitly assuming that Congress would have intended this difference in approach.”).

stock if certain conditions are met,<sup>38</sup> including that the transferring shareholders must be in “control” of the corporation after the exchange.<sup>39</sup> Under the step transaction doctrine, control is usually lost (and tax is therefore imposed) if the shareholders dispose of their stock in the corporation after the transfer pursuant to a pre-existing plan.<sup>40</sup> But the IRS has sometimes declined to apply the doctrine in this way when it has perceived a conflict with statutory purpose (to reduce tax frictions).<sup>41</sup> Commentators have agreed with the outcome but questioned the IRS’s rationale, describing it as “a new layer of confusion” in the step transaction doctrine.<sup>42</sup>

Finally, the economic substance doctrine may illustrate the inconsistency issue best of all. The doctrine has two prongs that must both be met for a transaction to be respected. One requires that “the taxpayer has a substantial purpose (apart from federal income tax effects) for entering into such transaction.”<sup>43</sup> The problem is that many tax provisions invite taxpayers to

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38. I.R.C. § 351.

39. *Id.* § 351(a), (c).

40. *See* S. Klein on the Square, Inc. v. Comm’r, 188 F.2d 127, 129-30 (2d Cir. 1951); Rev. Rul. 79-194, 1979-1 C.B. 145, 145-46.

41. *See, e.g.*, Rev. Rul. 2003-51, 2003-1 C.B. 938, 940 (“Treating a transfer of property that is followed by a nontaxable disposition of the stock received as a transfer described in § 351 is not necessarily inconsistent with the purposes of § 351. Accordingly, the control requirement may be satisfied in such a case, even if the stock received is transferred pursuant to a binding commitment in place upon the transfer of the property in exchange for stock.”); *see also* Rev. Rul. 2017-09, 2017-21 I.R.B. 1244, 1246 (“Back-to-back nonrecognition transfers are generally respected when consistent with the underlying intent of the applicable Code provisions and there is no compelling alternative policy.”).

42. *See, e.g.*, Jasper L. Cummings, Jr., Commentary, *Rev. Rul. 2003-51: A New Gloss on the Step Transaction Doctrine?*, 101 TAX NOTES 1473, 1473 (2003) (noting that the IRS’s “reasoning adds a new layer of confusion to the step transaction doctrine and could justify unintended results”).

43. I.R.C. § 7701(o)(1)(B). This is the subjective prong. The objective prong looks to the effect of the transaction on the “taxpayer’s economic position.” *See id.* § 7701(o)(1)(A).

Prior to codification in 2010, there was substantial variation between circuits regarding the details of the economic substance doctrine. *Compare, e.g.*, Bank of N.Y. Mellon Corp. v. Comm’r, 801 F.3d 104, 115 (2d Cir. 2015) (addressing a taxable year prior to the passage of § 7701(o), and noting that “[i]n our Circuit the test is not a rigid two-step process with discrete prongs; rather, we employ a ‘flexible’ analysis where both prongs are factors to consider in the overall inquiry into a transaction’s practical economic effects”), *with* Rice’s Toyota World, Inc. v. Comm’r, 752 F.2d 89, 91-92 (4th Cir. 1985) (applying the economic substance doctrine as a “two-pronged inquiry”). Codification, however, has moved the economic substance doctrine decisively in the direction of strict factors.

Because of the lag in bringing cases to trial, most of the economic substance cases cited in this Article concern the pre-codification version of the doctrine. However, the problems presented in these old cases persist even after codification. In particular,  
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participate in transactions solely for tax reasons—historic rehabilitation credits attract investors with no interest in historic rehabilitation,<sup>44</sup> renewable energy credits attract investors with no interest in renewable energy,<sup>45</sup> and so on. To apply the economic substance doctrine here would be poor policy, since the subsidy ought to expand the pool of investors and therefore bid down the returns demanded to fund such projects. If investors that invest solely to obtain a tax credit were ineligible, then the credit would effectively serve as a windfall to existing investors rather than spurring new investment.

Courts have skirted this issue in a variety of ways. One court inferred an exception in the economic substance doctrine for incentive programs.<sup>46</sup> Another court (as described in Part II.C.1) tweaked the doctrine so that tax effects alone provide sufficient economic substance to uphold a transaction.<sup>47</sup> This makes no sense, of course—even the most egregious tax shelters will change a taxpayer’s economic position and have a substantial purpose if tax effects are considered.

The general picture is therefore one of confusion. There are cases where we would like an anti-abuse doctrine to apply, but there are also cases where we *know* it should *not* apply—and the doctrine itself gives no basis to distinguish between these cases. Thus the accusations of arbitrariness by commentators unable to discern commonalities or a consistent doctrine. The courts and the IRS have felt constrained not to apply the doctrines in a manner too plainly contradictory to the purpose of the relevant statute.<sup>48</sup> Instead, they have deviated from the doctrine when necessary to achieve “sensible results.”<sup>49</sup>

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codification did not clarify to which transactions the economic substance doctrine would or would not apply. *See infra* Part II.D.

44. *See infra* Part II.C.1.

45. *See, e.g.,* Sacks v. Comm’r, 69 F.3d 982, 991-92 (9th Cir. 1995).

46. *Id.* at 992 (“If the government treats tax-advantaged transactions as shams unless they make economic sense on a pre-tax basis, then it takes away with the executive hand what it gives with the legislative.”).

47. *See* Historic Boardwalk Hall, LLC v. Comm’r, 136 T.C. 1, 26 (2011) (ruling that the taxpayer in question satisfied the objective prong of the economic substance test *after* considering rehabilitation tax credits), *rev’d on other grounds*, 694 F.3d 425 (3d Cir. 2012); *see also* Michael Bauer & Kevin Juran, *The Economic Substance of Tax Credits*, 131 TAX NOTES 499, 503 (2011) (“What, if anything, should be made of the fact that the Tax Court had the opportunity to hold that the economic substance doctrine was irrelevant to the instant case and opted not to?”).

48. *See* Historic Boardwalk Hall, 136 T.C. at 26 (describing Congress’s purpose in enacting the Code provision at issue in the case, which formed a crucial part of the trial court’s reasoning); ACM P’ship v. Comm’r, 73 T.C.M. (CCH) 2189, 2215 (1997), No. 10472-93, 1997 WL 93314, at \*36 (describing a sham transaction as one that “seeks to claim tax benefits, unintended by Congress”), *aff’d in part, rev’d in part*, 157 F.3d 231 (3d Cir. 1998).

49. *See* McCormack, *supra* note 5, at 715-17.

It was not always this way. Judges initially developed the anti-abuse doctrines not as judicial policymaking, but merely to clarify ambiguous statutes. Many of the doctrines emerged from the courts' reflections on statutory purpose during the early years of the federal income tax, when the Code was much sparser and its provisions more general.<sup>50</sup> At that time, the doctrines were not considered standalone rules<sup>51</sup> so much as tools of statutory interpretation.

In subsequent decades, partly in response to taxpayer demands for greater certainty, courts have articulated increasingly granular details regarding the application of the anti-abuse doctrines. This has caused a shift from broad general standards to the specific factors used today.<sup>52</sup> Judicial attempts to provide clarity and certainty to taxpayers are laudable, but multifactor tests inevitably encourage judges to focus on the factors to the exclusion of the interpretive concerns that inspired those factors.<sup>53</sup> This Article attempts to place the anti-abuse doctrines within a framework of statutory interpretation, and therefore to return some additional nuance to their application. Because this proposal harkens back to earlier courts' understandings of the role of anti-abuse doctrines, it should be straightforward for courts and the IRS to adopt.

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50. See, e.g., *Gregory v. Helvering*, 293 U.S. 465, 469 (1935) (articulating a precursor to the substance-over-form doctrine and the economic substance doctrine as facets of the central determination whether a transaction “was the thing which the statute intended”); *Lynch v. Turrish*, 247 U.S. 221, 226 (1918) (dismissing a “mere change of form” in one of the earliest cases interpreting the then-new income tax law and serving as a precursor to substance-over-form analysis), *cited in* *United States v. Phellis*, 257 U.S. 156, 168 (1921) (applying an early version of the substance-over-form doctrine); *Warner Co. v. Comm’r*, 26 B.T.A. 1225, 1228 (1932) (introducing the step transaction doctrine and holding that the Code provision on corporate reorganizations “permits, if it does not require, an examination of the several steps taken”).
51. Andy Grewal calls the economic substance doctrine, as currently applied, a “free-floating” doctrine. He suggests that the Supreme Court has never used the economic substance doctrine other than as a tool of statutory interpretation, *contra* the practice of lower courts. Grewal, *supra* note 14, at 970. Grewal’s emphasis on statutory interpretation suggests the potential appeal of the substantive canon framework to textualist thinkers.
52. Compare *Gregory*, 293 U.S. at 469 (rejecting a transaction as not being “the thing which the statute intended”), with *IES Indus., Inc v. United States*, 253 F.3d 350, 353 (8th Cir. 2001) (applying the economic substance doctrine without considering the purpose of the statute in question). Compare *Warner Co.*, 26 B.T.A. at 1228 (justifying its application of the step transaction doctrine as “our opinion” in a cursory manner), with *Superior Trading, LLC v. Comm’r*, 137 T.C. 70, 87-90 (2011) (describing in detail the factors to be considered in applying the step transaction doctrine, without reference to the relevant statute), *aff’d*, 728 F.3d 676 (7th Cir. 2013).
53. See generally Grewal, *supra* note 14 (arguing that lower courts and the IRS have inferred multifactor tests from Supreme Court rulings that contained only conventional statutory interpretation).

The history of the anti-abuse doctrines is also relevant because they were developed during the heyday of purposivism, and the language of early cases enforcing these doctrines tended to be highly purposivist, replete with references to Congress's intent and how best to effect that intent.<sup>54</sup> As a result, the doctrines tend to advance a vision of tax law that is sometimes at odds with a "literal" reading of the Code.<sup>55</sup> This has led to a second problem with the status quo.

## B. Tension with Textualism

The rise of textualism has caused courts and commentators to doubt the anti-abuse doctrines' continuing legitimacy. Due to the nonliteral tone of much of the case law concerning anti-abuse doctrines, the doctrines have come under attack as textualism has gained currency among scholars and practitioners.<sup>56</sup> As the "new textualism" gathered momentum toward the end of the twentieth century,<sup>57</sup> the Supreme Court began to read statutes in a narrower and more

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54. See *Gregory*, 293 U.S. at 469; *Lynch*, 247 U.S. at 230; *Warner Co.*, 26 B.T.A. at 1227.

55. For example, in *Gregory v. Helvering*, 293 U.S. at 469-70, the Supreme Court rejected a transaction as not being "the thing which the statute intended," in repudiation of the trial court's ruling that a "statute so meticulously drafted must be interpreted as a literal expression of the taxing policy," *Gregory v. Comm'r*, 27 B.T.A. 223, 225 (1932). See also, e.g., *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1354 (Fed. Cir. 2006) (holding that the economic substance doctrine operated to overcome "literal compliance with the statute" in "effectuating the underlying Congressional purpose"); *In re CM Holdings*, 301 F.3d 96, 102 (3d Cir. 2002) ("[E]ven if a transaction complies precisely with all requirements for obtaining a deduction, if it lacks economic substance it 'simply is not recognized for federal taxation purposes, for better or for worse.'" (quoting *ACM P'ship v. Comm'r*, 157 F.3d 231, 261 (3d Cir. 1998))); *Cadwell v. Comm'r*, 136 T.C. 38, 56 (2011) ("Pursuant to the substance over form doctrine, although the form of a transaction may literally comply with the provisions of the Code, that form will not be given effect where it has no business purpose and operates simply as a device to conceal the true character of a transaction."), *aff'd*, 483 F. App'x 847 (4th Cir. 2012). The economic substance doctrine in particular has often been applied in a nonliteral manner. While the textualist criticism of the anti-abuse doctrines has not been limited to the economic substance doctrine, as discussed in the following Subpart, many of the textualist objections to the economic substance doctrine have been resolved by the codification of § 7701(o), as discussed in Part II.D below.

56. BITTKER ET AL., *supra* note 5, ¶ 1.04 (describing, in relation to the economic substance doctrine, "the insistence of more than a few tax practitioners that the judge-made doctrine was illegitimate and had never actually been applied by the Supreme Court to deny a taxpayer any tax benefits"); Cunningham & Repetti, *supra* note 14, at 20-32; Jellum, *supra* note 14, at 589-90 (describing the rise of textualism and increasing skepticism regarding judicial anti-abuse doctrines). But see *supra* note 55 (describing how these challenges have been partly resolved by the codification of the economic substance doctrine); *infra* Part II.D (same).

57. New textualism is so called to distinguish it from the old, "plain meaning," textualism. "Plain meaning" textualism survived until the early twentieth century, when it was

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text-focused manner, especially by eschewing legislative history. Textualism has heavily influenced the jurisprudence of the Supreme Court,<sup>58</sup> and to a lesser extent that of the federal courts of appeals and district courts.<sup>59</sup> While few Justices or judges today are entirely purposivist or entirely textualist, we have reached an equilibrium that incorporates various indicia of statutory meaning but focuses on statutory text.<sup>60</sup> This shift in general methods of statutory interpretation has had profound effects on federal tax law.

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eclipsed by purposivism. *See, e.g.,* *United States v. Gudger*, 249 U.S. 373, 374-75 (1919); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Procter & Gamble Co. v. United States*, 225 U.S. 282, 293 (1912); *see also* Manning, *supra* note 22, at 79-80.

58. Justice Kagan famously remarked in a retrospective on the work of Justice Scalia that “we are all textualists now.” Harvard Law Sch., *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:09-:39, YOUTUBE (Nov. 25, 2015), <https://perma.cc/47TL-Q5W3>. The quote has become a virtual cliché in scholarly work on statutory interpretation. *See, e.g.,* Abbe R. Gluck, *Justice Scalia’s Unfinished Business in Statutory Interpretation: Where Textualism’s Formalism Gave Up*, 92 NOTRE DAME L. REV. 2053, 2056 (2017); Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018).
59. Lower courts and agencies have varied in the alacrity with which they have adopted the Supreme Court’s textualist example—in general, trial courts remain more purposivist than appellate courts. *See* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 58 (2018) (noting that “the increase [in judicial textualism] was larger for the courts of appeals than for the district courts”); *see also* 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, 1310 (2018) (“Even the text-centric judges described themselves in such terms as ‘textualist-pragmatist’ or ‘textualist-contextualist.’”). Although the judges polled by Gluck and Posner did not elaborate, their endorsement of pragmatism might reflect the “practical reason” initially championed by Eskridge and Frickey. *See infra* note 68. However, the debate has primarily centered on the conflict between purposivists and textualists.
60. *See* Gluck, *supra* note 58, at 2057-58 (“Thanks to the great intellectual efforts of textualists, purposivists, and pragmatists over the past three decades, a basic equilibrium has emerged. All sides have significantly moderated and largely have converged on a middle-ground, text-focused position that . . . includes recourse to broader context, including, in disciplined fashion . . . , legislative materials.” (footnote omitted)); John F. Manning, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911, 1925 (2015) (arguing that leading purposivists and textualists “have more in common than many may realize”); John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1315-16 (2010) (describing how second-generation textualism in some senses “is itself a purposive philosophy—one emphasizing that Congress expresses its purpose, in part, by specifying the preferred means (rules versus standards) of implementing its broader goals”); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 29-30 (2006) (“[T]extualism has been so successful in altering the views of even nonadherents that it has become increasingly difficult for textualists to identify, let alone conquer, any territory that remains between textualism’s adherents and nonadherents.”); Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 119, 128-30 (2009) (“The latest move in the interpretation wars, however, is to declare something of a truce. Textualism, intentionalism, and purposivism are either not all that different or at least not different in the way people usually think.”).

In particular, some scholars and practitioners have argued that a textual focus is fundamentally incompatible with the anti-abuse doctrines and consequently that the anti-abuse doctrines should be abolished.<sup>61</sup> Responding to this theoretical shift, courts have also sometimes ruled that the anti-abuse doctrines are judge-made and nonbinding because they derive from judicial reconstruction of legislative intent.<sup>62</sup> And many tax advisors (especially those at large accounting firms<sup>63</sup>) have cited the primacy of statutory text to support transactions that comply with the literal language of the Code but would have failed under the anti-abuse doctrines.<sup>64</sup>

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61. See, e.g., Grewal, *supra* note 14, at 978 (“A careful review of the Supreme Court’s jurisprudence reveals that the Court has never applied a free-floating economic substance test to tax statutes. Rather, the Court examines principles of economic substance only to the extent that the applicable statute makes those principles relevant.”); Madison, *supra* note 14, at 702 (“The article concludes from this analysis that the substance-over-form doctrines discussed here are no longer appropriate in tax cases.”).
62. See, e.g., *Summa Holdings v. Comm’r*, 848 F.3d 779, 782 (6th Cir. 2017) (“Each word of the ‘substance-over-form doctrine,’ at least as the Commissioner has used it here, should give pause. . . . ‘Form’ is ‘substance’ when it comes to law. The words of law (its form) determine content (its substance).”); *ACM P’ship v. Comm’r*, 157 F.3d 231, 265 (3d Cir. 1998) (McKee, J., dissenting); *Coltec Indus., Inc. v. United States*, 62 Fed. Cl. 716, 740-41, 752-56 (2004), *vacated*, 454 F.3d 1340 (Fed. Cir. 2006); Cunningham & Repetti, *supra* note 14, at 20-26 (observing the courts and practitioners’ shift away from the nonliteral doctrines in light of the new textualism, but arguing that the step transaction and sham transaction doctrines may have a valid basis even under textualism); Galle, *supra* note 14, at 363 (“Since the mid-1980s, as ‘textualist’ theories of statutory interpretation have become more prevalent, courts have grown increasingly skeptical of judge-made tax policy, especially where that policy has the effect of negating the clear lexical meaning of the text.”). See generally *infra* Parts II.C.1-2 (discussing examples of skepticism regarding the substance-over-form doctrine by textualist-leaning courts).
63. Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. ON REG. 77, 88-92 (2006).
64. Cunningham & Repetti, *supra* note 14, at 20-32; Rostain, *supra* note 63, at 93-94 (describing the rise of tax shelters as driven by the ability of textualist tax lawyers to provide favorable opinions to clients); see also Joseph Bankman, Commentary, *The Business Purpose Doctrine and the Sociology of Tax*, 54 SMU L. REV. 149, 150-54 (2001) (describing formalism, textualism, and literalism among young lawyers and large accounting firms that facilitates the promulgation of tax shelters); Joseph Bankman, Lecture, *Tax Enforcement: Tax Shelters, the Cash Economy, and Compliance Costs*, 31 OHIO N.U. L. REV. 1, 3 (2005) (linking Justice Scalia’s textualism with literalism and tax shelters); Galle, *supra* note 14, at 359-60 (suggesting that textualist doubts about the economic substance doctrine was “at the heart” of KPMG’s highly publicized tax evasion case).

The sources in the preceding paragraph deal with the rash of tax shelters that declined in the mid-2000s. However, even though the most notorious tax shelters have declined, the persistent tension between textualism and anti-abuse doctrines remains a thumb on the scale in favor of lower-profile tax avoidance. As Part II.C.3 below demonstrates, textualist skepticism of the doctrines continues to protect tax shelters even today.

Although the IRS has not followed the judicial trend toward textualism,<sup>65</sup> the apparent tension between textualism and anti-abuse doctrines has emboldened tax lawyers to sign off on transactions that would have been dubious to purposivists.<sup>66</sup> Thus, textualism's prominence in scholarly debates undermines a key barrier to abusive tax schemes.

Even for theorists (like myself) that do not identify as textualists, the new textualism has raised important questions about the justification for judicial doctrines that appear to abrogate statutory text. Some scholars have rejected textualist arguments outright, instead endorsing an alternative theory of statutory interpretation—for instance, a move toward purposivism<sup>67</sup> or practical reason.<sup>68</sup> Implicit in these arguments is the view that textualism is fundamentally incompatible with anti-abuse doctrines. But there is another way to address the supposed incompatibility, one that adapts the doctrines to our more textualist age.

## II. The Substantive Canon Framework

Reconceiving the doctrines as substantive canons helps to avoid the accusations of inconsistency and antitextualism described above. This Part introduces the theory behind substantive canons, describes how they address the problems in Part I, and provides examples of how they would apply in practice.

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65. See Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. (forthcoming 2020) (on file with author) (finding that although the Tax Court has followed the general judicial shift toward textualism, the IRS has remained highly purposivist); see also BITTKER ET AL., *supra* note 5, ¶ 1.04 (noting that the view that the economic substance doctrine was illegitimate “gained little or no traction”).

66. Cunningham & Repetti, *supra* note 14, at 26-30; Rostain, *supra* note 63, at 94.

67. See, e.g., Cunningham & Repetti, *supra* note 14, at 54 (“Is the designation of purposivism as the method to interpret subchapter K and to determine when a partnership should be disregarded reasonable? We believe the answer to [this] question[] is ‘yes.’”); Lederman, *supra* note 5, at 444 (“Courts should not hesitate to apply a systematic approach to purposive interpretation to all cases involving claimed abuse of the tax laws.”); McCormack, *supra* note 5, at 720-31. Some have also proposed a move toward what I call “structural purposivism.” See *infra* notes 235-38 and accompanying text.

68. “Practical reason” is a syncretic blend of textualism, intentionalism, and purposivism, mediated by the practical wisdom of the judge, first proposed by William Eskridge and Philip Frickey and applied in the tax context by Michael Livingston. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Michael Livingston, *Practical Reason, “Purposivism,” and the Interpretation of Tax Statutes*, 51 TAX L. REV. 677, 720-24 (1996).

A. What Are Substantive Canons?

Canons of construction are rules that guide courts in the interpretation of statutes. Legislation scholars typically divide the canons between “language canons” and “substantive canons.”<sup>69</sup> Language canons inform how text is read. For example, the Latin maxim *expressio unius est exclusio alterius* dictates that the express listing of certain items in a statute presumptively excludes any unmentioned comparable items.<sup>70</sup> Substantive canons, on the other hand, inform the substantive meanings of statutes based on normative concerns. For example, the rule of lenity requires that ambiguous criminal statutes be interpreted in favor of the defendant.<sup>71</sup>

Although scholars have proposed several species of substantive canon,<sup>72</sup> this Article focuses on presumptions. Presumptions “can be rebutted by statutory language, legislative history, and overall purpose,” depending on one’s methodological tastes.<sup>73</sup> In general, purposivists consider all three, but

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69. See, e.g., James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12-14 (2005); Krishnakumar, *supra* note 16, at 833-35; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 927-41 (1992). Language canons are also sometimes called “textual canons,” and sometimes a third category of “extrinsic canons” is added, referring to “outside sources, such as legislative history.” Gluck & Bressman, *supra* note 16, at 924-25.

70. *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (“[E]xpressing one item of [an] associated group or series excludes another left unmentioned.” (second alteration in original) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002))); see also *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

71. See, e.g., *Skilling v. United States*, 561 U.S. 358, 410 (2010); *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality opinion) (“The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.”); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

72. Presumptions are often contrasted with “clear statement rules,” which “can only be rebutted by clear statutory text.” William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992). Because clear statement rules generally are justified as promoting particular constitutional values, this Article focuses instead on presumptions, and all the substantive tax canons discussed herein are presumptions rather than clear statement rules. See *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991) (“Rules of plain statement and strict construction prevail only to the protection of weighty and constant values, be they constitutional . . . or otherwise . . . .” (citations omitted)); ESKRIDGE ET AL., *supra* note 23, at 650 (“Clear statement rules have been developed by the Supreme Court as expressions of quasi-constitutional values.”); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 164 (2010) (“Canons promoting extraconstitutional values may be employed only as presumptions guiding the choice between equally plausible interpretations of a statute.”).

73. See Eskridge & Frickey, *supra* note 72, at 597.

textualists eschew legislative history and only consider overall statutory purpose when the text is unclear.<sup>74</sup>

One weaker form of substantive canon is the tiebreaker, which applies “at the end of the interpretive analysis” if other tools of interpretation leave the court in doubt about the statute’s meaning.<sup>75</sup> Unlike the tiebreaker, a rebuttable presumption applies at the *beginning* of interpretive analysis.<sup>76</sup> I believe that most substantive tax canons are more appropriately classified as presumptions than as tiebreakers<sup>77</sup>—this is closer to how they are currently described in most casebooks, as doctrines that apply universally, not just presumptively. But for thinkers who prefer tiebreakers, recasting the anti-abuse doctrines as tiebreakers may still be preferable to banning them entirely.

Canons of construction have gained greater importance over the past few decades, in part due to the rise of textualism. Some critics believe that textualist judges are more likely to use canons, and that substantive canons in particular act as “safety valves” that prevent formalist textualism from producing absurd results.<sup>78</sup> Nevertheless, textualists are far from the only judges applying canons of construction—one recent survey by Abbe Gluck and Richard Posner of forty-two judges on courts of appeals revealed that *all* of those judges routinely used canons of construction,<sup>79</sup> even though *none* self-identified as unqualified

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74. Manning, *supra* note 22, at 84-85 (“[T]extualists generally forgo reliance on legislative history as an authoritative source of [the statute’s apparent overall] purpose. . . . [But] when semantic ambiguity creates the necessary leeway, textualists will try to construct a plausible hypothetical purpose (if possible) . . .”).

75. WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 353 (2d ed. 2006).

76. *Id.* at 353-54. Eskridge and his co-authors note that some presumptions may be rebutted by “only a subset” of interpretive tools. As I formulate them, however, the substantive tax canons could be rebutted by any conventional interpretive tools.

77. There are two exceptions. See *infra* Appendix A.5-6.

78. Linda D. Jellum, *But That Is Absurd! Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917, 921 (2011) (“But legislatures can be imperfect and text imprecise; thus, textualists have safety valves, doctrines that allow them to avoid the meaning of statutory text even when that text is very clear.”); Krishnakumar, *supra* note 16, at 826-27 (“There is a popular belief among statutory interpretation scholars that substantive canons of statutory construction . . . act as an ‘escape valve’ that helps textualist judges eschew, or ‘mitigate,’ the rigors of textualism.”); Manning, *supra* note 13, at 118 (“[T]he absurdity doctrine provides an important, albeit limited, safety valve.”); see also ESKRIDGE ET AL., *supra* note 23, at 687 (noting the possible criticism that “every human interpretive technique, including textualism, needs a ‘safety valve’ of some sort”).

79. Gluck & Posner, *supra* note 59, at 1328. For analogous empirical work on the use of canons by Justices of the Supreme Court, concluding that all Justices make extensive use of canons, see Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 909, 928, 929 tbl.1 (2016); and 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, 99-101 (2018).

textualists.<sup>80</sup> Scholars, too, now frequently invoke canons of construction regardless of their methodological orientation.<sup>81</sup> As Gluck and Posner note, the canons of construction “have taken precedence over legislative history not only in Supreme Court opinions but also in the now-widespread teaching of legislation in law schools.”<sup>82</sup> It has become apparent that canons of construction will remain important interpretive tools in the current *détente* between the purposivist and textualist camps.<sup>83</sup>

Tellingly, recent years have seen a boom in canons of construction generally and substantive canons in particular. Numerous scholars, with varying methodological stances, have come out in favor of substantive canons or have proposed new canons,<sup>84</sup> adding to the extensive and frequently cited list produced by William Eskridge and his co-authors in their leading casebook.<sup>85</sup> Yet this movement has only barely reached tax scholarship: Eskridge’s list only discusses one substantive tax canon that I endorse in this Article, the rule against implied tax exemptions discussed in Appendix A.5.<sup>86</sup>

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80. Gluck & Posner, *supra* note 59, at 1310 (“Even when asked to provide one word to describe their interpretive approaches, not one judge was willing to self-describe as ‘textualist’ without qualification. Even the text-centric judges described themselves in such terms as ‘textualist-pragmatist’ or ‘textualist-contextualist.’”).

81. *See infra* note 84.

82. Gluck & Posner, *supra* note 59, at 1301.

83. *Cf. id.* at 1301 (“Many contend that [arguments over textualism versus purposivism] have reached *détente* . . .”).

84. *See, e.g.*, Nicholas S. Bryner, *An Ecological Theory of Statutory Interpretation*, 54 IDAHO L. REV. 3, 6-7 (2018) (proposing an “environmental canon”); Jonathon S. Byington, *The Fresh Start Canon*, 69 FLA. L. REV. 115, 116-18 (2017) (arguing that circuit courts have developed a “fresh start canon” in bankruptcy cases and elevated its importance to a level that is inappropriate given the goals of bankruptcy law); Gluck, *supra* note 22, at 182 (proposing a “CBO Canon” that “ambiguous statutes should be interpreted in accordance with the reading of the statute adopted by the Congressional Budget Office”); Noah B. Lindell, *The Dignity Canon*, 27 CORNELL J.L. & PUB. POL’Y 415, 417 (2017) (proposing a “dignity canon”); Clinton G. Wallace, *Congressional Control of Tax Rulemaking*, 71 TAX L. REV. 179, 183 (2017) (proposing a “JCT Canon” that “regulation-writers and courts . . . should follow the construction adopted by the [Joint Committee on Taxation] for its revenue estimates and in its explanations of statutory provisions”).

85. ESKRIDGE ET AL., *supra* note 23, app. B.

86. *See id.* at 1171. Steve Johnson has also identified several potential substantive tax canons that this Article addresses below. *See* Steve R. Johnson, *The Canon That Tax Penalties Should Be Strictly Construed*, 3 NEV. L.J. 495, 495-96 (2003). These include pro-taxpayer canons, which I reject as obsolete, *see infra* Appendix A.9; anti-taxpayer canons, which I consider valid, *see infra* Appendix A.5; a variant on the whole code rule, which I reject as inconsistently applied and empirically inadequate, *see infra* Appendix A.8; and judicial statements that are not substantive canons, but rather endorsements of textualism or purposivism (e.g., “tax statutes are not extended beyond their clear import” and “Code provisions should be interpreted consistently with the basic premises of the tax system”) or policy-based exceptions (e.g., “deductions and

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Most importantly, scholars have not treated the anti-abuse doctrines discussed in Part I as substantive canons.<sup>87</sup>

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exemptions are not construed as applicable to activities that are illegal or contrary to public policy,” *see also infra* note 295). *See* Johnson, *supra*, at 495-96.

James Brudney and Corey Ditslear have written in passing on canons in tax law but primarily focus on the rule against implied tax exemptions. *See* Brudney & Ditslear, *supra* note 16, at 1295-97, 1297 n.272 (“We hope a tax law scholar will explore the origins and development of tax canons as a separate project.”).

Other scholars have written about specific tax canons without discussing the development of tax canons in general. *See, e.g.*, Steven A. Dean & Lawrence M. Solan, *Tax Shelters and the Code: Navigating Between Text and Intent*, 26 VA. TAX REV. 879, 891-904 (2007) (discussing the general rule of lenity in tax law and also observing the inconsistent application of a “principle that statutes imposing a tax are construed liberally in favor of the taxpayer,” both of which I discuss in Appendix A.9 (quoting *The Limited, Inc., v. Comm’r*, 286 F.3d 324, 332 (6th Cir. 2002))); Andy S. Grewal, *Why Lenity Has No Place in the Income Tax Laws*, 81 MO. L. REV. 1045 (2016) (discussing the general rule of lenity in criminal law as applied to tax cases, rather than tax-specific canons); Kristin E. Hickman, *Of Lenity, Chevron, and KPMG*, 26 VA. TAX REV. 905 (2007) (same); Wallace, *supra* note 84 (proposing a “JCT canon,” also discussed in Appendix A.9); Kristin Hickman, *Bridging Exceptionalism and Anti-Exceptionalism with the JCT Canon*, JOTWELL (Dec. 10, 2018), <https://perma.cc/EGZ6-QRQ6> (suggesting that Wallace’s JCT canon might also be understood as a tax exceptionalist argument for purposivist interpretation of the Code).

87. Brian Galle has proposed an “opt-in rule” for the economic substance doctrine, wherein Congress would “enact a codified doctrine that directs courts to disallow tax benefits for a transaction that lacks economic substance, unless that transaction was specifically identified by Congress as one that should receive favorable treatment.” Galle, *supra* note 14, at 387. Although somewhat analogous to treating the economic substance doctrine as a substantive canon, Galle’s rule was not adopted in the codification of the economic substance doctrine and would have operated to similar effect as a legislative clear statement rule, rather than as a judicial presumption. *Cf.* Charlene D. Luke, *The Relevance Games: Congress’s Choices for Economic Substance Gamemakers*, 66 TAX LAW. 551, 569 (2013) (“The two earliest bills dealing with economic substance actually contained a short angel list in the form of a list of credits, but such lists do not appear in later versions.” (footnote omitted) (citing Small Business Tax Relief Act of 2000, H.R. 3874, 106th Cong. § 266; and Abusive Tax Shelter Shutdown Act of 1999, H.R. 2255, 106th Cong. § 3)).

Charlene Luke has argued that the economic substance doctrine, as codified in § 7701(o) of the Code, should “not apply to transactions that are clearly consistent with the form and purpose of claimed tax benefits.” Luke, *supra*, at 558-61. This would also have a similar effect to treating the economic substance doctrine as a substantive canon, although Luke does not analyze the doctrine in these terms. However, Luke bases her argument on a specific reading of the legislative history behind § 7701(o) of the Code, and consequently her argument is narrower than the one set forth in this Article, and largely descriptive rather than normative. *See infra* note 170.

Joseph Bankman has previously noted that the economic substance doctrine “in some respects resembles a substantive canon of interpretation,” without endorsing this view. Joseph Bankman, *The Economic Substance Doctrine*, 74 S. CAL. L. REV. 5, 11 (2000), *cited in* *Santander Holdings USA v. United States*, 844 F.3d 15, 21 & n.8 (1st Cir. 2016); *see also* N.Y. STATE BAR ASS’N, TAX SECTION, REP. NO. 1228, REPORT ON CODIFICATION OF THE ECONOMIC SUBSTANCE DOCTRINE 6 & n.12 (2011), <https://perma.cc/S4AM-Y7DV>  
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B. Anti-Abuse Doctrines as Substantive Canons

The substantive canon framework addresses both of the problems sketched in Part I. There is nothing necessarily purposivist about substantive canons. Interpretive methodology matters in the rebuttal of the presumption that the doctrines apply, but that rebuttal could involve textualism, purposivism, practical reason, or any other method. Thus textualists ought to have no overarching objection to anti-abuse doctrines that act as substantive canons, although they will inevitably apply them differently in practice.

The framework also addresses doctrinal inconsistency by providing a cleaner and more comprehensible description of how the doctrines are actually applied. The substantive canon framework requires that courts consider the relevant statute as an integral part of the anti-abuse doctrines, rather than as an extrinsic factor that theoretically does not (but in practice often does) influence outcomes. Put another way, when courts apply the anti-abuse doctrines, I propose that they engage in a two-step process. First, the court parses the facts of the taxpayer's case to see whether the doctrine applies. If it does apply, it is only as a presumption—so the second step is to ask whether statutory text or purpose rebuts this presumption.

If presumptions can be rebutted by text or purpose, would this proposal relegate the anti-abuse doctrines to a position of unimportance? Likely not. The substantive canon framework might shrink the scope of the doctrines at the margins—most particularly by providing another avenue for lawyers to argue that their clients are acting within the intent of the Code and therefore not subject to the anti-abuse doctrines—but as noted above, courts are attuned to these arguments even under the status quo.<sup>88</sup>

Experience has demonstrated that presumptions are more effective than their tentative formal phrasing would imply. Legal cases, especially the limited minority that come before courts, frequently involve close calls in which doctrines such as presumptions can be determinative. In fact, the most common critique among scholars has been that substantive canons are *too* widely invoked, that any thumb on the interpretive scale will have dramatic effects.<sup>89</sup>

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(suggesting that the economic substance doctrine is similar to the canon against absurdities).

88. *See supra* Part I.A.

89. *See, e.g.,* Krishnakumar, *supra* note 16, at 827 (“In the conventional telling, substantive canons are thought to wield significant power—indeed, *too much* power—over interpretive outcomes.”). Using empirical evidence, Anita Krishnakumar argues that the dominance of the substantive canons has been overstated, but notes that they are still invoked in 14.4% of recent Supreme Court opinions. *Id.* at 850 & tbl.2. The substantive canons most commonly cited include several that operate as mere  
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The most likely effect of the substantive canon framework would be a shift in litigation from the content of the doctrines themselves to the statutes in question and, in particular, whether the statutes successfully rebut the doctrines. This Article is agnostic as to which tools are used in the rebuttal, since this will depend intimately on the reader's (and the courts') approaches to statutory interpretation, but we can nevertheless attempt to predict the effect of this shift in practice.

Since Supreme Court cases tend to attract the most scholarly attention, one might guess that the textualist leanings of the current Supreme Court would imply a textualist gloss on substantive tax canons, such that they will only be permitted to apply when the text is ambiguous. But this suspicion underrates the practical importance of the IRS. While the Supreme Court is hugely influential in determining the toolbox of anti-abuse doctrines available—if the Supreme Court rules that a particular doctrine is not valid, lower courts and the IRS are bound by its determination—other courts and agencies are otherwise generally free to select their own methods of statutory interpretation.<sup>90</sup> The IRS, which initially administers tax claims and which is the sole federal authority that the vast majority of taxpayers will ever deal with,<sup>91</sup> is highly purposivist in practice.<sup>92</sup> As a result, it is likely that in most cases the anti-abuse doctrines would be rebutted by some combination of statutory text, purpose, and legislative history.

A critic might complain that presumptions are loosely specified and therefore provide excessive leeway to judges, particularly in the all-important determination of whether statutory text or purpose rebuts a presumption.<sup>93</sup>

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presumptions, including the presumption against preemption, the presumption against retroactivity, and arguably the avoidance canon. *Id.* at 856.

90. See Gluck, *supra* note 22, at 178-79 (observing that while courts ideally should be subject to “a single set of fewer, ordered, and predictable statutory interpretation rules” which are “given stare decisis effect,” in practice they do not interpret statutes consistently and likely “never will”).

91. Only a small proportion of filed tax returns are ever audited. See *Enforcement Examinations*, INTERNAL REVENUE SERV., <https://perma.cc/P6WP-AMD6> (last updated May 17, 2019) (“The IRS audited almost 1.0 million tax returns, approximately 0.5 percent of all returns filed in Calendar Year 2017.”). Of audited returns, only a small proportion ever go to trial. See Elizabeth Chao & Andrew R. Roberson, *Overview of Tax Litigation Forums*, TAX CONTROVERSY 360 (Apr. 21, 2017), <https://perma.cc/3DAE-BU68> (describing how roughly 30,000 federal tax cases are pending each year, including Tax Court cases, federal district court cases, and Court of Federal Claims cases).

92. Preambles to regulations and other administrative materials drafted by the IRS frequently cite legislative history. See, e.g., T.D. 9817, 2017-9 I.R.B. 968, 968; I.R.S. Notice 2018-76, 2018-42 I.R.B. 599, 599. Legislative history is generally understood as a proxy for purposivist methodology. See Bruhl, *supra* note 59, at 29; see also Choi, *supra* note 65 (describing how the IRS remains highly purposivist, rather than shifting toward textualism like courts generally have).

93. See, e.g., Bruhl, *supra* note 59, at 11 (describing this determination as “fuzzy”).

This is a fair and fundamental critique: Because the substantive tax canons are intended to address unforeseen applications of tax statutes, they do not lend themselves to bright lines, and they do provide judges (and the IRS) greater latitude in interpretive matters. Part III.B below argues that this is a feature of this framework rather than a bug, but a critic generally opposed to expansions of judicial or administrative power may not find this argument persuasive.

### C. Applying the Framework

This Subpart uses examples from case law to illustrate how the anti-abuse doctrines have historically worked, and how they would work as substantive canons. These examples also emphasize the problems of inconsistency and tension with textualism sketched above.

#### 1. *Historic Boardwalk Hall*

In 2000, an organization was formed to restore Historic Boardwalk Hall, a National Historic Landmark in Atlantic City.<sup>94</sup> The organization advertised for investors, emphasizing the potential tax benefits of investment in the form of historic rehabilitation tax credits.<sup>95</sup> Pitney Bowes (a postage meter company not otherwise engaged in historic rehabilitation) joined the project, but only after receiving opinions from counsel and a guarantee from the restoration's organizer that it would qualify for the credits.<sup>96</sup> Funded by Pitney Bowes's investment, Historic Boardwalk Hall was restored and remains a popular event venue to this day.

However, the IRS denied Pitney Bowes's attempt to take the historic rehabilitation credits. Citing economic substance, the IRS claimed that the transaction was a sham and ought to be disregarded for tax purposes.<sup>97</sup> Applying the two prongs of the economic substance doctrine, the IRS had a strong case. Subjectively, Pitney Bowes was clearly interested in the transaction solely for its tax benefits—in fact, the deal was initially advertised as a “sale” of tax credits.<sup>98</sup> Objectively, Pitney Bowes took on no economic exposure in the deal, which was structured to pay Pitney Bowes a safe 3%

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94. *See* *Historic Boardwalk Hall, LLC v. Comm'r*, 136 T.C. 1, 3 (2011), *rev'd*, 694 F.3d 425 (3d Cir. 2012).

95. *Id.* at 3, 6-7. These tax credits provide a tax credit proportional to the expenses incurred in historic rehabilitation projects in order to incentivize investors to undertake such projects. *See* I.R.C. § 47 (2018).

96. *Historic Boardwalk Hall*, 136 T.C. at 15-16.

97. *Id.* at 17.

98. *Id.* at 6.

return on its investment regardless of whether the project succeeded or failed.<sup>99</sup>

Nevertheless, the trial court upheld the transaction as having sufficient economic substance.<sup>100</sup> Crucial to its opinion was its consideration of congressional intent in enacting the historic rehabilitation credit in the first place. It noted: “Congress enacted the rehabilitation tax credit in order to spur private investment in unprofitable historic rehabilitations. . . . Without the rehabilitation tax credit, Pitney Bowes would not have invested in [Historic Boardwalk Hall’s] rehabilitation, because it could not otherwise earn a sufficient net economic benefit on its investment.”<sup>101</sup>

Exactly right, but the court did not conclude with this cogent observation. Instead, it felt compelled to justify itself within the factors of the economic substance doctrine, by judging the economic effect of the transaction *after* taking into account the rehabilitation tax credits.<sup>102</sup> As noted above, this makes no sense—including tax benefits, any tax shelter would have a substantial economic effect. The whole point of the economic substance doctrine is to consider only *non-tax* effects.

The IRS agreed that the trial court’s rationale was inadequate. As noted in a Chief Counsel Memo (an internal statement of IRS policy publicly available via a Freedom of Information Act request), the IRS has continued to reject transactions like the one in *Historic Boardwalk Hall*.<sup>103</sup> The disagreement between the IRS and the Tax Court remains outstanding, to the chagrin of practitioners.<sup>104</sup>

Here is how the economic substance doctrine would work as a substantive canon, using the same purposive analysis the court favored. Pitney Bowes failed at least one, perhaps both, of the prongs of the doctrine, and accordingly the tax credit would presumptively be denied. However, the statutory purpose of the tax credit—to encourage historic rehabilitation by attracting new

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99. *Id.* at 14-15, 20-21. Compare this case with *ACM Partnership v. Commissioner*, 157 F.3d 231, 248 n.31 (3d Cir. 1998), which found that “a transaction . . . that has neither objective non-tax economic effects nor subjective non-tax purposes constitutes an economic sham whose tax consequences must be disregarded.”

100. *Historic Boardwalk Hall*, 136 T.C. at 27.

101. *Id.* at 26.

102. *Id.*

103. I.R.S. Chief Couns. Mem. 20124002F, at 16-18, 20-21 (Aug. 30, 2012).

104. See Shamik Trivedi, *Practitioners Balk at IRS Memo on Rehabilitation Credits*, 138 TAX NOTES 1050, 1052 (2013). The issue is somewhat ameliorated by Revenue Procedure 2014-12, which provides a safe harbor for rehabilitation credit transactions where the taxpayer takes on a requisite amount of economic exposure, therefore avoiding economic substance issues. Rev. Proc. 2014-12, 2014-3 I.R.B. 415, 415-16. But this partial solution merely adds transaction costs to the sale of tax credits that ideally would be freely tradeable.

investors—would rebut the presumption, and Pitney Bowes would receive the credit after all. So this analysis ultimately reaches the same result as the trial court, but without the confusing ad hoc rationale that had pushed the IRS toward the opposite result.

## 2. *Gitlitz*

Next, consider a lesser known (but more intuitive) anti-abuse doctrine: the rule preventing taxpayers from obtaining two redundant tax benefits from a single transaction, sometimes called the “*Ifeld* rule.”<sup>105</sup> Jurists in recent decades have come to regard the rule against double tax benefits as antitextualist, like many other anti-abuse doctrines. This movement crested in the Supreme Court’s 2001 decision in *Gitlitz v. Commissioner*, controversially ruling that a single transaction entitled stockholders to an increase in tax basis *and* an exemption from income tax.<sup>106</sup>

*Gitlitz* concerned a highly technical fact pattern involving shareholders in an “S corporation,” a corporate form that permits “pass-through” taxation such that the corporation and its shareholders are together subject only to a single level of tax (as opposed to two levels of tax for a conventional “C corporation”).<sup>107</sup> S corporation shareholders report the corporation’s income on their individual tax returns,<sup>108</sup> and in order to prevent double taxation upon future distributions from the corporation to its shareholders, the shareholders may increase their basis in the corporation by the amount of any such income.<sup>109</sup> Specifically, the basis increase includes “items of income (including tax-exempt income) . . . the separate treatment of which could affect the liability for tax of any shareholder.”<sup>110</sup> Increased tax basis benefits

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105. *Charles Ifeld Co. v. Hernandez*, 292 U.S. 62, 68 (1934) (“In the absence of a provision of the [applicable act] definitely requiring [a double deduction], a purpose so opposed to precedent and equality of treatment of taxpayers will not be attributed to lawmakers.”); *see also* *United States v. Skelly Oil Co.*, 394 U.S. 678, 684 (1969); *Duquesne Light Holdings v. Comm’r*, 861 F.3d 396, 407-09 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 2651 (2018); *AMBAC Indus., Inc. v. Comm’r*, 487 F.2d 463, 467 (2d Cir. 1973); *Knapp King-Size Corp. v. United States*, 527 F.2d 1392, 1401 (Ct. Cl. 1975) (*per curiam*) (calling the rule against double deductions “one of the fundamental principles of the tax laws”); *Black & Decker Corp. v. United States*, No. Civ. 02-2070, 2004 WL 2051215, at \*2 (D. Md. Aug. 3, 2004); *Denton & Anderson Co. v. Kavanagh*, 164 F. Supp. 372, 377-78 (E.D. Mich. 1958), *aff’d*, 265 F.2d 930 (6th Cir. 1959); I.R.S. Priv. Ltr. Rul. 79-39-013 (June 18, 1979).

106. 531 U.S. 206, 219-20 (2001).

107. *Id.* at 209.

108. I.R.C. § 1366(a)(1)(A) (1991). Since the events at issue in the case occurred in 1991, *Gitlitz*, 531 U.S. at 210, I refer to that year’s edition of the United States Code.

109. I.R.C. § 1367(a)(1)(A) (1991).

110. *Id.* § 1366(a)(1)(A).

shareholders by decreasing their taxable gain on any subsequent sale of stock.<sup>111</sup>

Under the facts of the case, the S corporation was insolvent and consequently cancelled over \$2 million of its indebtedness.<sup>112</sup> In general, cancellation of indebtedness is treated as income to the taxpayer relieved of the indebtedness.<sup>113</sup> This would have caused taxable income to be recognized by the S corporation's shareholders, except that cancellation of indebtedness is not included in gross income of an insolvent entity.<sup>114</sup> Because the S corporation was insolvent even after the cancellation of indebtedness, the shareholders realized no taxable income from the cancellation. Yet the shareholders nevertheless attempted to increase their tax basis in their shares, on the theory that the cancellation of indebtedness was an "item of income," even though it was not included in "gross income."<sup>115</sup> The exemption from taxation due to insolvency, paired with the increase in tax basis, was the double tax benefit that the taxpayers had controversially attempted to claim.

Justice Thomas, writing for an 8-1 majority, ruled in favor of the taxpayers. Although he acknowledged that this resulted in a "double windfall," he felt constrained by the "plain text" of the statute.<sup>116</sup> This case has been cited as the "high-water mark" of textualism in tax cases,<sup>117</sup> and an apt example of the perceived tension between anti-abuse doctrines and textualism—a near-unanimous decision, written in almost entirely textualist terms, where even the dissent did not argue that legislative history trumped the majority's reading of the text, but merely argued that the statute was ambiguous.<sup>118</sup>

Temporarily putting on our textualist hats (as some noted purposivists, such as Justice Breyer, did for this case), we might ask what difference the substantive canon framework could make here. If Justice Thomas was right that the meaning of the text was clear, then from a textualist perspective there would be no room in the substantive canon framework to apply a presumption against a double deduction—the presumption would have already been rebutted by the text of the statute. However, the statute was not as clear as the majority claimed, and *Gitlitz* is in fact a good case study for the application of

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111. Or increasing any taxable loss, which will also reduce their tax liability.

112. *Gitlitz*, 531 U.S. at 210.

113. I.R.C. § 61(a)(12) (1991).

114. *Id.* § 108(a), (d)(7)(A).

115. *Gitlitz*, 531 U.S. at 210.

116. *Id.* at 219-20.

117. See Thomas D. Greenaway, *Point: Textualism and the Plain Meaning of the Internal Revenue Code*, A.B.A. SEC. TAX'N NEWSQUARTERLY, Summer 2006, at 15, 15.

118. *Gitlitz*, 531 U.S. at 220-24 (Breyer, J., dissenting).

substantive tax canons, reflecting substantial ambiguities in the Code, as Justice Breyer (the lone dissenter) suggested.

The provision of the Code addressing cancellation of indebtedness income explicitly provided that “[i]n the case of an S corporation,” the relevant provisions “shall be applied at the corporate level.”<sup>119</sup> The trial court had held,<sup>120</sup> relying on the logic of another case decided at the same time,<sup>121</sup> that the limitation of the cancellation of indebtedness provisions to “the corporate level” precluded any effects at the shareholder level, therefore preventing the shareholders from stepping up their basis. Indeed, it is hard to imagine what the reference to “the corporate level” could mean other than the exclusion of shareholder effects.<sup>122</sup>

Justice Breyer’s dissent emphasized the two competing readings of the statute.<sup>123</sup> While he recognized the legitimacy of the majority’s distinction between items of income and gross income, he concluded that “[t]he arguments from plain text on both sides here produce ambiguity, not certainty.”<sup>124</sup> But Justice Breyer then used the ambiguity to justify the use of legislative history to provide additional clarity,<sup>125</sup> an approach that was predictably rejected by the textualist wing of the Court.

How would the Court have ruled using a substantive canon against double tax benefits? The double tax benefit claimed by the taxpayers would be presumptively prohibited. The question would therefore be whether the statutes were sufficiently unambiguous as to rebut the presumption. Justice Breyer likely would have thought not, and Justice Thomas may have thought yes regardless. But the analysis, stated this way, is different from a standard attempt to determine the best reading of a statute. It places an added thumb on the scale, a soft factor barring double tax benefits, and a way to rule against the taxpayer in this case on purely interpretive grounds (rather than as a matter of

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119. I.R.C. § 108(d)(7)(A) (1991).

120. *Winn v. Comm’r*, Nos. 5358-96 & 5359-96, 1998 WL 66085 (T.C. Feb. 19, 1998), *aff’d sub nom. Gitlitz v. Comm’r*, 182 F.3d 1143 (10th Cir. 1999), *rev’d*, 531 U.S. 206 (2001).

121. *Nelson v. Comm’r*, 110 T.C. 114 (1998), *aff’d*, 182 F.3d 1152 (10th Cir. 1999).

122. The “[p]resumption against redundancy” seems relevant here: A court should “avoid interpreting a provision in a way that would render other provisions of the statute superfluous or unnecessary.” *ESKRIDGE ET AL.*, *supra* note 23, app. B at 1153-54.

123. *Gitlitz*, 531 U.S. at 220-24 (Breyer, J., dissenting).

124. *Id.* at 220, 223.

125. Specifically, Justice Breyer cited extrinsic evidence from congressional committee reports. *Id.* at 221, 223. Justice Breyer also made the point that “other things being equal, we should read ambiguous statutes as closing, not maintaining, tax loopholes,” although his reasoning seemed to reflect common sense rather than any formal recourse to substantive canons. *See id.* at 223.

policy). While this approach might not have swayed hardline textualists on the Court, it could potentially have persuaded the more moderate Justices.

In an unsurprising coda, Congress reversed the result in *Gitlitz* the following year by amending the statute—endorsing the logic proposed by the trial court and Justice Breyer, the amendment clarified that the statute’s reference to “the corporate level” included not treating cancellation of indebtedness as income to shareholders in insolvent corporations.<sup>126</sup> Nevertheless, because the amendment to the Code was not retroactive, shareholders were able to amend their tax returns for prior tax years to take advantage of the double tax benefit created by *Gitlitz*, leading to substantial losses in revenue and additional work for the IRS for more than a decade.<sup>127</sup>

In short, *Gitlitz* was precisely the sort of case in which the Court ought to have invoked the presumption against double tax benefits. It featured ambiguity, arguments on both sides, and a canon that could have acted to adjudicate between two competing views. *Gitlitz* also emphasizes the utility of substantive canons acting as presumptions—in reality, and particularly in cases sufficiently difficult to generate circuit splits, statutes as complex as the Code rarely admit of unambiguous answers. The traditional conception of the rule against double tax benefits as a straightforward doctrinal rule masked its potential usefulness in mediating ambiguities.

### 3. *Benenson and Summa Holdings*

Some readers might be skeptical of my take on *Gitlitz*, especially those that see Supreme Court rulings as motivated more by politics than by theory. Others might think that the textualist challenge to the anti-abuse doctrines is a dead letter, a relic from the tax shelter wars of the 2000s. This Subpart will apply the substantive canons to reassess rulings from the past few years by courts other than the Supreme Court.

The cases concerned Clement Benenson and James Benenson III, two brothers who thought they had discovered a new way to reduce their taxes using Roth individual retirement accounts (IRAs). Roth IRAs are retirement savings accounts that provide no tax deduction for contributions,<sup>128</sup> but

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126. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 402(a), 116 Stat. 21, 40 (2002) (codified as amended at I.R.C. § 108(d)(7)(A) (2018)); see H.R. REP. NO. 107-251, at 52 (2001) (“The provision provides that income from the discharge of indebtedness of an S corporation that is excluded from the S corporation’s income is not taken into account as an item of income by any shareholder and thus does not increase the basis of any shareholder’s stock in the corporation.”).

127. See I.R.S. Tech. Adv. Mem. 201321019 (May 24, 2013) (allowing a shareholder to increase S corporation basis because a discharge occurred before the effective date of the amendment to § 108(d)(7) of the Code).

128. I.R.C. § 408A(c)(1).

generally exempt from taxation any amounts distributed from the account.<sup>129</sup> Because cash in Roth IRAs is essentially permanently exempt from further taxation, it is very valuable. But high-income taxpayers like the Benensons normally cannot contribute any cash into Roth IRAs.<sup>130</sup>

The Benensons attempted to circumvent these limits with the help of a family corporation that manufactured products for export. The Benensons formed a domestic international sales corporation (DISC), which was paid a commission from the family corporation on these exports.<sup>131</sup> The income of a DISC is taxed at a lower rate than normal corporate profits.<sup>132</sup> Since DISCs are typically owned by the shareholders of the corporation paying the commission, routing profits through a DISC effectively functions as a congressionally sanctioned export subsidy.

Ordinarily, a DISC is a closely held corporation owned by the same person or persons as the manufacturing corporation. But in this case, the DISC was owned by the Benensons' Roth IRAs rather than directly by the Benensons.<sup>133</sup> Consequently, by routing cash from the manufacturing corporation, to the DISC, to the Roth IRAs, the Benensons were able to transfer cash into their Roth IRAs far above ordinary limits (which were \$5,000 per year for lower-income taxpayers, and \$0 for the Benensons<sup>134</sup>)—\$5,182,314 in total over a seven-year period.<sup>135</sup>

The trial court's decision rested largely on the substance-over-form doctrine.<sup>136</sup> The Benensons had stipulated that they constructed the DISC and Roth IRAs solely to transfer money to their Roth IRAs above the contribution

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129. *Id.* § 408A(d)(1).

130. *See id.* § 408A(c)(3).

131. *Summa Holdings v. Comm'r*, 848 F.3d 779, 783 (6th Cir. 2017).

132. DISCs are exempt from tax on commissions up to \$10 million per year. I.R.C. §§ 991, 995(b)(1)(E). However, the shareholders of the DISC pay annual interest on the deferred tax liability. *Id.* § 995(f).

133. Their Roth IRAs owned the DISC through an intermediary corporation, to avoid "incurring any tax-reporting or shareholder obligations." *Summa Holdings*, 848 F.3d at 783.

134. *Id.* at 783-84.

135. *Id.* at 784.

136. *Summa Holdings v. Comm'r*, 109 T.C.M. (CCH) 1612, 1616, 2015 WL 3943219, at \*7 (2015) (suggesting as well that the transaction may have failed the prongs of the economic substance doctrine, but not applying it explicitly), *rev'd*, 848 F.3d 779, and *rev'd sub nom.* *Benenson v. Comm'r*, 887 F.3d 511 (1st Cir. 2018), and *rev'd sub nom.* *Benenson v. Comm'r*, 910 F.3d 690 (2d Cir. 2018). Because appellate court jurisdiction over federal tax cases is determined by the taxpayer's residence (for individuals) or principal place of business (for corporations), *see* I.R.C. § 7482(b)(1), each Benenson brother, and *Summa Holdings* itself, appealed to a separate circuit court.

limits.<sup>137</sup> Because the relationship between the Benensons' corporation, the DISC, and the Roth IRAs was predicated solely on form and not on substance, the court concluded that the payments "were not DISC commissions but deemed dividends to Summa's shareholders followed by contributions to the Benenson Roth IRAs."<sup>138</sup>

Professional commentary has frankly described the Benensons' strategy as a "loophole"<sup>139</sup> and a "tax shelter."<sup>140</sup> The transactions were conducted entirely between related parties, which typically incurs the greatest risk that the substance-over-form doctrine will apply.<sup>141</sup> On its face, this would seem to be a classic case for the anti-abuse doctrines, where two complex, widely separated provisions of the Code interact in an unforeseen way. The Benensons appealed, but their prospects seemed poor.<sup>142</sup>

Yet in a surprising series of reversals, the trial court's reasoning was roundly rejected by the Sixth, First, and Second Circuits.<sup>143</sup> The Sixth Circuit, which ruled first, criticized not just this specific application of the substance-over-form doctrine, but also the doctrine itself, expressing incredulity over "each word" of the phrase "substance-over-form doctrine."<sup>144</sup> The court argued that "[a]s originally conceived and as traditionally used," the doctrine merely prevented taxpayers from arbitrarily relabeling their activities, for example by calling "income" something else to avoid income tax.<sup>145</sup> It saw the IRS's use of the doctrine as an overbroad attempt to chase revenue.<sup>146</sup> Most of all, the Sixth

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137. See *Summa Holdings*, 109 T.C.M. (CCH) at 1616, 2015 WL 3943219, at \*7.

138. *Id.* at 1617, 2015 WL 3943219, at \*8.

139. Lorraine Bailey, *Sixth Circuit Upholds Tax Loophole for the Rich*, COURTHOUSE NEWS SERV. (Feb. 17, 2017), <https://perma.cc/M4MY-L9TD>.

140. Peter J Reilly, *Conservative Judge Okays Huge Roth IRA Tax Shelter, Slams IRS Substance over Form Attack*, FORBES (Feb. 20, 2017, 7:41 AM), <https://perma.cc/2V4J-ZBFW>.

141. BITTKER & LOKKEN, *supra* note 30, ¶ 4.3.3 ("The substance-over-form doctrine is invoked by the government with greatest success with respect to transactions between related persons, since in these circumstances form often has minimal, if any, nontax consequences and particular forms are often chosen solely to reduce taxes.").

142. See Ed Slott, *\$7,000 in Roth IRA Contributions That Became \$6 Million in Tax-Free Gains*, FIN. PLAN. (Mar. 28, 2017, 11:17 AM EDT) (describing the Sixth Circuit's subsequent reversal as "a surprising outcome"), <https://perma.cc/C55C-BLCK>.

143. *Summa Holdings v. Comm'r*, 848 F.3d 779 (6th Cir. 2017); *Benenson v. Comm'r*, 887 F.3d 511 (1st Cir. 2018); *Benenson v. Comm'r*, 910 F.3d 690 (2d Cir. 2018).

144. *Summa Holdings*, 848 F.3d at 782.

145. *Id.* at 785.

146. *Id.* at 788-89; see also *id.* at 787 ("What started as a tool to prevent taxpayers from placing labels on transactions to avoid tax consequences they don't like runs the risk of becoming a tool that allows the Commissioner to place labels on transactions to avoid textual consequences he doesn't like.").

Circuit was animated by a concern for the integrity of statutory text.<sup>147</sup> Like the Court in *Gitlitz*, it felt that the text must be respected regardless of whether the result would be “dubious tax policy.”<sup>148</sup> But by limiting the substance-over-form doctrine merely to prohibit inapt labels, the Sixth Circuit significantly narrowed the scope of this doctrine.

One important thread in the Sixth Circuit’s opinion,<sup>149</sup> which became even more pronounced in subsequent First<sup>150</sup> and Second<sup>151</sup> Circuit opinions, was that the substance-over-form doctrine (at least as used by the IRS) is just a proxy for purposivism. The court interpreted the IRS’s use of the doctrine as “invoking a statutory purpose (maximizing revenue),”<sup>152</sup> which it rejected.<sup>153</sup> Subsequent commentary has acknowledged these rulings for what they are: a “textualist counterrevolution” against the perceived purposivism of anti-abuse doctrines.<sup>154</sup>

But there is nothing necessarily purposivist or textualist about the substance-over-form doctrine. Here is how it works as a substantive canon. All transactions whose form is selected solely to reduce taxes and not to reflect substance, and especially those undertaken between related parties without an attempt at arm’s-length dealing or fair market valuations, are presumptively invalid for tax purposes. However, that presumption can be rebutted by the statute, using whatever combination of text, legislative history, or other

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147. *See id.* at 788-89 (“The best way to effectuate Congress’s nuanced policy judgments is to apply each provision as its text requires—not to elevate purpose over text when taxpayers structure their transactions in unanticipated tax-reducing ways.”); *id.* at 789 (“[Statutory] purpose must be grounded in text. It cannot be invoked to save the statute from itself.”); *id.* at 790 (“That these laws allow taxpayers to sidestep the Roth IRA contribution limits may be an unintended consequence of Congress’s legislative actions, but it is a text-driven consequence no less.”).

148. *Id.* at 790.

149. *See id.* at 789 (rejecting the IRS’s attempts to “invok[e] a statutory purpose (maximizing revenue)”).

150. *See Benenson v. Comm’r*, 887 F.3d 511, 521 (1st Cir. 2018).

151. *See Benenson v. Comm’r*, 910 F.3d 690, 699 (2d Cir. 2018) (“In short, substance-over-form is a tool to prevent taxpayers from mislabeling transactions ‘to avoid tax consequences they don’t like’; it is not an authorization for the Commissioner to relabel transactions ‘to avoid textual consequences he doesn’t like.’” (quoting *Summa Holdings*, 848 F.3d at 787)).

152. *Summa Holdings*, 848 F.3d at 789.

153. The Sixth Circuit, from which the other circuits drew heavily, was especially critical of the broad substance-over-form rule that had descended from *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945). *See Summa Holdings*, 848 F.3d at 786-87; *see also Benenson*, 887 F.3d at 528-29 (Lynch, J., dissenting) (criticizing the Sixth Circuit for its rejection of *Court Holding*).

154. *See Mazzei v. Comm’r*, 150 T.C. 138, 197 (2018) (Holmes, J., dissenting), *argued*, No. 18-72451 (9th Cir. Feb. 14, 2020).

evidence that a judge prefers. Thus, even conventional Roth IRAs are presumptively invalid—but that presumption is rebutted by the text, the purpose, and the legislative history of the Code, so conventional Roth IRAs are ultimately safe. The same would go for the other tax incentives that Congress has deliberately created.

How would the substance-over-form canon play out for the Benensons? My own view is that neither the text of the Code nor the legislative history were particularly clear in this case—neither suggests any awareness of this issue. Therefore, the initial presumption of invalidity should stand and the Benensons’ structure should be rejected. Of course, statutory clarity is an elusive concept, and any of the circuit courts might have disagreed. But at least they would have done so in an analytically consistent manner, and in a manner that aligns more closely with prior case law and longstanding interpretive customs.

We may soon learn more. Shortly after the Sixth Circuit’s decision, the same trial court ruled in a very similar case, again using the substance-over-form doctrine to reject a taxpayer’s attempt to transfer large amounts of cash to a Roth IRA through a nested ownership structure.<sup>155</sup> This case, which in my view would also benefit from analysis of the doctrine as a substantive canon, has been appealed to the Ninth Circuit.<sup>156</sup>

#### D. Codified Canons: Section 7701(o)

What if judges reject the substantive canon framework and continue to challenge the anti-abuse doctrines? Congress could still rescue the doctrines by codifying them. This happens frequently,<sup>157</sup> the most important example being § 7701(o), which codified the economic substance doctrine in 2010.<sup>158</sup> Congress had been concerned that the new textualism was encouraging practitioners to argue that the doctrine was “illegitimate.”<sup>159</sup> The committee

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155. *Mazzei*, 150 T.C. at 168.

156. *Mazzei*, No. 18-72451 (9th Cir. argued Feb. 14, 2020).

157. Such codifications are relatively common, not necessarily as a response to textualism, but usually as an attempt to give the IRS more latitude in preventing abusive tax avoidance. See Madison, *supra* note 14, at 746-47 (listing examples in §§ 183, 269, and 707 of the Code, and in the regulations governing § 355(e) of the Code). See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (considering, with examples, how legislatures may validly codify canons of construction).

158. See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(a), 124 Stat. 1029, 1067-68 (codified at I.R.C. § 7701(o) (2018)).

159. See BITTKER ET AL., *supra* note 5, ¶ 1.04 (describing “the insistence of more than a few tax practitioners that the judge-made [economic substance] doctrine was illegitimate and had never actually been applied by the Supreme Court to deny a taxpayer any tax benefits”).

report describing § 7701(o) and the rationale behind its enactment emphasized the Court of Federal Claims’s opinion in *Coltec Industries, Inc. v. United States*, which stated (in dicta) that “the use of the ‘economic substance’ doctrine to trump ‘mere compliance with the Code’ would violate the separation of powers,”<sup>160</sup> a familiar textualist complaint.<sup>161</sup> The court’s decision also cited with approval a number of prominent textualist scholars and jurists, including Justice Scalia.<sup>162</sup> Although the ruling was subsequently overturned by the Federal Circuit,<sup>163</sup> Congress wished to reiterate the continuing validity of the economic substance doctrine, and at the same time wished to clarify details of its application.<sup>164</sup>

Tellingly, the codification by § 7701(o) was titled a “Clarification of economic substance doctrine,”<sup>165</sup> rather than styled as a promulgation of new law. To make matters even more clear, § 7701(o)(5)(C) stated that “[t]he determination of whether the economic substance doctrine is relevant to a transaction shall be made in the same manner as if this subsection had never been enacted.”<sup>166</sup> This provision sparked confusion among scholars,<sup>167</sup> but makes perfect sense if one thinks of the economic substance doctrine as a substantive canon. Congress intended to clarify certain aspects of the doctrine, but otherwise wished to leave its strength as a presumption intact. Indeed, the IRS’s Office of Chief Counsel (with a predictably purposivist take) has taken this phrase to mean that “[t]he economic substance doctrine does not apply

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160. 62 Fed. Cl. 716, 756 (2004), *vacated*, 454 F.3d 1340 (Fed. Cir. 2006).

161. *See* H.R. REP. NO. 111-443, vol. 1, at 293-95 (2010).

162. *Coltec Indus.*, 62 Fed. Cl. at 755 (citing SCALIA, *supra* note 13, at 3-37; and Coverdale, *supra* note 14, at 1507).

163. *Coltec Indus.*, 454 F.3d at 1343.

164. H.R. REP. NO. 111-443, vol. 1, at 293-95. These details included the resolution of an outstanding circuit split as to whether the test for economic substance would be conjunctive (and) or disjunctive (or). *See id.* at 297.

The act codifying the economic substance doctrine also added a special penalty for taxpayers engaging in transactions that are disallowed for lacking economic substance. *See* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1409(b), 124 Stat. 1029, 1068-69 (codified at I.R.C. § 6662(i) (2018)); H.R. REP. NO. 111-443, vol. 1, at 298-305. The codification was treated as a “revenue raiser” to partially offset the costs of the Affordable Care Act. *See* Andy Grewal, *Economic Substance De-Codification and the Supreme Court*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 6, 2017), <https://perma.cc/HJR3-MREU>.

165. I.R.C. § 7701(o).

166. *Id.* § 7701(o)(5)(C).

167. *See, e.g.*, Jellum, *supra* note 14, at 625-66 (“While the legislation as a whole creates a more uniformly applicable doctrine, this specific provision simply adds confusion.”); Erik M. Jensen, *Legislative and Regulatory Responses to Tax Avoidance: Explicating and Evaluating the Alternatives*, 57 ST. LOUIS U. L.J. 1, 32 (2012) (“That is a confusing proposition; pretend to ignore something that you really cannot ignore.”).

when a taxpayer's treatment of an item is consistent with the congressional intent underlying the relevant Code sections."<sup>168</sup>

Section 7701(o) not only places Congress's imprimatur on the economic substance doctrine, but it also provides even more pressure to develop an explanation for other anti-abuse doctrines that squares with a modern mode of reasoning that is typically at least somewhat textualist. Moreover, § 7701(o) (like other codifications of doctrines in more specific circumstances throughout the Code) strikes a blow against arguments that anti-abuse doctrines are inherently unacceptable under general principles of statutory interpretation.<sup>169</sup>

Finally, § 7701(o) is procedurally valuable because it serves as a model for the modification and clarification of substantive canons.<sup>170</sup> Congress does right by statutorily guiding the application of specific substantive tax canons to aid interpretation of the Code.<sup>171</sup> While I do not believe that codification is necessary for courts to continue enforcing the anti-abuse doctrines, codification would be a useful override if textualist skepticism regarding the doctrines continues.

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168. I.R.S. Chief Couns. Mem. 201640018, at 42 (Sept. 30, 2016).

169. However, a textualist might argue that the codification of this canon alone implies abnegation of the other canons, which have not been codified, as per the *expressio unius est exclusio alterius* canon. I thank Leandra Lederman for this point. If these arguments are made, pressure could increase to codify the other substantive canons, following the same process. I do not believe that codification is necessary, as the substantive tax canons are already good law.

170. Charlene Luke makes the same point, arguing that this provision should be interpreted so that "the statute does not apply to transactions that are clearly consistent with the form and purpose of claimed tax benefits." Luke, *supra* note 87, at 555. She bases her argument largely on the codification's legislative history, including the statement in the Joint Committee on Taxation's report that "[i]f the realization of the tax benefits of a transaction is consistent with the Congressional purpose or plan that the tax benefits were designed by Congress to effectuate, it is not intended that such tax benefits be disallowed." *Id.* at 565-81 (quoting STAFF OF J. COMM. ON TAXATION, 112TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 111TH CONGRESS, JCS-2-11, at 378 n.1034 (J. Comm. Print 2011)); *see also* I.R.S. Large Bus. & Int'l Dir. LB&I-04-0711-015 (July 15, 2011) (suggesting, in post-codification internal guidance for IRS employees, that if a "[t]ransaction that generates targeted tax incentives is, in form and substance, consistent with Congressional intent in providing the incentives," this "tend[s] to show that application of the economic substance doctrine . . . is likely not appropriate").

171. *Cf.* Scott, *supra* note 157 (reviewing canons, including substantive canons, that have been codified by state legislatures or Congress); Nancy C. Staudt et al., *Judicial Decisions as Legislation: Congressional Oversight of Supreme Court Tax Cases, 1954-2005*, 82 N.Y.U. L. REV. 1340 (2007) (reviewing legislative responses to Supreme Court tax decisions).

### III. The Case for Substantive Tax Canons

None of this is to say that substantive canons are without criticism—various scholars and judges have scrutinized substantive canons and, in certain cases, have found them wanting. This Part addresses these concerns by cabining the substantive tax canons to a relatively limited group of doctrines justified as background norms. It also describes the normative advantages and the potential limitations of substantive canons.

#### A. Substantive Canons Serve as Background Norms

While substantive canons have been justified on a variety of grounds,<sup>172</sup> this Article focuses on canons that reflect shared understandings between Congress and the courts. It argues that this restricted set of canons is justified and should be acceptable even to critics of the substantive canons in general.

One early criticism of the canons of construction was the accusation by Karl Llewellyn in 1950 that most every canon has a corresponding counter-canon that can be used to equal and opposite effect.<sup>173</sup> Llewellyn memorably illustrated his point by listing twenty-eight canons, including both language and substantive canons, along with twenty-eight “parries” stating opposite rules.<sup>174</sup> While some have challenged the validity of his list,<sup>175</sup> Llewellyn’s seminal article has informed a broader critique, arguing that judges and Justices can “cherry-pick” among a wide range of supposed canons in order to effect favored results.<sup>176</sup> Despite the widespread belief that textualists are more likely

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172. See Gluck & Bressman, *supra* note 16, at 912-16 (summarizing disparate justifications for canons of construction); Gluck & Posner, *supra* note 59, at 1329 (same).

173. See 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, 401-06 (1950). For a modern reappraisal, see Krishnakumar, *supra* note 79, at 912 (“This Article takes Llewellyn’s famous juxtaposition of canons and counter-canons as its inspiration and examines the extent to which the modern Supreme Court actually duels over the most common statutory interpretation canons and tools in opposing opinions in the same case.”).

174. Llewellyn, *supra* note 173, at 401-06.

175. See, e.g., SCALIA, *supra* note 13, at 26 (“[I]f one examines the list, it becomes apparent that there really are not two opposite canons on ‘almost every point’—unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law-bending judge.”); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 650-51 (1992) (“[I]n a wide array of situations, common sense or practical wisdom will inform judges’ decisions about which canon to employ in a given context. For example, one may tell a person standing on the edge of a deep gorge ‘he who hesitates is lost.’ One also might say ‘look before you leap.’ But, of course, common sense dictates that the latter maxim is more appropriate than the former in this context.”).

176. See William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 534 (2013) (reviewing SCALIA & GARNER, *supra* note 22); see also Eskridge & Frickey, *supra* note 72, at 595-96; Mendelson, *supra* note 79, at 76-77; William N. *footnote continued on next page*

to employ substantive canons,<sup>177</sup> textualists such as Justice Scalia<sup>178</sup> have worried that vague substantive canons may be easily manipulated by courts or otherwise facilitate judicial power grabs.<sup>179</sup>

A separate criticism is that the canons do not reflect actual congressional norms, and that therefore many or most of our canons should be removed or replaced.<sup>180</sup> This line of argument does not reject the general concept of canons of construction, as it either endorses their underlying logic or at least concedes that canons are broadly used by courts in practice and therefore unlikely to change.<sup>181</sup> It does, however, call for a culling of the canons and in some cases proposes alternative canons that the courts ought to take up.<sup>182</sup>

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Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1542-43 (1998) [hereinafter Eskridge, *Textualism*] (reviewing SCALIA, *supra* note 13) (warning that substantive canons are “potentially undemocratic,” “potentially lawless,” and “potentially destabilizing” if applied by judges contrary to the will of Congress).

177. See *supra* note 78 and accompanying text.

178. “To the honest textualist, all of these preferential rules and presumptions are a lot of trouble.” SCALIA, *supra* note 13, at 28. They “increase the unpredictability, if not the arbitrariness, of judicial decisions.” *Id.*

179. See Krishnakumar, *supra* note 16, at 827 (“The conventional wisdom is that substantive canons operate as an interpretive trump card, allowing judges to reject statutory readings dictated by other tools of construction in favor of readings based on external policy considerations.”); see also *id.* at 827-28 (summarizing the complaint that substantive canons are “counter-majoritarian, subject to judicial invention and reinvention, and difficult for Congress to overcome” (citing Eskridge, *supra* note 13, at 683-84; Eskridge & Frickey, *supra* note 72, at 636-40; Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2119 (2015); and Eskridge, *Textualism*, *supra* note 176, at 1542-43)). Note, however, that the complaint of countermajoritarianism is sharpest in the context of substantive canons that are constitutionally required, see Katyal & Schmidt, *supra*, at 2118-22 (discussing the constitutional canon of avoidance). This Article does not deal with constitutional canons, and I am not aware of any substantive tax canons that are properly justified on constitutional grounds.

Gluck has argued that there is a large number of generally recognized canons, and emphasized the difficulty in distinguishing between them, which generally decreases the formalism with which such canons are applied. Gluck, *supra* note 58, at 2061-64; see also Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 547-49 (1992).

180. See Gluck, *supra* note 22, at 185 (“The fact is that congressional drafters do not see the federal courts’ interpretive practice as sufficiently predictable or objective to coordinate with.”); Gluck & Bressman, *supra* note 16, at 940-49; Gluck & Posner, *supra* note 59, at 1327-34; Shu-Yi Oei & Leigh Z. Osofsky, *Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels*, 104 IOWA L. REV. 1291, 1334-36 (2019).

181. See Gluck, *supra* note 22, at 183-87.

182. See *id.* at 182 (proposing a “CBO Canon,” that “ambiguous statutes should be interpreted in accordance with the reading of the statute adopted by the Congressional Budget Office”); Wallace, *supra* note 84, at 183 (proposing a “JCT Canon” that “regulation-  
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I do not attempt to justify the long list of non-tax canons that has traditionally been drawn from rulings of methodologically and ideologically diverse courts.<sup>183</sup> Nor do I mount a general defense of the canons, many of which I agree are empirically questionable or otherwise so vague as to be prone to cherry-picking. As the analysis in the Appendix demonstrates in greater detail, many of the tax doctrines that might be considered candidates for application as substantive canons do not survive close scrutiny. But some do.

The substantive tax canons promoted by this Article generally do not have recognized counter-canons of the sort that Llewellyn described.<sup>184</sup> While the rule against double tax benefits can be rebutted, there is no corresponding principle arguing that the taxpayer ought to receive double tax benefits as a general matter. The substantive tax canons are merely rebuttable presumptions and not unqualified universal law, but they are sufficiently narrowly prescribed that they raise little problem of counter-canons.

Moreover, the substantive tax canons can be narrowly justified on the ground that they reflect shared understandings and therefore serve as background norms undergirding statutes. That is, the substantive tax canons reflect common understandings implicit in legislation even when not expressed in the text of the statute, the legislative history, or the statute's apparent purpose.<sup>185</sup> Even critics of the canons have conceded that this limited subset of the canons is justifiable, sometimes arguing that the canons should be pared back to include only this subset.<sup>186</sup> The Supreme Court itself has held background norms or general legislative awareness to be valid bases for substantive canons in a number of cases, including some decided under the new textualist regime.<sup>187</sup> This justification for the application of substantive canons

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writers and courts . . . should follow the construction adopted by the [Joint Committee on Taxation] for its revenue estimates and in its explanations of statutory provisions”).

183. The most commonly cited such list is the encyclopedic compilation in ESKRIDGE ET AL., *supra* note 23, app. B.

184. An arguable exception is the rule against implied tax exemptions. Historically, an opposite rule favoring taxpayers had existed, but the latter rule has been regarded as obsolete for at least seventy years. *See infra* Appendix A.5.

185. Substantive canons are therefore distinct from purposivism—they often work *against* the statute's apparent purpose, in order to prevent the statute from going too far.

186. Justice Scalia and Brian Garner, known for their criticisms of wide-ranging substantive canons, have said that there are canons “so deeply ingrained, [they] must be known to both drafter and reader alike so that they can be considered inseparable from the meaning of the text.” SCALIA & GARNER, *supra* note 22, at 31; *see also* SCALIA, *supra* note 13, at 29 (indicating that the rule of lenity “is validated by sheer antiquity,” and noting that derogation of another substantive canon “is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied”).

187. *See, e.g.,* *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014); *Bond v. United States*, 134 S. Ct. 2077, 2088-92 (2014); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (“Congress is well aware that the ambiguities it chooses to produce in a statute

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has been echoed by a variety of commentators with diverse methodological views, including Justice Scalia, Bryan Garner, Abbe Gluck, John Manning, and Cass Sunstein.<sup>188</sup>

While this Article makes a theoretical case that textualism is compatible with substantive tax canons, some textualists may ultimately disagree. Discussing the views of textualists as a group risks overgeneralization, and there are certainly examples of textualists who disagree with specific tax canons. Justice Scalia, for example, disapproves of the rule against implied tax exemptions discussed in Appendix A.5.<sup>189</sup> And in practice, many textualists are more sympathetic to certain canons—those dealing with federalism, for example<sup>190</sup>—than others.

But what textualists oppose most of all is free-ranging reconstruction of the law to match perceived congressional intent. This is what the anti-abuse doctrines have come to represent, at least for some courts.<sup>191</sup> And this is the view that this Article reconsiders. As substantive canons, the doctrines are equally useful to textualists and purposivists, who may overlay their own interpretive methodology in the rebuttal step. The decision as to which doctrines are valid canons ought to be separate from general questions of methodology.

Canons that serve as background norms are simply tools of faithful agency, which facilitate an interpretation of text as such text is conventionally

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will be resolved by the implementing agency.” (citation omitted)); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 n.22 (1983) (“Members of Congress . . . appear to have been generally aware that the statute would be construed by common-law courts in accordance with traditional canons.”). Numerous concurrences and dissents have commented on the subject as well. *See, e.g., Abramski*, 134 S. Ct. at 2281-82 (Scalia, J., dissenting); *Bond*, 134 S. Ct. at 2094-97 (Scalia, J., concurring in the judgment); *United States v. Hayes*, 555 U.S. 415, 434-35 (2009) (Roberts, C.J., dissenting); *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (“[L]egislative express-reference or express-statement requirements may function as background canons of construction of which Congress is presumptively aware.”); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 712 (1995) (O’Connor, J., concurring) (arguing, in the context of a strict liability statute, that statutory terms should be construed in accordance with their common law meanings absent evidence of contrary congressional intent); *id.* at 720-21 (Scalia, J., dissenting).

188. *See* Gluck, *supra* note 22, at 180-81 (“Judges, including and especially textualist-formalists, . . . often claim[] that the canons are background assumptions against which Congress drafts, and justify[] them on that basis over other interpretive tools, such as purpose and legislative history.”); *supra* notes 22, 186.

189. *See infra* note 297.

190. Abbe R. Gluck, *Essay, Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 *YALE L.J.* 534, 553 & n.44 (2011).

191. *See supra* Parts I.B, II.C.2-3.

understood. Their use is pervasive in a variety of contexts concerning textual interpretation but not directly involving statutes, from constitutional law to contract law.<sup>192</sup> For example, contracts carry implied warranties of merchantability and implied terms of concurrent exchange (“so that payment can only be demanded on tender of the goods and delivery can be demanded only on tender of the cash”<sup>193</sup>). Implied contractual terms are not reflected in the text of the contract. Instead, they are read into the contract as background norms that facilitate efficient contract drafting, rather than requiring parties explicitly to recapitulate every standard contractual understanding every time they enter into an agreement. Like the substantive tax canons, they can be rebutted if the parties explicitly contract out of the standard provisions.<sup>194</sup>

Likewise, jurists have read a broad police power into the Constitution, although the phrase is never used in the Constitution itself.<sup>195</sup> Rather, the police power has been inferred by jurists in order to render the Constitution practicable and achieve sensible results,<sup>196</sup> in the same way that the substantive tax canons have been inferred by judges in order to render the Code practicable and achieve sensible results. As Richard Epstein has argued with respect to contracts, the Constitution, and statutes in general, “legal language, like ordinary language, is *incomplete by design*. It is too costly and cumbersome to spell out all of the background conditions for every routine transaction.”<sup>197</sup>

Because their status as background norms is testable, the substantive tax canons proposed by this Article themselves are testable and invite the kind of

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192. See Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295, 309 (2017) (“In looking at the basic text, it is necessary to supplement textual precision with the correct set of background norms to understand the full picture.”).

193. *Id.* at 298 (citing Edwin W. Patterson, *Constructive Conditions in Contracts*, 42 COLUM. L. REV. 903, 933 (1942)).

194. See Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1525 (2016) (“Because parties are free to make their own deals, the rest of contract law plays a residual role; that is, the *law* is the rules and standards that specify by default parts of contracts when parties leave them blank.”). For example, parties may contract out of the implied warranty of merchantability. U.C.C. § 2-316 (AM. LAW INST. & UNIF. LAW COMM’N 1951).

195. See Epstein, *supra* note 192, at 310-19.

196. See *id.* at 310.

197. *Id.* at 298; see also *id.* at 309 (“In looking at the basic text, it is necessary to supplement textual precision with the correct set of background norms to understand the full picture.”); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1970-78, 1980-82 (2011) (analogizing methods of statutory interpretation to rules of contract and constitutional interpretation). Epstein’s approach to determining background norms has overtones of purposivism or structural purposivism, rather than the focus on found background norms emphasized by this Article (although I believe the two are compatible). See Epstein, *supra* note 192, at 310-11.

surveys previously conducted by other scholars to see which interpretive methodologies and canons were accepted among legislative drafters.<sup>198</sup> Future research could provide more evidence on whether the substantive tax canons I endorse have been widely accepted. Any of the substantive tax canons discussed in this Article that are *not* widely known to or understood by drafters must be either discarded or defended on alternative grounds.

I do not wish to overstate the extent to which canons of construction can actually be confirmed by polling congressional staffers. Many tax statutes were passed decades ago—some tax statutes currently in effect originate as far back as the Internal Revenue Code of 1954<sup>199</sup>—and it would be difficult to poll drafters and congresspeople of that time to see whether they agree with the substantive tax canons proposed by this Article. Indeed, a major contribution of textualism has been to underscore the epistemic difficulty of ascertaining shared congressional intent, or even the existence of shared intent. Mere surveys of legislators and judges, while they may constitute useful evidence in favor of or against a particular statutory principle, are not dispositive (nor advertised as such by the scholars presenting such surveys). Surveys may in fact do a better job of debunking potential canons than of verifying canons—for this reason, this Article tends to emphasize that the substantive tax canons are falsifiable, rather than cleanly verifiable.

Nevertheless, the argument against unitary congressional norms can be taken too far. Common understandings are pervasive in modern life and in fact make cogent discourse possible. Words have common meanings, and most documents, like contracts and the Constitution, are rife with background norms that inform interpretive conclusions. Although we should always be conscious of the limitations of survey work, analysis of these norms is hardly impossible. Surveys should be supplemented with historical work, sociological study, and analysis of case law, but they are still worth conducting. Ultimately, the invention of new substantive canons is not the goal of this Article. Rather, this Article “finds” existing canons that reflect the logic of past holdings in tax cases as well as concepts widely articulated in tax scholarship.

Importantly, the anti-abuse doctrines discussed above are some of the most universally accepted concepts in federal tax law.<sup>200</sup> It would be virtual

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198. See generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons* (pts. 1 & 2), 65 STAN. L. REV. 901 (2013), 66 STAN. L. REV. 725 (2014) (discussing results from a survey of congressional staffers on legislative drafting practices); Oei & Osofsky, *supra* note 180 (discussing results from a survey of tax legislative staffers on drafting practices specific to tax law).

199. See *infra* note 206.

200. See, e.g., BITTKER & LOKKEN, *supra* note 30, ¶ 4.3 (discussing the substance-over-form doctrine, the economic substance doctrine, and the step transaction doctrine as “pervasive judicial doctrines”); see also *infra* notes 204-06 and accompanying text.

malpractice for any tax lawyer not to be familiar with the substance-over-form doctrine, the economic substance doctrine, or the step transaction doctrine, and it would be a grave oversight for any judge not to consider them where applicable. These doctrines are familiar to tax practitioners, tax scholars, employees at the Treasury and IRS, and, indeed, many lawyers who have never specialized in tax, since these canons are frequently taught in introductory law school courses on federal taxation.<sup>201</sup> Moreover, because tax experts are involved in the process of preparing tax legislation from its initial conception throughout the drafting process,<sup>202</sup> we can be confident that certain substantive tax canons do serve as background norms known to drafters of statutes at relevant points in their deliberations.

Thus, the most important claims made by this Article are highly unlikely to be defeated on empirical grounds. As Bittker and Lokken note in their canonical<sup>203</sup> treatise, the anti-abuse doctrines “are so pervasive that they resemble a preamble to the Code, describing the framework within which all statutory provisions are to function.”<sup>204</sup> And they are venerable as well as popular—all of the substantive tax canons endorsed in this Article were established prior to the Internal Revenue Code of 1954,<sup>205</sup> which is the source of the earliest tax statutes still in force today.<sup>206</sup>

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201. See, e.g., MARVIN A. CHIRELSTEIN, *FEDERAL INCOME TAXATION: A LAW STUDENT’S GUIDE TO THE LEADING CASES AND CONCEPTS* 439-47 (11th ed. 2009); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, *FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES* 813-14 (6th ed. 2009).

202. See McCormack, *supra* note 5, at 727-28 (“[M]embers of Congress do not write the actual language of the tax statutes and might not even read the statutes before approving them. . . . Instead, the congressional staff and writers craft the precise language pursuant to general directions from committee members.” (footnotes omitted)); Oei & Osofsky, *supra* note 180, at 1295-96 (“[D]rafters at the House and Senate Office of Legislative Counsel took primary responsibility and control over turning policies into statutory language, and . . . other participants in the process almost completely deferred to Legislative Counsel on formulation issues . . .”); Wallace, *supra* note 84, at 181-83, 210.

203. No pun intended.

204. BITTKER & LOKKEN, *supra* note 30, ¶ 4.3.1.

205. See *infra* notes 261, 267, 274, 278, 293, 300, 306-07.

206. The current codification of the Code derives from the Tax Reform Act of 1986. See STEPHEN F. GERTZMAN, *FEDERAL TAX ACCOUNTING* ¶ 3.01[2] n.6 (West 2019) (“Unless otherwise indicated, all references to ‘IRC’ or to ‘Code’ are to the Internal Revenue Code of 1986, as amended.”). But because the Tax Reform Act of 1986 incorporated large chunks of the Internal Revenue Code of 1954, one could conservatively argue that we ought to look back to 1954 to establish the bona fides of the substantive tax canons. The Internal Revenue Code of 1954 was a wholesale reworking of the Code, with conscious re-enactment or rejection of each provision, influenced in significant part by the American Law Institute’s model tax code. See Lawrence Zelenak, *The Almost-Restatement of Income Tax of 1954: When Tax Giants Roamed the Earth*, 79 BROOK. footnote continued on next page

A few clarifications before proceeding further. First, I do not claim that any drafter actually writes tax statutes with substantive tax canons specifically in mind—the anti-abuse doctrines do not prevent any tax avoidance scheme because Congress foresaw that scheme, but rather because Congress did not. Instead, I argue that these canons form a pattern of settled norms of which drafters are presumptively aware.

Second, although this Article focuses on substantive canons whose legitimacy comes from their status as widely accepted background norms, there are other theories that would endorse a wider swath of canons. Some of these abandon altogether the idea of judges as faithful agents of the legislature. As recent empirical work has cast doubt on the degree of congressional consensus, even regarding key doctrines like the rule of lenity,<sup>207</sup> alternative theories of interpretation have become increasingly attractive.<sup>208</sup>

William Baude and Stephen Sachs, for example, argue that substantive canons may be valid regardless of whether Congress was aware of them;<sup>209</sup> they and other scholars have endorsed various criteria to determine whether such canons are law, such as H.L.A. Hart’s famous “rule of recognition.”<sup>210</sup> This Article concerns the least controversial set of substantive canons, the one that has garnered the most support among scholars and jurists,<sup>211</sup> and the one that avoids ongoing debates on the nature of statutory interpretation that exceed the scope of this Article.<sup>212</sup> But, importantly, the arguments in this Article should apply even more strongly under a positivist view that justifies substantive canons by their widespread acceptance among judges, rather than Congress: Consensus among judges is if anything easier to evaluate than

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L. REV. 709, 717-23 (2014). Thus, 1954 represents a secure testing point by which time the most important anti-abuse doctrines were widely accepted.

207. See Gluck & Bressman, *supra* note 16, at 946 (“Of the sixty-five respondents in our survey who had participated in drafting criminal legislation, only 35% were familiar with the rule of lenity by name.”).

208. I intend to discuss nonfaithful-agent theories of interpretation in tax law in a subsequent article.

209. See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1123 (2017) (“[L]egal canons operate if—indeed, especially if—the drafters are unaware of them.”). The set of canons advanced in this Article are likely a strict subset of those advanced by Baude and Sachs.

210. See H.L.A. HART, *THE CONCEPT OF LAW* 95-96 (2d ed. 1994). Baude and Sachs “assume . . . something like Hartian positivism” in their article, “partly for ease of exposition.” Baude & Sachs, *supra* note 209, at 1116. William Eskridge has also argued that interpretive presumptions can be defended as “public values,” that is, “background norms that contribute to and result from the moral development of our political community.” William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1007-08, 1045-49 (1989).

211. See *supra* notes 22, 186.

212. See Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1336-39 (2017).

consensus among legislative drafters, given the relative ease of polling current judges rather than long-ago drafters.

Jonathan Siegel's theory of "contextualism" also parallels my use of substantive canons. He argues that statutory interpretation is driven by "background principles of administrative law,"<sup>213</sup> specific to each area of law and justified as expressions of the "judicial power."<sup>214</sup> Siegel, like Baude and Sachs, believes that these background principles can sometimes legitimately override congressional will.<sup>215</sup> His theory ultimately depends on "judicial 'discernment'"<sup>216</sup> of background principles. I suspect this approach would endorse the same substantive tax canons as this Article, and perhaps a few more.

In arguing that the anti-abuse doctrines are valid substantive canons because they are widely followed, this Article makes a somewhat bloodless descriptive claim. In reality, though, textualist judges are not solely motivated by concerns of methodology—they often have normative commitments that may accompany or even supersede concerns of faithful agency. For example, textualists like Justice Scalia are sometimes thought to hold libertarian pro-taxpayer views, which could cut against the generally anti-taxpayer anti-abuse doctrines.<sup>217</sup> Or, textualists might often be motivated by a normative preference for rules over standards,<sup>218</sup> which might lead them to prefer literal interpretations of tax statutes over fuzzier anti-abuse doctrines. The following Subpart makes a normative case for why the anti-abuse doctrines should be applied as substantive canons, but this may not be convincing to all readers. The argument that substantive canons serve as background norms is essentially an appeal to textualism rather than an appeal to all textualists. It is a descriptive argument, and one that might be outweighed in the end by other normative concerns.

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213. Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1024 (1998) (emphasis omitted).

214. *Id.* at 1094-1103. Siegel also argues that the judiciary is the "most institutionally competent actor" to infer background principles and that their use is consequently normatively desirable. *Id.* at 1103.

215. In fact, Siegel goes a step further by arguing that canons may even override statutory text. *Id.* at 1036-37, 1050 (describing how background principles "may even overcome the strong implications of statutory text directed to [a] precise issue," and how his theory of contextualism sometimes "gives more weight to maintaining a sound structure of administrative law than to implementing the congressional will").

216. *Id.* at 1060-62.

217. *See infra* note 297.

218. *See* Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 417 (2005) ("As a normative matter, moreover, textualists are more likely than intentionalists to resolve uncertainties in favor of 'ruleness' . . .").

A final caveat: Some scholars may criticize substantive canons for providing greater latitude to judges, who can selectively apply them even when no counter-canon exists. For example, form may trump substance by default when the substance-over-form doctrine is not invoked, meaning that there may be something of a shadow counter-canon that judges implicitly apply.<sup>219</sup>

This subtler criticism does not pick up the core of Llewellyn's complaint, which was that canons of construction are useless because they provide little guidance to judges forced to pick between contradictory values. Here, the substance-over-form doctrine presses a thumb on the scale against taxpayer abuse and provides clear directional guidance to judges. The critique of selective application instead objects to the enlargement of interpretive power by judges and the IRS, who will now have an additional degree of freedom in their decisions. I agree that this is a likely result, and I argue in the following Subpart that this is in fact normatively desirable. Again, critics who are opposed to any enlargements of judicial or administrative power will find this exposition unsatisfying, and ultimately they and I may disagree.

#### B. Substantive Canons Make Statutes More Flexible and Intuitive

By serving as background norms, substantive canons make statutory drafting more efficient and help courts better serve as faithful agents of the legislature. But there is an additional structural benefit of recasting anti-abuse doctrines as substantive canons, namely that doing so permits legislators to draft the Code at a higher and more intuitive level. Absent the substantive canon framework, Congress might be obliged to specifically hard-code any exceptions to the doctrines. For instance, Marvin Chirelstein and Lawrence Zelenak have proposed that Congress explicitly carve out incentive programs that should not be subject to the economic substance doctrine, specifically calling out § 170(e) (charitable contribution deductions), § 219(a) (retirement account contributions), and others.<sup>220</sup> And as described above, Congress was also forced to amend the Code to specifically prevent S corporation shareholders from obtaining a double tax benefit after the *Gitlitz* decision.<sup>221</sup>

There is a large literature on the tradeoff between statutory specificity and generality—specificity when Congress attempts to address loopholes and errors in the Code itself, generality when Congress leaves statutory interstices

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219. See, e.g., *United States v. Davis*, 397 U.S. 301, 312-13 (1970) (“[T]he difference between form and substance in the tax law is largely problematical . . .”).

220. See Marvin A. Chirelstein & Lawrence A. Zelenak, Essay, *Tax Shelters and the Search for a Silver Bullet*, 105 COLUM. L. REV. 1939, 1955-56, 1956 n.55 (2005); see also Galle, *supra* note 14, at 385-87 (citing this proposal with approval).

221. See *supra* Part II.C.2.

to be addressed by the IRS and the courts.<sup>222</sup> The main advantage of specificity is that it provides taxpayers with certainty in planning their affairs. This can be beneficial if taxpayer planning itself is benign. For example, it would benefit no one if taxpayers had to guess at what activities qualified for the research tax credit; the Code accordingly lays out the relevant criteria in considerable detail.<sup>223</sup> On the flipside, generality is ideal in contexts where taxpayer planning itself is malign, since additional certainty would only provide a roadmap for taxpayer exploitation.

The anti-abuse doctrines are a paradigmatic case where generality is better, since they have always been intended as a weapon to fight taxpayer abuse.<sup>224</sup> It would be ironic and counterproductive to insert rigid statutory exceptions to doctrines whose primary function is to mitigate unforeseen statutory quirks. The flexible nature of the anti-abuse doctrines lends itself to generality in statutory drafting, and this generality is facilitated by the substantive canon framework, which avoids cumbersome statutory detail.<sup>225</sup>

Similarly, the substantive canon framework permits the anti-abuse doctrines to be applied in a more intuitive manner, increasing predictability and decreasing planning costs for taxpayers. Intuitive rules are naturally more likely to gain widespread acceptance as background norms—the genesis of many substantive tax canons was some court’s attempt to avoid an unintuitive result. And once a particular precedent has been created, its uptake is greatly facilitated by intuitive appeal. The rule against double tax benefits is a good

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222. See generally Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 661-65 (2003) (presenting a tradeoff between “mass complexity,” when technical details provide certainty to all taxpayers (placing a burden on many taxpayers, who must deal with longer and more technical regulations), and “specific complexity,” when statutes are written at a high level, leaving taxpayers to seek specific guidance as needed (placing a burden on those taxpayers who must seek such guidance)); Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9 (1982) (describing “hyperlexis” as lawyers’ tendency toward excessive complexity, and its presence in the tax code as deriving from taxpayers’ and tax practitioners’ desire for specific guidance). For further discussion of Manning’s theory of hyperlexis, see Gordon D. Henderson, *Controlling Hyperlexis—The Most Important “Law and . . .”*, 43 TAX LAW. 177 (1989); and Richard M. Lipton, *We Have Met the Enemy and He Is Us: More Thoughts on Hyperlexis*, 47 TAX LAW. 1 (1993).

223. See I.R.C. § 41 (2018).

224. See Assaf Likhovski, *The Duke and the Lady: Helvering v. Gregory and the History of Tax Avoidance Adjudication*, 25 CARDOZO L. REV. 953, 967 (2004) (“[A]nti-avoidance doctrines are meant to prevent abuse of the tax code.”).

225. See David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 867 (1999) (arguing in favor of anti-abuse doctrines, particularly those in statutes and regulations, that act as standards, since “rules are systematically more complex than standards because rules can less afford to overlook uncommon transactions than can standards”).

example of an intuitive rule, such that many different courts have independently applied it without citing each other.<sup>226</sup>

Moving the tax law in an intuitive direction is beneficial for three main reasons. First, it decreases taxpayer planning costs in both time and money, since a major reason that taxpayers pore over tax forms and hire lawyers is to avoid counterintuitive traps for the unwary. Second, it makes the law more equitable, since compliance burdens fall disproportionately on the poorest taxpayers, who are the ones least able to spend the time and money required to understand complex rules.<sup>227</sup> Third, as a matter of justice, decreasing the space between the “intuitive tax code” and the actual tax code avoids making inadvertent criminals of well-intended but unsophisticated taxpayers.<sup>228</sup> A more intuitive tax law will therefore be simpler, less costly, and more equitable.

### C. Substantive Canons Complement Purposivism

Although the substantive tax canons are intended to appeal to all interpreters regardless of methodology, one might ask whether the substantive tax canons are as useful for purposivists as for textualists. Could a purposivist simply replace the substantive tax canons with a general purposivist inquiry, as some have suggested?<sup>229</sup> Or could the IRS, which (as noted above) interacts with many more taxpayers than ever reach the courts, simply conduct its business in a purposivist fashion with the backing of *Chevron* deference?<sup>230</sup>

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226. Appendix A.4 discusses in depth a line of cases denying double tax benefits in reliance on *Charles Iffeld Co. v. Hernandez*, 292 U.S. 62 (1934). However, many other cases deny double tax benefits without citing *Ilfeld*. See, e.g., *U.S. Tr. Co. v. IRS*, 803 F.2d 1363, 1369 (5th Cir. 1986) (rejecting “a literal interpretation” of a Code section that “would allow an estate a double tax benefit in many situations”); *Payne v. United States*, 489 F.2d 1404, 1404, 1407 (Ct. Cl. 1974) (denying a “double tax benefit” as a “windfall not contemplated by Congress”).

227. See Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 19 (1992) (“Complexity’s costs, moreover, impose disproportionate burdens on the poor by raising prices and necessitating the services of lawyers and other professionals trained in the management of complexity.”).

228. In certain contexts, such as partnership taxation, even law firms sometimes appear to advise their clients based on intuition rather than legal analysis. See Lawrence Lokken, *Taxation of Private Business Firms: Imagining a Future Without Subchapter K*, 4 FLA. TAX REV. 249, 252 (1999); George K. Yin, *The Future Taxation of Private Business Firms*, 4 FLA. TAX REV. 141, 201 (1999).

229. See, e.g., Lederman, *supra* note 5, at 444 (“Courts should not hesitate to apply a systematic approach to purposive interpretation to all cases involving claimed abuse of the tax laws.”); McCormack, *supra* note 5, at 720-44.

230. See generally *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44 (2011) (applying *Chevron* deference to tax cases).

I believe that the IRS has benefited from its largely purposivist posture, but this approach is not mutually exclusive with the application of substantive tax canons. In fact, the substantive canon framework complements purposivism by providing the IRS and courts with additional context in the most common fact patterns. This comports with conventional scholarship on the choice between rules and standards, which contends that more determinate rules are better suited to legal situations that are more likely to occur.<sup>231</sup>

The purposivist approaches sketched above assume that general purposivism could accomplish the same goals as the substantive tax canons, which is not quite true. The substantive tax canons dictate different results from purposivism. They are *narrower* in certain respects: They do not cover every situation where congressional intent may conflict with the plain text of a statute. But they are also *broader* in certain respects: The theory of substantive canons implies that statutory meaning can be inferred even where legislative history provides no evidence that Congress would have preferred a particular result.<sup>232</sup> Thus, legislative history stands to be underinclusive in certain circumstances, and can be usefully supplemented by background norms as reflected in the substantive tax canons. Indeed, the substantive tax canons are most likely to apply *because* Congress will not bother to debate, or to reflect in its committee reports, conclusions merely reflecting widely held assumptions regarding the application of the tax law, which is what the substantive tax canons fundamentally are.

Moreover, the substantive canon framework provides several normative benefits over and above those provided by purposivism. First, the anti-abuse doctrines provide uniformity and predictability in statutory interpretation. Although a universal purposivist standard may seem infinitely flexible, it would be difficult to implement in practice across the IRS and the myriad courts empowered to adjudicate tax cases, which present considerable variation in interpretive styles and procedural approaches at trial and pre-trial.<sup>233</sup> Given methodological variation between even these authorities, it is hard to imagine their successfully implementing a general purposivist rule.

Second, enumeration of the substantive tax canons provides purchase for Congress to engage with, and in some cases to amend, the content of the canons. Congress did exactly this by codifying the economic substance doctrine, as discussed in Part II.D above, and it could be useful to extend this

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231. See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 577 (1992).

232. Cf. Dean & Solan, *supra* note 86, at 889 (“While courts rely upon legislative intent in making their decisions, they do not rely upon unexpressed legislative intent.”).

233. See generally Choi, *supra* note 65 (contrasting purposivism at the IRS with textualism at the Tax Court).

treatment to other substantive tax canons as well. So the framework of substantive canons provides a settled ground on which to debate their legitimacy or amend them as required.

Third, any shift away from the anti-abuse doctrines and toward broad judicial discretion is likely to cause considerable short-term confusion and ultimately may cause courts to fall back on the substantive tax canons regardless. Each of the substantive tax canons was developed by judges aiming to interpret statutes in a purposivist mode while still providing workable road markers for their successors and for taxpayers. These judges managed to create enduring rules that have been passed down to us today. Given that the substantive canon framework addresses the inconsistency in anti-abuse doctrines as well as their tension with textualism—the very problems that inspired scholars to propose a general purposivism in the first place—the substantive canon framework is the more parsimonious and measured approach.

Fourth, the most pragmatic and perhaps most decisive consideration is that a sharp shift to purposivism is unlikely to happen, and almost certain not to happen solely for tax purposes. Advocates of pure purposivism must contend with our relatively textualist courts.<sup>234</sup> Consequently, even those who believe that general purposivism would be preferable may still accept the substantive canon framework as a second-best solution.

There is an even more specific concern, though, that a certain kind of purposivist might raise. Some scholars, most prominently Deborah Geier and Lawrence Zelenak, have advanced a methodology of statutory interpretation specific to federal tax law that might be called “structural purposivism”—they argue that the structure of the Code itself should be read to imply certain principles that overcome statutory text.<sup>235</sup> Is the theory of substantive tax canons truly distinct from this school of thought as well?

Yes, and for similar reasons as for purposivism more generally. The substantive canon framework is more determinate, more familiar, more

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234. See Bruhl, *supra* note 59, at 6-7 (“[A]lthough the lower courts and the Supreme Court all shifted toward textualist tools starting in the late-1980s, the change was dampened and less transformative at each step further down the judicial hierarchy.”); Choi, *supra* note 65 (describing how the Tax Court has followed the general judicial trend toward textualism).

235. Deborah A. Geier, Commentary, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492, 497 (1995) (“Code provisions ought to be construed so as not to damage [their] fundamental structure, even if doing so requires that a statutory term be construed in a nonliteral (nontextual) fashion.”); Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 661 (1986) (“The pattern of the statute in which the language to be interpreted appears may indicate a statutory structure and an underlying legislative policy at odds with a literal interpretation of the language.”).

parsimonious, and generally complementary to an overarching stance of structural purposivism. The two frameworks are far from identical: The justification for the substantive tax canons is distinct from a justification based on structural principles that can be divined from a close and extensive familiarity with the Code. The substantive tax canons are instead, as discussed above, widely accepted background norms, meaning that there will be some perceived structural principles that do not pass muster as canons (for example, the “whole code rule” discussed in Appendix A.8) and some canons that do not reflect structural principles (most anti-abuse doctrines were developed for policy reasons rather than deduced from the structure of the Code).

Moreover, the substantive tax canons are conceptually useful because they are falsifiable<sup>236</sup>—unlike general structural principles, they can be refuted through historical investigation or surveys. Critics have alleged that an intelligent interpreter of the Code could likely justify almost any principle as ultimately “structural,” rendering structural purposivism arbitrary, unpredictable, and not useful as a mechanism for judges to distinguish between different potential outcomes.<sup>237</sup> Against this criticism, the falsifiability and determinacy of the substantive tax canons is a particular advantage.<sup>238</sup>

#### D. The Evolution of Substantive Tax Canons

Part I.A discusses one aspect of the evolution of the substantive tax canons, from corollaries of ordinary statutory interpretation to free-floating rules.<sup>239</sup>

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236. Cf. KARL R. POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE 37 (4th ed. 1972) (“[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability.” (emphasis omitted)).

237. See, e.g., Livingston, *supra* note 68, at 678-79 (“Supporters of [structural] purposive interpretation tend to exaggerate the logic and consistency of the Code, and to overstate the authority of tax scholars as interpreters of basic tax principles.”); Edward A. Zelinsky, Commentary, *Text, Purpose, Capacity and Albertson’s: A Response to Professor Geier*, 2 FLA. TAX REV. 717, 718-25 (1996) (responding to Geier, *supra* note 235) (offering a variety of examples where structural principles in the Code are debatable).

238. In addition, as with purposivism, structural purposivism may not be compatible with the textualism subsequently embraced by the Supreme Court. See Geier, *supra* note 235, at 516 (“Because I believe that Justice Scalia sometimes gets ordinary-meaning argumentation wrong, I rejected the language of his literal textualism and embraced the language of purposivism.” (footnote omitted)). Zelenak’s critique of “literal interpretation” might also be considered an early rejection of the new textualism. See Zelenak, *supra* note 235, at 675 (“There should be no absolute rule, however, prohibiting interpretations incompatible with literal statutory language. Sufficiently strong evidence can justify a contextual interpretation, even when that interpretation is irreconcilable with the statutory language.”).

239. Cf. Grewal, *supra* note 14, at 970 (criticizing the “free-floating economic substance doctrine”).

But this raises another question: Can these canons evolve, and to what extent can their evolution be directed by Congress, the courts, or both?

The question is partly driven by the apparent disconnect between the courts that first developed the anti-abuse doctrines and this Article's emphasis on background norms. A substantive canon is only a background norm if it is widely known. There was a time when each of the doctrines was not known, and therefore one might argue that even substantive tax canons that are legitimate today were not legitimate as initially promulgated.

This argument takes too narrow a view of how norms evolve. Much as the meanings of words can change, norms will emerge or disappear to suit the content and context of any body of law.<sup>240</sup> Changes in the "average quality" of goods or the "ordinary purposes" for which they are used would change the implied warranty of merchantability.<sup>241</sup> Likewise, the anti-abuse doctrines would be less applicable and would be supplanted by other norms if the United States switched to a sales tax or value-added tax.<sup>242</sup>

During the infancy of the federal income tax, when statutes were relatively sparse and agency practice was relatively uncertain, courts stepped in and established substantive canons that have since become entrenched both in the law and in the minds of legislative drafters.<sup>243</sup> Today, because so much of tax law is statutory and because existing anti-abuse doctrines have largely filled any remaining gaps, there is much less room for new substantive tax canons. And this is as it should be—absent the pressing need for clarification that characterized the early years of the Code, maintaining a consistent set of canons has numerous benefits in predictability, administrability, and democratic legitimacy, so that courts cannot easily change the background norms against which Congress legislated.<sup>244</sup>

Thus, it seems appropriate that judicial development of substantive tax canons has greatly receded today.<sup>245</sup> The substantive tax canons may continue to shift over time, but the ability of judges to reshape existing substantive canons is much narrower than in the past (when, for example, the present rule

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240. This argument maps the literature on how common law can change over time. *See generally* HART, *supra* note 210, at 95-99 (describing "rules of change" in law).

241. U.C.C. § 2-314(2)(b)-(c) (AM. LAW INST. & UNIF. LAW COMM'N 1951).

242. *Cf.* CONG. BUDGET OFFICE, *OPTIONS FOR REDUCING THE DEFICIT: 2019 TO 2028*, at 289-91 (2018), <https://perma.cc/CC62-W4U2> (contemplating a federal value-added tax).

243. *See supra* notes 50-53 and accompanying text.

244. *See, e.g.*, Eskridge, *supra* note 13, at 683.

245. This does not, however, rule out the development of new judicial substantive tax canons in new areas of tax law. For example, a dramatic expansion in the system of federal taxation, such as the adoption of a sales or consumption tax, could require new substantive canons to facilitate the interpretation and enforcement of a new set of statutes.

against implied tax exemptions, discussed in Appendix A.5, evolved from a prior rule stating the exact opposite result).

Congress may be taking up the slack by legislating on these issues in the judiciary's stead. For example, Congress has codified anti-abuse doctrines in a number of places in the Code, as discussed in Part II.D above. Congressional direction regarding methods of statutory interpretation has been controversial, with some scholars and jurists resisting legislative interference.<sup>246</sup> However, legislation guiding the application of substantive tax canons is a particularly appropriate intervention. It pertains to specific interpretive points of law or policy rather than to broad methodological directives (as with, for example, a Connecticut statute broadly requiring courts to adopt textualist methods,<sup>247</sup> which courts have generally ignored<sup>248</sup>). It is restricted to an area of law with less constitutional content, in which Congress's directives do not threaten broader separation-of-powers concerns such as judicial review. And it is restricted to an area of law that is fundamentally Congress-made, and therefore in which legislative directives are more akin to definitional clarification than preemption of judicial power.

Even Linda Jellum, a prominent scholarly critic of legislative interference in statutory interpretation, argues that “[g]eneral interpretive directives likely

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246. Most scholars generally resist legislation directing courts in constitutional interpretation, but some resist direction on non-constitutional statutory interpretation as well. Compare, e.g., Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 768 n.48 (2013) (“It may be the case that a few special rules of statutory interpretation are sufficiently constitutional in nature to be unamenable to congressional revision.”), and Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2139-40, 2156 (2002) (“Congress can and should codify rules of statutory interpretation. . . . Some interpretive techniques are constitutionally required and may not be abrogated by Congress.”), with, e.g., Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1794-95 (2010) [hereinafter Gluck, *States as Laboratories*] (discussing the Connecticut Supreme Court’s resistance to textualist directives from the legislature), and Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 879-97 (2009) (arguing that under certain circumstances legislative interference in judicial interpretation should be resisted). For commentary on judicial resistance to legislative interference with interpretive methodologies, see SCALIA & GARNER, *supra* note 22, at 244-45 (describing legislative instructions as to specific statutes as merely “clarification of the statute’s meaning,” but describing interpretive rules of general applicability enacted by a legislature as “more problematic,” inappropriate as to past statutes, and potentially inappropriate as to future ones); and Gluck, *States as Laboratories*, *supra*, at 1785-97. But see generally Scott, *supra* note 157 (endorsing the codification of canons of construction).

247. 2003 Conn. Pub. Acts 03-154 (codified at CONN. GEN. STAT. § 1-2z (2019)).

248. See Gluck, *States as Laboratories*, *supra* note 246, at 1791-97.

violate separation of powers while specific interpretive directives do not.”<sup>249</sup> Overall, legislation affecting the content and breadth of substantive tax canons serves as useful dialogue between the judiciary and the legislature.

### Conclusion

To date, scholars and judges have generally formulated anti-abuse doctrines in tax law as free-floating rules applied without reference to statutory meaning. The perceived tension between judge-made doctrine and statutory text has inspired criticism from textualists;<sup>250</sup> moreover, the narrow focus of anti-abuse doctrines has created confusion in cases where courts have declined to apply these doctrines or modified them to reach sensible results. This Article reevaluates anti-abuse doctrines as substantive canons, useful to both textualists and purposivists, that facilitate the best reading of the statute by elucidating background norms shared by Congress and the courts. It also categorizes and evaluates the substantive tax canons, drawing on an extensive primary review of tax cases.

Alongside its contributions to the literatures on legislation and anti-abuse doctrines, this Article also complicates the literature on tax exceptionalism.<sup>251</sup> Some scholars have argued that tax legislation ought to be exempt from generally applicable interpretive methods. According to these tax exceptionalists, the Code is simply too complicated, too old, too specialized, or too rife with richly remunerative opportunities for avoidance, to be treated like other statutes.<sup>252</sup> Others have argued that this is wrong-headed, that the

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249. Jellum, *supra* note 246, at 879.

250. *See, e.g.,* *Gitlitz v. Comm’r*, 531 U.S. 206, 209-19 (2001); *Coltec Indus., Inc. v. United States*, 62 Fed. Cl. 716, 755-56 (2004), *vacated*, 454 F.3d 1340 (Fed. Cir. 2006).

251. Specifically, the literature on tax exceptionalism in statutory interpretation. Other varieties of tax exceptionalism include administrative law exceptionalism. *See generally* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537 (2006) (rejecting administrative tax exceptionalism). They also include exceptionalism as to unique normative concerns raised by tax law. *See, e.g.,* Alex Raskolnikov, *Accepting the Limits of Tax Law and Economics*, 98 CORNELL L. REV. 523, 527 (2013) (arguing that many “basic tax policy questions” cannot “be answered based on the same type of reasoning that law and economics scholars routinely deploy when addressing other areas of economic regulation”).

252. *See, e.g.,* Cunningham & Repetti, *supra* note 14, at 7 (noting that textualism is “particularly inappropriate for interpreting tax statutes”); Bradford L. Ferguson et al., *Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process*, 67 TAXES 804, 806-07 (1989) (citing the Code’s complexity, age, extensive legislative history, specialized nature, and specialized drafting process); Mary L. Heen, *Plain Meaning, the Tax Code, and Doctrinal Incoherence*, 48 HASTINGS L.J. 771, 786 & n.73, 818-19 (1997); Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819, 826-27 (1991) (citing the Code’s complexity, frequency of amendment, and rich context).

distinction is cultural rather than intrinsic to tax legislation, and that federal tax law ought to be treated like any other subject area.<sup>253</sup> This Article reconciles these two camps by suggesting that federal tax law follows the same process to generate substantive canons as other subject areas, but that it simply has more or broader-reaching substantive canons by virtue of its long history, complexity, and fundamental policy goals.

Overall, the substantive canon framework offers numerous improvements in the administration of tax law.<sup>254</sup> It suggests future empirical work, where congressional staffers could be surveyed on their knowledge of and support for the various substantive tax canons enumerated in this Article. Ultimately, it updates old judge-made doctrines for a modern age of statutes.

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253. See, e.g., BITTKER & LOKKEN, *supra* note 30, ¶ 4.2.1 (“[V]iewed in the perspective of history or even from the bench of a contemporary court of general jurisdiction, the Code is just another statute, which suffers from the same ailments that have afflicted legislative enactments since Parliament first tampered with the common law.”); Paul L. Caron, *Tax Myopia, or Mamas Don’t Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 590 (1994) (“A symbiotic relationship between tax and nontax law will deepen our tax understanding while providing a fertile area in which to test and refine nontax principles.”); James B. Lewis, Viewpoint, *The Nature and Role of Tax Legislative History*, 68 TAXES 442 (1990) (responding to Ferguson et al., *supra* note 252) (arguing that the tax legislative process is not different, that tax legislative history is not more extensive, and overall that tax statutory interpretation should not be treated differently from other subject areas); Livingston, *supra* note 68, at 686 (“In my personal experience, scholars in other fields tend to be unimpressed by the assertion of tax uniqueness, noting that the assertedly special features of taxation—detail, revision, and underlying structural principles—are shared in varying degrees by other laws.”).

254. See *supra* Part III.

### **Appendix: Catalog of Substantive Tax Canons**

This Appendix provides a listing of substantive tax canons, based on my review of relevant case law. Many of the substantive tax canons proposed by this Article have already been discussed above. This Appendix provides additional detail, as well as a resource for future scholars, by considering (and sometimes rejecting) potential canons.<sup>255</sup>

Not all of the canons listed here stand on equal footing, if widespread acceptance is the key criterion. The first three are exceedingly well known, widely taught in law schools, and broadly applied by practitioners. The others are less broadly accepted and have occasionally been disputed.<sup>256</sup> Moreover, there is a conceptual distinction between the first four and the last two canons endorsed by this Article. The first four operate most cleanly as true presumptions, rules that apply at the start of statutory analysis and must be rebutted.<sup>257</sup> The last two operate more as tiebreakers, rules that apply at the end of statutory analysis if ambiguity remains.<sup>258</sup>

Because this Appendix draws solely on case law and scholarly articles, it could be usefully supplemented by empirical work, such as surveys of judges or legislators, or more focused historical analysis of particular canons. This is especially true of the canons discussed in Appendix A.4 through A.6, which have been advanced primarily in court rulings and whose acceptance by legislative counsel has yet to be confirmed. I present this list as a first step but invite any disagreement on its specifics.

#### **A.1. The Substance-over-Form Doctrine**

The substance-over-form doctrine<sup>259</sup> requires that transactions be taxed in accordance with their substance rather than their form.<sup>260</sup> This doctrine is one of the oldest substantive tax canons, dating back to 1918.<sup>261</sup> It is also arguably

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255. Not all of the substantive tax canons described in this Appendix are anti-abuse doctrines—for example, the rule of lenity for taxpayers redeeming property is intended to benefit taxpayers rather than to prevent abuse.

256. *See infra* notes 282, 297-99, 309-11 and accompanying text.

257. *See* ESKRIDGE ET AL., *supra* note 75, at 353-54.

258. *See id.* at 353. Rules of lenity (or anti-lenity, like the rule against implied tax exemptions) have more of a tiebreaking quality to them, since they apply to resolve ambiguities that remain after ordinary statutory interpretation. *See id.* at 379 (describing Lawrence Solan's view that the modern rule of lenity acts as a tiebreaker).

259. *See supra* notes 32-36, 50, 55, 200-01, 219 and accompanying text.

260. *See, e.g.,* Gregory v. Helvering, 293 U.S. 465, 469 (1935); United States v. Phellis, 257 U.S. 156, 168 (1921); Estate of Weinert v. Comm'r, 294 F.2d 750, 755 (5th Cir. 1961).

261. Lynch v. Turrish, 247 U.S. 221, 226 (1918) (dismissing a “mere change of form” in one of the earliest cases interpreting the then-new income tax law and serving as a precursor  
*footnote continued on next page*

an umbrella principle that covers most of the other substantive canons described in this Article: The central concept behind the other doctrines is that compliance with the literal language (i.e., the form) of the Code may not suffice to achieve a particular tax result.<sup>262</sup>

The substance-over-form doctrine is widely applied in case law and frequently taught in introductory federal tax courses.<sup>263</sup> As such, it is one of the most secure substantive tax canons.

#### A.2. The Economic Substance Doctrine

The economic substance doctrine<sup>264</sup> broadly states that a transaction lacking economic substance will be disregarded for tax purposes. Sometimes known as the “sham’ transaction doctrine,”<sup>265</sup> and related to the “business purpose” doctrine (which it has now subsumed),<sup>266</sup> it is the primary example used in this Article and is arguably the most important substantive tax canon. It is only slightly younger than the substance-over-form doctrine, since most scholars date it to the Supreme Court’s 1935 ruling in *Gregory v. Helvering*.<sup>267</sup> The economic substance doctrine played an important role in fighting abusive tax shelters in the 2000s,<sup>268</sup> and continues to be used against tax shelters today.<sup>269</sup> It, too, is widely cited in case law and widely taught in introductory tax courses,<sup>270</sup> serving as an important and uncontroversial substantive canon.

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to substance-over-form analysis), cited in *Phellis*, 257 U.S. at 168 (applying an early version of the substance-over-form doctrine).

262. See, e.g., *Sec. Indus. Ins. Co. v. United States*, 702 F.2d 1234, 1244 (5th Cir. 1983) (“The step transaction doctrine is a corollary of the general tax principle that the incidence of taxation depends upon the substance of a transaction rather than its form.”).

263. See, e.g., RICHARD SCHMALBECK ET AL., *FEDERAL INCOME TAXATION* 263-75, 756 (5th ed. 2018).

264. See *supra* notes 2-7, 10, 43-55, 62, 87, 200-01 and accompanying text; *supra* Part II.D.

265. *Summa Holdings v. Comm’r*, 848 F.3d 779, 785 (6th Cir. 2017).

266. See, e.g., *Shockley v. Comm’r*, 872 F.3d 1235, 1247 (11th Cir. 2017). As articulated today, business purpose is just one prong of the economic substance doctrine. I.R.C. § 7701(o)(1)(B) (2018).

267. 293 U.S. 465, 469 (1935) (articulating a precursor to the economic substance doctrine as part of the central determination whether a transaction “was the thing which the statute intended”).

268. See, e.g., *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1352 (Fed. Cir. 2006); *IES Indus., Inc. v. United States*, 253 F.3d 350, 353 (8th Cir. 2001).

269. See, e.g., *Bank of N.Y. Mellon Corp. v. Comm’r*, 801 F.3d 104, 115 (2d Cir. 2015).

270. See, e.g., SCHMALBECK ET AL., *supra* note 263, at 707-28.

### A.3. The Step Transaction Doctrine

The step transaction doctrine<sup>271</sup> “requires that the interrelated steps of an integrated transaction be analyzed as a whole rather than treated separately.”<sup>272</sup> Of the doctrines discussed in this Article so far, it may be the one treated most like a canon by courts and the IRS, who frequently and explicitly weigh it against statutory purpose and congressional intent.<sup>273</sup> Moreover, the step transaction doctrine is also very old (dating back to the 1930s<sup>274</sup>), widely cited,<sup>275</sup> and frequently taught in law school courses<sup>276</sup>—on the whole, a secure substantive canon.

### A.4. The Rule Against Double Tax Benefits

Perhaps the best-known statement of the rule against double tax benefits<sup>277</sup> was the Supreme Court’s ruling in *United States v. Skelly Oil Co.* that “the Code should not be interpreted to allow [the taxpayer] ‘the practical equivalent of a double deduction,’ absent a clear declaration of intent by Congress.”<sup>278</sup> Notice that, as formulated in *Skelly Oil*, the rule against double deductions was stronger than a mere presumption<sup>279</sup>—it was instead quite like a “clear statement rule,” a species of substantive canon that “can only be rebutted by clear statutory text” (and not by a showing of legislative purpose).<sup>280</sup> The Court in *Ilfeld* similarly held that “[i]n the absence of a provision of the [applicable act] definitely requiring [a double deduction], a purpose so opposed to precedent and equality of treatment of taxpayers will

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271. See *supra* notes 37-42, 50, 200-01 and accompanying text.

272. BITTKER & LOKKEN, *supra* note 30, ¶ 4.3.5. For examples of cases applying the step transaction doctrine, see *True v. United States*, 190 F.3d 1165, 1174-77 (10th Cir. 1999); and *Associated Wholesale Grocers v. United States*, 927 F.2d 1517, 1521-26 (10th Cir. 1991).

273. See *supra* notes 37-42 and accompanying text.

274. *Warner Co. v. Comm’r*, 26 B.T.A. 1225, 1228 (1932) (introducing the step transaction doctrine and holding that the Code provision on corporate reorganizations “permits, if it does not require, an examination of the several steps taken”).

275. See, e.g., *Barnes Grp., Inc. v. Comm’r*, 593 F. App’x 7, 9 (2d Cir. 2014); *Gunkle v. Comm’r*, 753 F.3d 502, 504 n.2 (5th Cir. 2014).

276. See, e.g., GEORGE K. YIN & KAREN C. BURKE, *CORPORATE TAXATION* 394-95 (2d ed. 2016).

277. See *supra* Part II.C.2.

278. 394 U.S. 678, 684 (1969) (citation omitted) (quoting *Charles Ilfeld Co. v. Hernandez*, 292 U.S. 62, 68 (1934)).

279. See, e.g., *Black & Decker Corp. v. United States*, No. Civ. 02-2070, 2004 WL 2051215, at \*2 (D. Md. Aug. 3, 2004) (“The tax code should not be interpreted to allow taxpayers the practical equivalent of a double-deduction absent a clear declaration of intent by Congress.”).

280. *Eskridge & Frickey*, *supra* note 72, at 597.

not be attributed to lawmakers.”<sup>281</sup> Ever since these early precedents, courts have differed on the precise level of congressional intent required to overcome the rule against double tax benefits—some courts have explicitly phrased the rule as a “presumption”<sup>282</sup> rather than as a clear statement rule.

My own view, mirroring Eskridge’s, is that clear statement rules should be promulgated frugally, since in practice they often prove very difficult to rebut. (As noted in Part II.B, substantive canons also often acquire much greater strength in practice than one might predict in theory.) Many commentators believe that a doctrine requiring a clear statement from Congress for policy reasons, rather than to protect constitutional values, would threaten the separation of powers and imbue the judiciary with excessive interpretive latitude.<sup>283</sup> Thus, the rule against double tax benefits should act as a mere presumption. As *Gitlitz* illustrated, even with this limitation, the courts are confronted with a sufficient quantum of difficult cases that they will have plenty of opportunity to apply the doctrine.

Like the preceding three doctrines, the rule against double tax benefits also has been inconsistently applied in the past. For example, imagine that a taxpayer receives a gift of cash and donates the cash to charity, treating the gift as tax-exempt<sup>284</sup> and the donation as tax-deductible.<sup>285</sup> In this case, “[i]t is absolutely clear that the taxpayer may take advantage of both the deduction and the exclusion, even though this is the equivalent of a double deduction.”<sup>286</sup> Richard Schmalbeck, Lawrence Zelenak, and Sarah Lawsky conclude from this that the rule against double tax benefits does not apply “so long as the two benefits have independent policy justifications.”<sup>287</sup> Although not stated in these terms, their logic parallels this Article’s view of the rule against double tax benefits as a presumption rebuttable by contrary statutory purpose.

An important corollary question is how far the rule against double tax benefits extends. In *Ilfeld*, *Skelly Oil*, and other early cases applying the rule, it

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281. *Ilfeld*, 292 U.S. at 68.

282. *See, e.g.*, *United Telecomm. v. Comm’r*, 589 F.2d 1383, 1387-88 (10th Cir. 1978) (citing *Ilfeld* for “[t]he presumption . . . that statutes and regulations do not allow a double deduction”); *see also* *AMBAC Indus., Inc. v. Comm’r*, 487 F.2d 463, 467 (2d Cir. 1973) (“We are further persuaded to resolve any ambiguity . . . because of the recently repeated admonition by the Supreme Court that the Code should not be interpreted to allow (the taxpayer) ‘the practical equivalent of a double deduction.’” (quoting *Ilfeld*, 292 U.S. at 68)).

283. *See, e.g.*, Barrett, *supra* note 72, at 163-64 (“Canons promoting extraconstitutional values may be employed only as presumptions . . .”).

284. I.R.C. § 102(a) (2018).

285. *Id.* § 170(a)(1).

286. SCHMALBECK ET AL., *supra* note 263, at 482.

287. *Id.* at 483.

was specifically applied in the context of consolidated tax returns to prevent a corporate parent from deriving two tax deductions from a single economic loss.<sup>288</sup> However, a number of other cases have expanded the principle to federal tax law more generally.<sup>289</sup> This has resulted in a circuit split, with some circuits limiting the *Ifeld* doctrine to consolidated returns and others applying it more generally.<sup>290</sup> *Gitlitz* arguably resolved this circuit split in favor of the more limited view; however, since *Gitlitz* did not address the rule against double tax benefits head on, and certainly did not address it as a substantive canon, my own view is that this issue remains live and could be resolved by a future Supreme Court ruling. Moreover, Congress's immediate reversal of the result in *Gitlitz* could be taken as evidence in favor of a broad rule.

On the other hand, close reading of the Code places more doubt on this canon than any of the others endorsed in this Appendix. Several sections of the Code specifically deny double tax benefits,<sup>291</sup> which arguably implies (consistent with the *expressio unius* canon<sup>292</sup>) that double tax benefits should be permitted where not explicitly denied. On balance, while I believe that this canon is sufficiently intuitive and widely followed that it ought to be adopted as a substantive tax canon of general application, additional empirical research would be required to confirm this view. Meanwhile, Congress could usefully codify this canon as a presumption in order to remove any doubt.

#### A.5. The Rule Against Implied Tax Exemptions

The rule against implied tax exemptions states, in the words of *United States v. Wells Fargo Bank*, that “exemptions from taxation are not to be implied; they must be unambiguously proved,”<sup>293</sup> a dictum that has since been

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288. See, e.g., *Duquesne Light Holdings v. Comm’r*, 861 F.3d 396, 407-09 (3d Cir. 2017) (explaining the status of the *Ifeld* doctrine), *cert. denied*, 138 S. Ct. 2651 (2018); *Greif Cooperage Corp. v. Comm’r*, 85 F.2d 365, 366 (3d Cir. 1936); *Comm’r v. Nat’l Casket Co.*, 78 F.2d 940, 941-42 (3d Cir. 1935).

289. See, e.g., *Marwais Steel Co. v. Comm’r*, 354 F.2d 997, 997-99 & 997 n.1 (9th Cir. 1965) (investment losses among corporate taxpayers filing separate returns); *Chi. & N.W.R. Co. v. Comm’r*, 114 F.2d 882, 887 (7th Cir. 1940) (appropriate method of depreciation for railroad property); *Comar Oil Co. v. Helvering*, 107 F.2d 709, 711 (8th Cir. 1939) (deductibility of anticipated inventory losses).

290. See, e.g., *Estate of Miller v. Comm’r*, 400 F.2d 407, 411 (3d Cir. 1968) (distinguishing the rule against double deductions as specific to “the peculiar income tax context of consolidated corporate income tax reporting” (footnote omitted)).

291. E.g., I.R.C. §§ 136(b), 597(b)(3), 6426(h) (2018).

292. See *supra* note 70 and accompanying text.

293. 485 U.S. 351, 354, 356, 359 (1988); see also *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (citing “the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed”); *Squire v. Capoman*, 351 U.S. 1, 6 (1956) (“[T]o be valid, exemptions to tax laws should be clearly

*footnote continued on next page*

widely quoted by appellate and trial courts.<sup>294</sup> As a corollary, some courts have ruled that income tax deductions should be strictly construed.<sup>295</sup> Unlike the other substantive tax canons of which this Article approves, this canon is often explicitly described by the courts as a canon of construction. Accordingly, it has been included in the influential list of substantive canons compiled by Eskridge and his co-authors (the only substantive tax canon endorsed by this Article that is included in that list).<sup>296</sup>

This canon has been criticized by some commentators on theoretical and historical grounds. Justice Scalia and Bryan Garner have argued that “[l]ike any other governmental intrusion on property or personal freedom, a tax statute should be given its fair meaning, and this includes a fair interpretation of any exceptions it contains.”<sup>297</sup> Bittker, McMahon, and Zelenak have commented that “it is far from clear why the Code should be construed strictly against *either* the taxpayer *or* the government.”<sup>298</sup> In fact, prior to the 1930s, the Supreme Court had frequently articulated exactly the opposite rule, that

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expressed.”); *U.S. Tr. Co. v. Helvering*, 307 U.S. 57, 60 (1939) (“Exemptions from taxation do not rest upon implication.”).

294. *See, e.g.*, *Dollander v. IRS*, 383 F. App’x 932, 933 (11th Cir. 2010) (per curiam); *Adkins v. United States*, 882 F.2d 1078, 1080 (6th Cir. 1989); *United States v. Mount Sinai Med. Ctr. of Fla., Inc.*, 353 F. Supp. 2d 1217, 1223 (S.D. Fla. 2005).

295. *See, e.g.*, *Knight v. Comm’r*, 552 U.S. 181, 192 (2008) (noting that “an income tax deduction is a matter of legislative grace” (quoting *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 84 (1992))).

A variant is the “principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy.” *Green v. Connally*, 330 F. Supp. 1150, 1161 (D.D.C.), *aff’d sub nom. Coit v. Green*, 404 U.S. 997 (1971). However, in *Green* and elsewhere, this principle is phrased as an implication of purposivism rather than a standalone canon, since Congress could not have meant to provide a charitable exemption to certain bad charities. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) (noting Congress’s “intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy”). Query whether this highly purposivist conclusion would still stand today.

296. ESKRIDGE ET AL., *supra* note 23, app. B at 1171; *see also* Sunstein, *supra* note 22, at 475.

297. SCALIA & GARNER, *supra* note 22, at 362. I take Justice Scalia’s challenge to this rule as primarily normative, although he and Garner also claim that “many Supreme Court cases denying an exemption make no mention of this rule, and even some cases granting an exemption ignore it.” *Id.* at 359 (footnote omitted). In any case, this is a good example of a situation where textualists may reasonably disagree with me on which particular anti-abuse doctrines are legitimate, even if they agree on the broader project in this Article, namely that the doctrines ought to be evaluated as substantive canons.

298. BITTKER ET AL., *supra* note 5 ¶ 1.03[1]; *see also* Peter Lowy, Viewpoint, *Deductions Should Not Be Narrowly Construed*, 89 TAX NOTES 1181, 1181 (2000); Johnson, *supra* note 86, at 500 n.51.

ambiguities should be resolved in favor of the taxpayer. In 1917, the Supreme Court held that “[i]n case of doubt [tax statutes] are construed most strongly against the Government, and in favor of the citizen.”<sup>299</sup>

Nevertheless, by 1934, casebook authors had begun to deprecate the rule in favor of taxpayers, noting that “the latest tendency of the courts is strongly against constructions which permit tax avoidance.”<sup>300</sup> The reversal of the rule followed broader political shifts during the New Deal, toward purposivism and against taxpayers (especially rich ones).<sup>301</sup> And today, the general anti-taxpayer rule has been sufficiently widely validated and cited that, in my view, its place among the substantive canons is secure.

Moreover, the Supreme Court’s flip may not be as arbitrary as it first appears. One could argue that the rule’s direction should depend on the likelihood of abuse by government or taxpayers. If the government is seen as likely to impose arbitrary taxes, a pro-taxpayer presumption will serve as a check on government overreach. Conversely, if taxpayers are seen as likely to use abusive planning to avoid legitimate taxes, an anti-taxpayer presumption will serve as a check on tax avoidance. The shift from the pro-taxpayer to the anti-taxpayer rule followed reports of widespread tax avoidance by the rich during the 1930s.<sup>302</sup>

In addition, one could argue that even if both positions are equally legitimate, consistently applying the anti-taxpayer rule serves as a useful tiebreaker that promotes predictability and administrability<sup>303</sup>—much like the rule to drive on the right side of the road selects between two equally good choices, but still serves an important public function. Thus the rule against implied tax exemptions prevents taxpayers from wasting time in speculation about the tax goodies they otherwise might seek to collect.

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299. *Gould v. Gould*, 245 U.S. 151, 153 (1917); *see also* *United States v. Wigglesworth*, 28 F. Cas. 595, 596-97 (C.C.D. Mass. 1842) (No. 16,690); *Adams v. Bancroft*, 1 F. Cas. 84, 85 (C.C.D. Mass. 1838) (No. 44); SCALIA & GARNER, *supra* note 22, at 359 (“Indeed, until the early 20th century, the rule applicable to exemptions from federal taxes was the reverse.”); Likhovski, *supra* note 224, at 977-83 (summarizing the shift in jurisprudence regarding the rule against implied tax exemptions).

300. 1 RANDOLPH E. PAUL & JACOB MERTENS, JR., *THE LAW OF FEDERAL INCOME TAXATION* § 3.06 (1934).

301. *See* Likhovski, *supra* note 224, at 977-88.

302. *See id.* at 958 (“In the months and weeks prior to the [Supreme Court’s 1934] decision [in *Gregory*], newspapers were filled with reports about the tax avoidance tricks practiced by a group of leading industrialists and bankers, chief among whom was Andrew Mellon, former Secretary of the Treasury.”).

303. *See generally* Baude & Sachs, *supra* note 209, at 1110-12 (discussing “closure rules,” interpretive defaults that act as tiebreakers); Adam M. Samaha, *On Law’s Tiebreakers*, 77 U. CHI. L. REV. 1661 (2010) (discussing legal tiebreakers in general).

In any event, the courts have widely embraced this canon, and it is unlikely to disappear in the foreseeable future.

#### A.6. The Rule of Lenity for Taxpayers Redeeming Property

For almost the entire history of the United States, the government has had the power to seize property from taxpayers who fail to pay their taxes. This power is necessary to the enforcement of any tax system and predates the modern federal income tax.<sup>304</sup> However, owners have generally had a countervailing statutory right to redeem property so seized by paying the taxes owed.<sup>305</sup> Courts have long held that such redemption statutes should be interpreted with leniency to the taxpayer.<sup>306</sup>

This right emerged very early on and is in fact the oldest of all the substantive canons listed in this Article. As early as 1871, the Supreme Court held that “[i]t is the general rule of courts to give to statutes authorizing redemption from tax sales a construction favorable to owners.”<sup>307</sup> The rule grew in importance with the introduction of the federal income tax in the early twentieth century, to which it still applies today. Although one state trial court has grandiloquently described this rule as a constraint against “unrestrained tyranny,”<sup>308</sup> it is still (like the rule of lenity in criminal law) generally understood as a mere presumption—courts have described it as a “rule of thumb,”<sup>309</sup> and the Supreme Court has said that “[c]ourts cannot . . . make any exceptions not made in the statute.”<sup>310</sup> Courts have also noted that

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304. *Corbett v. Nutt*, 77 U.S. (10 Wall.) 464, 465-68 (1871) (statement of the case) (considering the redemption of property sold after failure to pay a land tax imposed on Confederate states during the Civil War); *Bennett v. Hunter*, 76 U.S. (9 Wall.) 326, 333-36 (1870) (same).

305. See I.R.C. § 6337 (2018).

306. See, e.g., *Corbett*, 77 U.S. (10 Wall.) at 474 (“It is the general rule of courts to give to statutes authorizing redemption from tax sales a construction favorable to owners . . .”); *Bennett*, 76 U.S. (9 Wall.) at 335 (holding that because a tax sale was simply a “revenue measure,” redemption of the property subject to the tax sale should not be prohibited “if a more liberal construction can be given to [the statute] consistently with its terms”); *Westland Holdings v. Lay*, 392 F. Supp. 2d 1283, 1286 (D. Wyo. 2005), *aff’d*, 462 F.3d 1228 (10th Cir. 2006); *Seay v. United States*, No. CIV. A. W-98-CA-145, 1998 WL 718187, at \*4 (W.D. Tex. July 8, 1998); *Babb v. Frank*, 947 F. Supp. 405, 406-07 (W.D. Wis. 1996); *Anselmo v. James*, 449 F. Supp. 922, 925 (D. Mass. 1978); *United States v. Lowe*, 268 F. Supp. 190, 192 (N.D. Ga. 1966), *aff’d mem. sub nom. Lowe v. Monk*, 379 F.2d 555 (5th Cir. 1967).

307. *Corbett*, 77 U.S. (10 Wall.) at 474-75.

308. *McC Campbell v. DiNuzzo*, 270 N.Y.S.2d 685, 689-90 (Sup. Ct. 1966).

309. *Babb*, 947 F. Supp. at 406.

310. *Keely v. Sanders*, 99 U.S. 441, 446 (1879).

“[t]he rule that redemption statutes are to be liberally construed does not mean their provisions can be disregarded.”<sup>311</sup>

The rule of taxpayer lenity has expanded alongside the modern expansion of statutory redemption rights—for instance, redemption by parties other than the property owner, such as “heirs, executors, or administrators,”<sup>312</sup> or with respect to liens rather than seizures.<sup>313</sup> On the whole, this rule is uncontroversial, ancient, and widely followed, and consequently a secure substantive canon.

#### A.7. Not a Canon: The Presumption That IRS Assessments Are Correct

Courts have long followed a “[p]resumption that IRS tax assessments are correct.”<sup>314</sup> This is a good example of a common law rule that is widely recognized as legitimate, but which does not concern statutory interpretation and therefore ought not to be considered a canon of construction.

While phrased broadly, the effects of this rule are narrow and procedural. Tax disputes begin when the IRS provides the taxpayer with a “notice of deficiency,” which states the nature and amount of any underpayment.<sup>315</sup> As Leandra Lederman has described, this notice “functions as an inchoate complaint that the taxpayer answers by filing a petition.”<sup>316</sup> If the taxpayer files a petition to challenge the notice in court, the presumption of correct assessments serves to place the burden of proof on the taxpayer.<sup>317</sup>

The presumption of correctness has been defended because the evidence required to contest a tax claim, typically consisting of the taxpayer’s financial records, is much more readily available to the taxpayer than the IRS.<sup>318</sup> On normative grounds and as a descriptive matter, the presumption of correct

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311. *Krassner v. Veneman*, 23 Cal. Rptr. 673, 677 (Dist. Ct. App. 1962), cited in *Babb*, 947 F. Supp. at 407.

312. I.R.C. § 6337(b)(1) (2018).

313. *Id.*

314. See *ESKRIDGE ET AL.*, *supra* note 23, app. B at 1171 (citing *United States v. Fior d’Italia, Inc.*, 536 U.S. 238, 242-43 (2002)).

315. See I.R.C. § 6212(a); Treas. Reg. § 301.6212-1(a), (b) (2019).

316. Leandra Lederman, “Civilizing Tax Procedure: Applying General Federal Learning to Statutory Notices of Deficiency,” 30 U.C. DAVIS L. REV. 183, 193 (1996).

317. Lederman distinguishes between the “burden of going forward” and the “burden of persuasion.” *Id.* at 201-03. The burden of going forward is the “burden of producing evidence in the first instance,” whereas the burden of persuasion is the burden of demonstrating that the taxpayer’s position is “more probable than not.” See Edward W. Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 STAN. L. REV. 5, 15-16 (1959).

318. Leo P. Martinez, *Tax Collection and Populist Rhetoric: Shifting the Burden of Proof in Tax Cases*, 39 HASTINGS L.J. 239, 275, 277 (1988).

assessment seems to be a legitimate common law rule. However, not all valid rules are canons of construction.<sup>319</sup> Valid rules might solely concern questions of fact; in contrast, canons of construction are tools of statutory interpretation, and it is only useful to classify a rule as a canon if it concerns questions of law.

Another way to think about the distinction is to think about what would rebut the presumption. Throughout this Article, I have emphasized that presumptions are rebutted *by the statute*—by statutory text or purpose, or the legislators’ intent in enacting the statute.<sup>320</sup> In contrast, the presumption of correct assessment is not rebutted by the statute, but by a taxpayer’s producing evidence to demonstrate that the IRS’s assessment was factually inaccurate. Consequently, although this presumption seems to be a valid procedural rule, it is not a canon of construction.

#### A.8. Not a Canon: The Whole Code Rule

The “whole code rule” is a conjectured substantive canon stating that “when Congress expresses or describes a tax law concept in one part of the Internal Revenue Code, that expression or description should be deemed probative regarding Congress’s treatment of the concept in a separate part of the code.”<sup>321</sup> This rule has been cited and relied upon by the Supreme Court in certain cases.<sup>322</sup> Nevertheless, this rule is not well supported by existing evidence or current practice,<sup>323</sup> making it a good example of a rule that has received some theoretical support yet can be rejected on empirical grounds.

Scholars have generally criticized “whole act”<sup>324</sup> or “whole code” rules as poor descriptions of the way that Congress actually drafts statutes. In general,

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319. There has been some dispute as to whether canons of construction, and interpretive methodology in general, serve as a form of federal common law subject to *stare decisis*. Gluck has argued in favor of such methodological *stare decisis*, while acknowledging that her views have not gained traction in practice. See Gluck, *supra* note 22 at 178. Jacob Scott has also argued that canons of construction should be considered part of the “common law of interpretation.” Scott, *supra* note 157, at 345.

320. See *supra* text accompanying note 73; *supra* Part II.B.

321. Brudney & Ditslear, *supra* note 16, at 1298-99.

322. See Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1, 13-16 (2004); Drye v. United States, 528 U.S. 49, 56-57 (1999); United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 222-23 (1996); United States v. Hill, 506 U.S. 546, 555-56, 556 n.7 (1993); United States v. Dalm, 494 U.S. 596, 601-02 (1990); United States v. Rodgers, 461 U.S. 677, 695-98 (1983); United States v. Consumer Life Ins. Co., 430 U.S. 725, 745-46 (1977); Laing v. United States, 423 U.S. 161, 176-77 (1976).

323. This is true with respect to the entire U.S. Code, as discussed immediately below, but especially with respect to the Internal Revenue Code.

324. See ESKRIDGE ET AL., *supra* note 23, app. B at 1153-55 (“Each statutory provision should be read by reference to the whole act. Statutory interpretation is a ‘holistic’ endeavor.”  
*footnote continued on next page*)

surveys and other direct primary evidence have suggested that Congress does not draft new statutes with existing statutes in mind.<sup>325</sup>

Some have suggested that the “whole code rule” is more sensible as specifically applied to tax statutes, because the Code is a “largely unified and self-referential regulatory scheme . . . which is amended in some fashion almost annually and substantially updated at regular intervals.”<sup>326</sup> On the other hand, many have argued that the Code is not coherent at all, but was instead cobbled together over time to meet a variety of different institutional goals.<sup>327</sup> I share this latter view, and indeed, there are many examples of terms that are used and interpreted inconsistently between different parts of the Code.<sup>328</sup> On the whole, there is little evidence to indicate that a norm of consistency has permeated the drafting or interpretation of the Code, and little evidence that this particular canon is a valid background norm, or even a descriptively accurate reflection of congressional drafting practice.

#### A.9. Other Non-Canons

The discussion above is limited to substantive tax canons that have been widely accepted by courts and drafters of statutes. The concept of substantive canons used by this Article elevates widely shared background norms above mere “patterns of judicial reasoning”<sup>329</sup> or “good rules of thumb.”<sup>330</sup> The current popularity of substantive canons has encouraged many scholars to attempt to canonize their favored policies,<sup>331</sup> which Anita Krishnakumar and Victoria Nourse have criticized as dangerous “overcanonization” that “opens the door for anyone—and judges in particular—to make up canons anytime

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(footnote omitted) (quoting *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988))).

325. See, e.g., William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 176-77, 242-45 (2000); Gluck & Bressman, *supra* note 16, at 936.

326. Brudney & Ditslear, *supra* note 16, at 1299-1300 (discussing, but not endorsing, this view).

327. Oei & Osofsky, *supra* note 180, at 1323 (noting that because “drafters were often operating under immense time pressure,” they “may not do as good of a job thinking about the interrelationships between provisions as might otherwise be desirable”).

328. For example, for purposes of subsections 368(a)(2)(F)(ii) and (iii) of the Code relating to certain corporate reorganizations, the term “security” follows the expansive definition in the Investment Company Act of 1940. I.R.C. § 368(a)(2)(F)(vii) (2018); see also 15 U.S.C. § 80a-2(a)(36) (2018). In contrast, for purposes of subsections 351, 354(a)(1), and 361(a) of the Code concerning certain other types of reorganizations, “security” is generally understood to follow a narrower definition that excludes, for example, any note with a term of five years or less. See BITTKER & LOKKEN, *supra* note 30, ¶ 91.2.4.

329. See Krishnakumar & Nourse, *supra* note 22, at 175-77.

330. *Id.* at 177-79.

331. See, e.g., ESKRIDGE, *supra* note 22, at 114-21; *supra* note 84.

they choose.”<sup>332</sup> Not every judicial trend or good policy is a canon.<sup>333</sup> This Article takes the more cautious view, although I welcome disagreement by others on the validity of the canons it discusses.

There are several other canons that have been suggested in court rulings as general principles of federal taxation, but for which I have not found persuasive evidence of wide acceptance as background norms. These include:

- A rule that “restrictions upon the IRS summons power should be avoided ‘absent unambiguous directions from Congress.’”<sup>334</sup>
- A rule that “tax provisions . . . incorporate domestic tax concepts absent a clear congressional expression that foreign concepts control.”<sup>335</sup>
- A “[p]resumption that tax valuation statutes follow [the] majority approach [i.e., the approach followed by most states], and that departures from the majority approach would be signaled with clear statutory language.”<sup>336</sup>
- A “JCT Canon . . . direct[ing] that regulation-writers and courts, when confronted with an ambiguous statutory provision, should follow the construction adopted by the [Joint Committee on Taxation] for its revenue estimates and in its explanations of statutory provisions.”<sup>337</sup>
- A minimum “single layer of taxation” to be imposed on income.<sup>338</sup>
- A rule that “charitable deductions and exemptions are read broadly.”<sup>339</sup>
- A rule that “tax sections should be interpreted so as to minimize abuse and circumvention.”<sup>340</sup> This is a good example of one of the “patterns of judicial reasoning”<sup>341</sup> that does not qualify as a background norm—while most judges try to avoid abuse and circumvention, they do so as a matter of sound policy or common sense rather than by following a canon.

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332. Krishnakumar & Nourse, *supra* note 22, at 174-79.

333. *Cf. id.* at 189 (“[T]he ultimate test of a canon is one that reflects the stability of compromise, by which we mean that *the canon reflects the agreement of Supreme Court Justices appointed by different parties and across ideological divides.*”).

334. *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984) (quoting *United States v. Bisceglia*, 420 U.S. 141, 150 (1975)).

335. *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 145 (1989).

336. *ESKRIDGE ET AL.*, *supra* note 23, app. B at 1171 (citing *Limtiaco v. Camacho*, 549 U.S. 483, 491 (2007)).

337. Wallace, *supra* note 84, at 183; *see also supra* note 84.

338. Geier, *supra* note 235, at 499.

339. Johnson, *supra* note 86, at 496; *see also Hartwick Coll. v. United States*, 801 F.2d 608, 615 (2d Cir. 1986).

340. Johnson, *supra* note 86, at 496 (citing *Gitlitz v. Comm’r*, 531 U.S. 206, 223 (2001) (Breyer, J., dissenting)).

341. *See* Krishnakumar & Nourse, *supra* note 22, at 175-77.

- A “principle of complete accounting,” under which “a taxpayer’s reportable income, however measured, ultimately should equal her real income.”<sup>342</sup>
- A rule that “tax penalties should be applied only strictly.”<sup>343</sup>
- The “*Danielson* rule” preventing the taxpayer from disavowing the chosen form of her transaction except in circumstances such as “mistake, undue influence, fraud, [or] duress.”<sup>344</sup> Like the presumption that IRS assessments are correct, this rule is best categorized as a pragmatic presumption that can be rebutted by a showing of facts, not of law.
- A rule that if “the words of a tax statute are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.”<sup>345</sup> This pronouncement stands in particular tension with the rule against implied tax exemptions.

Future research would likely benefit from further point-by-point discussion of these potential canons, including research as to their uptake by Congress. Even if they do not serve as background norms, they may still be defended on other grounds outside the scope of this Article. For instance, they may serve constitutional purposes, satisfy the reader’s preferred Hartian “rule of recognition,”<sup>346</sup> or help statutory interpretation conform to actual congressional practice (as with the JCT Canon).

One contribution of this Article has been to assemble all of the rules that might fairly be described as background norms based on my reading of case law. While I have aimed to be comprehensive, I have excluded substantive canons that are not specific to taxation, even though they may apply to tax cases as well—for example, the invocation of the sovereign immunity canon in the context of misconduct by an IRS employee,<sup>347</sup> or the application of the

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342. Theodore P. Seto, *The Function of the Discharge of Indebtedness Doctrine: Complete Accounting in the Federal Income Tax System*, 51 TAX L. REV. 199, 206 (1996).

343. Johnson, *supra* note 86, at 497. Johnson argues that this rule is old but not generally followed. *Id.* at 517-22, 525 (“The majority of tax penalty cases do not invoke it . . .”). He also criticizes it on a number of normative grounds, suggesting that it adds little to standard methods of interpretation in tax cases. *Id.* at 511-17.

344. *Comm’r v. Danielson*, 378 F.2d 771, 775 (3d Cir. 1967).

345. *United States v. Marshall*, 798 F.3d 296, 318 (5th Cir. 2015) (quoting *Exxon Mobil Corp. v. Comm’r*, 689 F.3d 191, 199 (2d Cir. 2012)), *cited in In re Canada*, 574 B.R. 620, 635 (N.D. Tex. 2017). *But see Dean & Solan*, *supra* note 86, at 893 (“Courts are notoriously inconsistent in applying this doctrine . . .”); *supra* notes 299-301 and accompanying text.

346. *See HART*, *supra* note 210, at 95.

347. *See IRS v. Murphy*, 892 F.3d 29, 40-41 (1st Cir. 2018) (declining to apply the sovereign immunity canon).

general criminal rule of lenity to tax cases.<sup>348</sup> I have also excluded definitions that courts have promulgated to clarify specific tax statutes—for example, the factors that the courts use to determine whether a financial instrument is debt or equity,<sup>349</sup> whether a person is an employee or an independent contractor,<sup>350</sup> or whether a valid partnership has been formed.<sup>351</sup> These guidelines are simply the court’s best reading of the statutes in question; they are not substantive canons so much as ordinary-course statutory interpretation.<sup>352</sup>

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348. *See generally* Grewal, *supra* note 86 (considering the general rule of lenity as specifically applied to tax cases); Hickman, *supra* note 86 (same). However, as I discuss elsewhere, courts seem to apply an especially strong version of the rule of lenity to tax cases. This may be due to the perceived greater complexity of the tax laws and concomitantly greater difficulty of compliance. Courts also seem more likely to declare tax statutes void for vagueness as a constitutional matter when criminal penalties are at issue. *See* 1 IAN M. COMISKY ET AL., TAX FRAUD & EVASION ¶ 2.03[3][d] (West 2019) (“Ignorance is also excusable if the law itself is unknowable, vague, or ambiguous. In such circumstances, the failure of the law to give adequate notice of what is required or prohibited violates the Fifth Amendment’s due process clause.”).

349. *See, e.g.*, *Tex. Farm Bureau v. United States*, 732 F.2d 437, 438 (5th Cir. 1984).

350. *See, e.g.*, *Filipidis v. United States*, No. 17585 Civil, 1970 WL 425, at \*1-2 (D. Md. Dec. 29, 1970), *aff’d*, No. 71-1267, 1971 WL 3011 (4th Cir. 1971).

351. *See, e.g.*, *Chemtech Royalty Assocs. v. United States*, 766 F.3d 453, 460-61 (5th Cir. 2014).

352. *See also supra* Appendix A.7 (arguing that a common law presumption with no bearing on statutory interpretation is not a canon of construction); *supra* note 86 (arguing that general judicial tendencies toward purposivism or textualism are not canons of construction). Similarly, the assignment of income doctrine, *see, e.g.*, *Comm’r v. Banks*, 543 U.S. 426, 433-34 (2005) (“[G]ains should be taxed ‘to those who earn them,’ a maxim we have called ‘the first principle of income taxation.’” (citations omitted) (first quoting *Lucas v. Earl*, 281 U.S. 111, 114 (1930); and then quoting *Comm’r v. Culbertson*, 337 U.S. 733, 739 (1949))), is probably best understood as interpreting the meaning of “income” under the Internal Revenue Code, I.R.C. § 61(a) (2018).