# STRICT CONSTRUCTION OF DEPORTATION STATUTES AFTER *LOPER BRIGHT*

NANCY MORAWETZ*

*The Supreme Court's decision in* Loper Bright Enterprises v. Raimondo *calls on courts to apply a broad range of rules of statutory construction instead of engaging in a deferential inquiry about whether an agency's views are reasonable. Courts of appeals face the question how to apply their new interpretative responsibilities in the absence of* Chevron *deference. This Essay argues that courts of appeals must now apply the long-standing rule of strict construction of deportation statutes, also known as the immigration rule of lenity, which provides that ambiguities in deportation statutes be resolved to limit the sanction of deportation. This Essay shows that the Court developed the rule of strict construction of deportation statutes as a substantive check against the harsh consequences of deportation statutes. It further shows that the Court treated it as a strong substantive rule that applied to ambiguous statutes, even in situations where the agency's position found support in its contemporaneous interpretation of the statute. By 1966, the Solicitor General as well as majority and dissenting Justices treated the rule as settled, leaving only the question whether a particular statutory provision contained an ambiguity sufficient to trigger the rule in the case before the Court. This established rule of strict construction is supported by the same justifications as the criminal rule of lenity and is further supported by unique aspects of deportation statutes, which typically have no statute of limitations and may apply retroactively. While much remains to be seen about how courts will apply their interpretive powers in the wake of* Loper Bright*, the rule of strict construction of deportation statutes has the pedigree of a strong substantive rule that ought to be considered fully in determining the scope of deportation laws.*

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> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment of exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a

* Professor of Clinical Law, New York University School of Law. The author thanks Adam Cox, Jill Family, Amanda Frost, Lucas Guttentag, Daniel Harawa, Aidan Langston, Manuel Vargas, Christopher Walker, and Jonathan Weinberg for their thoughtful comments. The author also gratefully acknowledges the discussion with colleagues on this subject at the New York University School of Law Summer Workshop and the Immigration Law Professors Workshop.

> forfeiture is a penalty. To construe this statutory provision less generously to the [noncitizen] might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.
>
> —*Fong Haw Tan v. Phelan*, 1948[1]

## INTRODUCTION

The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* calls on courts to apply a broad range of rules of statutory construction instead of engaging in a deferential inquiry about whether an agency's views are reasonable.[2] For immigration law, this mandate has immediate and widespread impact on the work of the courts of appeals. As just one example, on August 27, 2024, the Board of Immigration Appeals ruled that the deportability ground for a child abuse offense extends to attempt convictions, even though the statute does not specify that it encompasses attempt offenses.[3] This ruling will surely be appealed to the federal courts of appeals, which annually hear thousands of immigration appeals.[4] The key question, in this matter as with so many others,[5] is how courts should approach these questions in the wake of *Loper Bright*. Without *Chevron* deference, do any default rules apply with respect to ambiguous statutory provisions concerning deportation? This Essay answers in the affirmative: Courts should now look to the long-standing rule of strict construction of deportation statutes, also known as the immigration rule of lenity, which

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1 333 U.S. 6, 10 (1948) (citation omitted).

2 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2264–68 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)) (noting that courts interpret statutes using traditional tools of statutory interpretation).

3 *In re* D. Rodriguez, 28 I. & N. Dec. 815, 817–21 (B.I.A. 2024).

4 Decisions of the Board of Immigration Appeals are subject to direct review in the courts of appeals. 8 U.S.C. § 1252(b)(2). Between July 2022 and June 2023, there were 5,748 administrative agency appeals resolved in the courts of appeals. United States Courts, U.S. Court of Appeals, Table B-5, U.S. Courts of Appeals Statistical Table for the Federal Judiciary, U.S. COURTS (June 30, 2023), https://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2023/06/30 [https://perma.cc/G3NL-GFWD]. Seventy-nine percent of these cases involve petitions for review from decisions of the Board of Immigration Appeals. United States Courts, *Federal Judicial Caseload Statistics 2023*, https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2023 [https://perma.cc/R96P-WVQK].

5 Shortly after *Loper Bright*, the Supreme Court sent two immigration cases back to the courts of appeals for reconsideration in light of *Loper Bright*. *See* Diaz-Rodriguez v. Garland, 55 F.4th 697 (9th Cir. 2022) (en banc) (determining whether endangering the welfare of a minor is a crime of child abuse), *petition for cert. filed*, 2023 WL 2479259 (U.S. Mar. 8, 2023) (No. 22-863), *vacated and remanded*, 144 S. Ct. 2705 (2024); Solis-Flores v. Garland, 82 F.4th 264 (4th Cir. 2023) (determining whether receipt of stolen property is a crime involving moral turpitude), *petition for cert. filed*, 2024 WL 778298 (U.S. Feb. 20, 2024) (No. 23-913), *vacated and remanded*, 144 S. Ct. 2709 (2024).

provides that ambiguities in deportation statutes be resolved to limit the sanction of deportation.[6]

Past commentary has tried to situate the immigration strict construction rule in a world dominated by *Chevron*.[7] Current literature presents every possible iteration of the role of the strict construction rule in the context of *Chevron*'s two-step framework. Commentators have argued that it is a substantive canon that should be applied at step one;[8] that it should be a tool of last resort at step one;[9] that it should be applied at step two to evaluate reasonableness;[10] that it should be applied as a tool of last resort after step two;[11] that it requires a higher level of ambiguity than the ambiguity needed for deference at step one;[12] or that the strict construction rule should be "interred" because it short-circuits deference to agency interpretations.[13]

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6 *Loper Bright* recognizes an initial step about whether a statute has delegated to an agency some range of interpretative authority. *See* 144 S. Ct. at 2273. The government's arguments for expressly delegated interpretive authority to all interpretations by the Attorney General does not hold muster as to deportation statutes. *See* Nancy Morawetz, *Immigration Law After Loper Bright: The Meaning of 8 U.S.C. § 1101(a)(3)*, 99 N.Y.U. L. REV. ONLINE 282, 287–97 (2024) (arguing that a statute resolving immigration law conflicts internal to the executive branch does not bear on judicial deference questions); *see also* Ruiz v. Att'y Gen., 73 F.4th 852, 860–62 (11th Cir. 2023) (Newsom, J., concurring) (analyzing text and history of 8 U.S.C. § 1103(a)(1)). Without the requirement to defer, judges use a "traditional interpretive toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the law." Kisor v. Wilkie, 588 U.S. 558, 600 (2019) (Gorsuch, J., concurring). The only question in that framework is whether an agency's view about how to read the law is persuasive. *See id.* at 596–99 (discussing Skidmore v. Swift & Co., 323 U.S. 134 (1944)). Under *Loper Bright*, "agencies have no special competence in resolving statutory ambiguities. Courts do." 144 S. Ct. at 2251.

7 *See* 467 U.S. at 842–43 (stating that when reviewing an agency's statutory construction, courts must address two questions: whether Congress has directly spoken to the issue and, if not, whether the agency's construction is permissible).

8 *See* David A. Luigs, Note, *The Single-Scheme Exception to Criminal Deportations and the Case for* Chevron*'s Step Two*, 93 MICH. L. REV. 1105, 1130–31 (1995) (arguing that *Chevron* is not applicable to deportation statutes); *cf.* Elliot Greenfield, *A Lenity Exception to* Chevron *Deference*, 58 BAYLOR L. REV. 1, 55–61 (2006) (arguing that the criminal rule of lenity should trump interpretations of statutes with criminal implications).

9 *See* Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to* Chevron *Deference in Immigration Cases*, 99 CORNELL L. REV. 925, 946–47 (2014) (arguing that courts should examine other tools before applying the rule of lenity at step one).

10 *See* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 574–82 (2003) (arguing that the immigration rule of lenity is best applied at step two of *Chevron*).

11 *See* David S. Rubenstein, *Putting the Immigration Rule of Lenity in its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 517 (2007) (suggesting that courts may use the immigration lenity canon after concluding at step two that the agency interpretation is unreasonable).

12 *See* William T. Gillis, Note, *An Unstable Equilibrium: Evaluating the "Third Way" Between* Chevron *Deference and the Rule of Lenity*, 12 N.Y.U. J.L. & LIBERTY 352, 361–62 (2019) (suggesting that for deportation statutes, when a statute is ambiguous enough to trigger *Chevron* deference but not the rule of lenity, courts may avoid canons that the author characterizes as leading to the government always winning or always losing).

13 *See* Patrick J. Glen, *Interring the Immigration Rule of Lenity*, 99 NEB. L. REV. 533, 536

There is also literature seeking to exclude deference in the specific context of detention statutes[14] or statutes governing fear-based relief.[15] All of this literature seeks to place the strict construction rule within the *Chevron* framework.

With *Loper Bright*, the terrain has shifted. The *Loper Bright* decision requires that courts apply traditional tools of statutory construction when they face a statutory question.[16] These traditional tools include substantive canons that the Court applied long before *Chevron*.[17] Indeed, the *Loper Bright* decision refers to several canons as a contrast to how *Chevron* approached decisionmaking.[18] As Justice Gorsuch observed, *Chevron* deference not only was in tension with substantive canons of construction, but also served as the inverse of substantive rules on the proper treatment of ambiguity in statutory interpretation.[19]

*Loper Bright* leaves open a window for courts to look to "persuasive" agency views under the *Skidmore* doctrine.[20] As others have observed, *Loper Bright*'s reference to *Skidmore* is in tension with the Court's emphatic embrace of the role of courts in interpreting statutes.[21] Whatever role *Skidmore* has, however, it is hard to reconcile *Skidmore* deference to

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(2021) (arguing that the immigration rule of lenity is irrelevant under *Chevron*).

14 *See* Alina Das, *Unshackling Habeas Review:* Chevron *Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 197–203 (2015) (arguing that strict construction rules and not *Chevron* deference should apply to the construction of detention statutes); Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 532–33 (2019) (arguing that a physical liberty exception to *Chevron* is justified normatively and is reflected in Supreme Court practice).

15 *See* Michael Kagan, Chevron*'s Asylum: Judicial Deference in Refugee Cases*, 58 HOUS. L. REV. 1119, 1146 (2021) (arguing that *Chevron* should not apply to interpretations of asylum law).

16 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2266, 2268 (2024) (stating that the purpose of traditional tools of interpretation is to assist courts in resolving statutory ambiguities in any context, including ambiguities about the scope of agency power).

17 *See generally* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 576–84 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (discussing the Court's use of substantive canons and rationales for such canons).

18 *See* 144 S. Ct. at 2269 (discussing the major questions doctrine, which requires express congressional action for economically or politically significant issues); *id*. at 2271 (discussing the lack of clarity about *Chevron*'s interaction with the rule of lenity).

19 *Id.* at 2286 n.5 (Gorsuch, J., concurring) (mentioning the rule of lenity, the presumption against retroactivity, and the federalism canon as being in tension with *Chevron*, while also noting that the rule of lenity specifically is nearly the inverse of *Chevron*).

20 *See id.* at 2262 (citing Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

21 *See* Kristin E. Hickman, *Anticipating a New Modern* Skidmore *Standard*, 74 DUKE L.J. ONLINE (forthcoming 2025) (manuscript at 3) (on file at https://ssrn.com/abstract=4941144) (observing that the tone and tenor of the *Loper Bright* decision do not align with pre-*Loper Bright*, *Skidmore* caselaw); *see also* Mayfield v. Dep't of Labor, 117 F.4th 611, 619 (5th Cir. 2024) (noting difficulty in evaluating what work *Skidmore* deference does if courts should adopt the best interpretation of a statute). *But see* Lopez v. Garland, 116 F.4th 1032, 1041–43 (9th Cir. 2024) (using *Skidmore* deference to uphold interpretation that was a reversal in agency position).

interpretations that run counter to a substantive rule of statutory interpretation that is designed to require Congress, and not the agency, to decide an issue of statutory interpretation.[22]

This Essay places the traditional substantive rule of strict construction of deportation statutes in this context.[23] It shows that the Supreme Court debated and developed the traditional rule of strict construction of deportation statutes through decisions over several decades, making it an established precedent that is worthy of full application in the wake of *Loper Bright*.[24] This issue is of immediate importance to circuit courts as they adjudicate cases remanded in the wake of *Loper Bright*, as well as other cases percolating through the courts of appeals.[25]

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[22] *Loper Bright* cited to King v. Burwell, 576 U.S. 473 (2015), as an example of how the Court had already cut back on *Chevron* deference in the case of major questions. Notably, the key rationale offered in *King* for the emerging major questions doctrine was that certain matters (in that case whether to delegate important authority to an agency) should be decided by Congress. *King*, 576 U.S. at 485–86. This structural argument about Congress's role is common to substantive canons. *See, e.g.*, Wooden v. United States, 595 U.S. 360, 391 (2022) (Gorsuch, J., concurring) (describing role of the rule of lenity in "plac[ing] the weight of inertia on the party that can best induce Congress to speak more clearly" (citations omitted)). Indeed, just days after deciding *Loper Bright*, the Court turned to a substantive presumption to conclude that the statute of limitations on an agency rule starts with the date the individual is affected. *See* Corner Post v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2451–52 (2024) (basing statutory construction on theory that Congress legislates against a standard rule for statutes of limitations). *See also* Harrow v. Dep't of Def., 601 U.S. 480, 484 (2024) (requiring a clear statement from Congress for a procedural requirement to be treated as jurisdictional). It is beyond the scope of this Essay to fully explore the relationship between substantive canons and statutory interpretation. The goal here is to show that the rule of strict construction of deportation statutes has a valid pedigree and precedential status as a substantive rule of statutory interpretation.

[23] Despite the Court's use of substantive canons, there continues to be scholarly debate about the proper role (if any) for substantive canons. *See*, *e.g.*, Benjamin Eidelson & Matthew C. Stephenson, *The Incompatibility of Substantive Canons and Textualism*, 137 HARV. L. REV. 515, 586 (2023) (arguing that substantive canons are an attractive way to simulate constitutional limits where current doctrine gives constitutional values short shrift); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1109–11 (2017) (analogizing substantive canons with priority and closure rules in interpreting private law documents). There is also some dispute about how to measure, and whether it is possible to measure ambiguity so as to apply canons based on ambiguity. *Compare* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2134–44 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (arguing for reducing or eliminating reliance on substantive canons due to the difficulty of assessing ambiguity), *with* Ryan D. Doerfler, *How Clear is "Clear"?*, 109 VA. L. REV. 651, 672 (2023) (suggesting that context matters, such that ambiguity canons should apply in high stakes interpretations).

[24] *See* Anita S. Krishnakumar & Victoria F. Nourse, Book Review, *The Canon Wars*, 97 TEX. L. REV. 163, 177–84 (2018) (reviewing WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION (2016)) (contrasting substantive rules of construction developed through precedent with stray isolated comments).

[25] The Supreme Court has remanded several cases for reconsideration in light of its decision in *Loper Bright*. *See, e.g.*, Santana v. Garland, No. 24-46, 2025 WL 76414 (U.S. Jan. 13, 2025) (vacating and remanding for further consideration in light of *Loper Bright*); Wong v. Garland, 145 S. Ct. 432 (2024) (same); Solis-Flores v. Garland, 144 S. Ct. 2709 (2024) (same); Diaz-Rodriguez

This Essay makes two arguments: first, that the cases that announced and applied the rule of strict construction for deportation statutes treated the rule as an important substantive rule; and second, that the rule of strict construction properly reflects the Court's concerns with the severity of deportation, the resulting need for Congress to assess the circumstances triggering deportation, as well as considerations of fair notice in the context of an area of statutory law where Congress has immense powers. Part I explores the cases in which the Court developed the immigration strict construction rule to show that it served as a substantive rule in the resolution of those cases. Although it is difficult to know exactly what role multiple justifications played in the outcome of a case, an examination of the briefs and opinions demonstrates that the strict construction rule operated as a strong substantive rule that was determinative in the face of textual ambiguity. Part II explores underlying justifications for the rule. These include the harshness of deportation, separation of powers concerns, and fair warning of deportation consequences. These concerns reach beyond the justifications for the criminal rule of lenity due to unique characteristics of deportation law, such as the absence of any statute of limitations, and the limits of recognized constitutional constraints on expansive deportation laws during the period when the Court developed the rule of strict construction. Finally, the Essay concludes that in the wake of *Loper Bright*, courts should apply the traditional rule of strict construction of deportation statutes.

## I
## DEVELOPMENT OF THE RULE OF STRICT CONSTRUCTION OF DEPORTATION STATUTES

The cases that first developed the rule of strict construction of deportation statutes treated it as a substantive rule of statutory interpretation. While Justices disagreed about whether a particular provision was or was not ambiguous, so as to trigger the rule, they came to agree that the rule applied to resolution of statutory questions in deportation cases. By 1966, the Solicitor General referred to the rule as the "familiar" rule on doubts being resolved in favor of the noncitizen, questioning only whether the provision at issue was clear or ambiguous.[26]

The case most frequently cited as the origin of the rule of strict construction is *Fong Haw Tan v. Phelan*.[27] The petitioner had immigrated to

v. Garland, 144 S. Ct. 2705 (2024) (same). The lower courts continue to face statutory interpretation questions on a variety of issues. *See, e.g.*, Edwards v. Att'y Gen., 56 F.4th 951, 963–64 (11th Cir. 2022) (discussing the definition of the word "sentence" for immigration purposes in the context of a state court modification of a sentence), *vacated and replaced*, 97 F.4th 725 (11th Cir. 2024).

[26] *See* Brief for the Petitioner at 36–37, I.N.S. v. Errico, 385 U.S. 214 (1966) (No. 54) [https://perma.cc/4B7T-7VVR].

[27] 333 U.S. 6 (1948). An earlier case, Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947),

the United States in 1910 at the age of sixteen as a lawful permanent resident. In 1925, he was convicted of two murders through a single indictment and trial. Under then-applicable law, he was deportable if he had been "sentenced more than once" for an offense that was a crime involving moral turpitude.[28] Prior to *Fong Haw Tan*, there was a four-way split on how to read the phrase "sentenced more than once." The Ninth Circuit below in *Fong Haw Tan* required only that there was more than one offense, regardless of whether it arose from the same event.[29] Meanwhile, the Second Circuit looked to whether the sentencing was simultaneous or consecutive;[30] the Fourth Circuit considered whether the crimes were from separate transactions;[31] and the Fifth Circuit required that the second case come after the sentencing and punishment for the first offense.[32] In a unanimous opinion, the Supreme Court noted these different interpretations, and then stated that it would follow the Fifth Circuit reading of the statute.[33] The Court offered two justifications for that choice: (1) it discussed how there was "a trace of that purpose found in its legislative history," and (2) it announced that it would "resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile."[34] The Court's statement of a presumption against deportation followed when the Court stated:

> To construe this statutory provision less generously to the [noncitizen] might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.[35]

On its face, it is hard to see this description of the methodology applied in *Fong Haw Tan* as anything but a strong substantive rule of statutory construction. The government argued in its brief in favor of the rule of the Fourth Circuit, offering persuasive reasons why a separate transaction rule would lead to the fewest anomalies in the application of the statute.[36] The

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offered a less strong version of the rule—that the Court would not allow deportation to depend on circumstances that were "so fortuitous and capricious." *Delgadillo* also justified its reading of the relevant statute on the extremity of banishment or exile. *Id.*

28 Immigration Act of 1917, ch. 29, § 19(a), 39 Stat. 889, amended by 54 Stat. 671.

29 Nishimoto v. Nagle, 44 F.2d 304, 306 (9th Cir. 1930).

30 Johnson v. United States *ex rel.* Pepe, 28 F.2d 810, 811 (2d Cir. 1928).

31 Tassari v. Schmucker, 53 F.2d 570, 573 (4th Cir. 1931).

32 Wallis v. Tecchio, 65 F.2d 250, 252 (5th Cir. 1933).

33 Fong Haw Tan v. Phelan, 333 U.S. 6, 8–9 (1948).

34 *Id.* at 9–10.

35 *Id.* at 10.

36 The government first outlined the positions of the circuits, and then explained why it thought the statute was ambiguous and that there was no relevant administrative interpretation. *See* Brief for the Respondent at 13–23, *Fong Haw Tan*, 333 U.S. 6 (No. 370) [https://perma.cc/VE66-D7ZK]. It proceeded to argue that the various circuit rules created arbitrary distinctions between similar

government further argued that two separate murders ought to constitute two transactions, but offered as a back-up position that the Court could remand to determine whether the case involved the unusual circumstance of a single bullet killing two people as part of one event.[37] The Court rejected these alternative constructions in favor of the rule of strict construction.[38] Its decision made clear that the statute was in fact ambiguous, and that it saw no more than a "trace" of support in legislative history for the rule it ultimately adopted.[39] Instead, the Court looked to the rule of strict construction to resolve the case.[40]

In subsequent years, the Court reaffirmed the validity of the rule of strict construction. Because the rule turns on ambiguity, the Justices did not necessarily agree on whether a statute was ambiguous. But throughout the next two decades, they repeatedly cited to the rule as appropriate when a statute is ambiguous. Other than one dissenting opinion written shortly after *Fong Haw Tan*,[41] no dissent questioned the validity of the rule.

For example, in 1954, in *Barber v. Gonzales*, the Court held that persons of Philippine origin who had entered the United States prior to the independence of the Philippines could not be deported for two crimes involving moral turpitude after entry because they had never entered the United States from a foreign jurisdiction.[42] The respondent in *Barber* had arrived in the United States in 1930, four years before the Philippine Independence Act, which transformed Philippine residents from nationals to "aliens."[43] After discussing its interpretation of the term "entry," the Court considered the Solicitor General's argument that its reading implemented Congress's broader purpose to "terminate the United States residence" of so-called "alien criminals."[44] The Court relied on the strict construction rule to reject this argument and essentially render previous nationals exempt from deportation on criminal grounds. Justice Minton, who was appointed to the Court a year after *Fong Haw Tan*,[45] penned a dissent disagreeing with the

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cases and that a separate transaction rule better accomplished Congress's purpose, as "revealed by its meager legislative history." *Id.* at 24–29. It concluded that a separate transaction rule was best and that the court could either treat two murders as necessarily two transactions or remand for further inquiry. *Id.* at 30–33.

37 *Id.*

38 *Id.*

39 *Id.* at 9.

40 *But see* Glen, *supra* note 13, at 542–44 (suggesting that the rule of strict construction was an afterthought in the Court's opinion).

41 *See* Barber v. Gonzales, 347 U.S. 637, 644 (1954) (Minton, J., dissenting) (arguing that the Court's strict construction approach violated public policy).

42 *Id.* at 642 (majority opinion).

43 Philippine Independence Act of 1934, 48 Stat. 456, 462 § 8(a)(1) (1934).

44 *Barber*, 347 U.S. at 642.

45 *See Justices 1789 to Present*, Supreme Court of the United States https://www.supremecourt.gov/about/members_text.aspx [perma.cc/47A8-3JSF] (listing

rule of strict construction announced in *Fong Haw Tan*, and expressing his view that it led to a "strained construction" of the term "entry."[46] He was joined by two Justices who had signed onto the *Fong Haw Tan* opinion.[47]

Four years later, the Court turned again to the strict construction rule to conclude that a deportation ground that applied after "entry" should refer to the most recent of the person's entries.[48] *Bonetti v. Rogers* concerned the applicability of the deportation ground for membership in the Communist Party.[49] The petitioner had left the United States after he was no longer a member of the Communist Party to fight in the Spanish Civil War and then returned as a new immigrant.[50] This case came on the heels of cases about whether deportation laws could reach back in time to those who were past members of the Communist Party. In 1939, the Supreme Court had ruled that it would not read a then-existing deportation provision based on membership in the Communist Party as applying to those who had relinquished their membership before it became a ground of deportation.[51] Congress revised the deportation law in 1940 to expressly cover past membership in the Communist Party.[52] In 1952, the Supreme Court upheld the 1940 law.[53] Congress further expanded its deportation grounds for members of the Communist Party in 1950.[54] The Court upheld the retroactive effect of the new expansion in 1954.[55]

By the time *Bonetti* came to the Court in 1958, there were powerful grounds for the government to argue that Congress had a broad purpose to rid the United States of persons who had ever been members of the Communist Party. The briefing reflected the government's confidence in its statutory argument.[56] In addition to arguing about past constructions of the term "entry," the government cited extensive passages in the legislative history, and submitted an additional supplemental brief to the reply brief to add more evidence of Congress's intent.[57] Nonetheless, the Court concluded

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appointment dates of Justices).

46 *Barber*, 347 U.S. at 643 (Minton, J., dissenting).

47 Justice Reed joined the Court in 1938. Justice Burton joined the Court in 1945. *See* Supreme Court of the United States, *supra* note 45.

48 Bonetti v. Rogers, 356 U.S. 691, 700 (1958).

49 *Id.* at 692–93.

50 *Id.*

51 Kessler v. Strecker, 307 U.S. 22, 29 (1939) ("If Congress meant that past membership, of no matter how short duration or how far in the past, was to be a cause of present deportation the purpose could have been clearly stated.").

52 Alien Registration Act, 54 Stat. 670, 673 § 23(a) (1940) (repealed 1952).

53 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 584–96 (1952).

54 Internal Security Act of 1950, 64 Stat. 987, 1006 § 22 (repealed 1971).

55 *See* Galvan v. Press, 347 U.S. 522, 531 (1954).

56 Brief for the Respondent at 9–23, Bonetti v. Rogers, 356 U.S. 693 (1958) (No. 94) [https://perma.cc/W8EK-QSYG].

57 Supplemental Memorandum for the Respondent at 2–10, *Bonetti*, 356 U.S. 693 (No. 94)

that Congress had not considered the "novel" situation presented in the case of a person who had been readmitted to the country prior to the 1950 law, such that the statute was ambiguous.[58] It proceeded to cite to the strict construction rule to justify its holding in favor of the returned immigrant.[59] The dissent did not question whether such a rule existed but instead argued that the evidence of congressional intent was powerfully against what it saw as a strained reading of immigration law that benefited the noncitizen.[60]

The Court revisited the strict construction rule in 1964 in a case about whether deportability grounds apply to a person who obtained citizenship fraudulently and who, prior to denaturalization, was convicted of the crime underlying the deportation proceedings. In *Costello v. I.N.S.*, the petitioner was naturalized in 1925, was convicted of tax crimes in 1954, and was denaturalized in 1959 on the ground that his original naturalization application was fraudulent.[61] He had listed his occupation as real estate when he in fact received most of his income from bootlegging during Prohibition.[62] Once Costello lost his citizenship, the Immigration and Naturalization Service sought to deport him based on his 1954 tax convictions. Before the Supreme Court, the question was whether the deportability statute applied to a person who held citizenship at the time of the relevant conviction, and whether the subsequent denaturalization related back to the improper citizenship application.[63] The petitioner relied heavily on *Fong Haw Tan*, citing it six times in the opening brief and three times in the reply brief, including in a section titled: "The Principle of *Fong Haw Tan v. Phelan* Dictates a Construction of Section 241(a)(4) as not Applying to Petitioner."[64] The Solicitor General, in contrast, did not cite to *Fong Haw Tan*, relying solely on an argument that the statute was clear.[65] The Court ruled for Mr. Costello. Both the majority and the dissent cited to *Fong Haw Tan*, with the majority invoking it as resolving any doubts,[66] and the dissent arguing that Congress's intent was sufficiently clear that the rule of strict construction did

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[https://perma.cc/44TZ-6JRA] (attaching supplemental evidence of congressional intent to bar or deport all noncitizens with ties to the Communist Party).

58 *Bonetti*, 356 U.S. at 696.

59 *Id.* at 699.

60 *Id.* at 702–03 (Clark, J., dissenting) (arguing that majority was amending the statute and not discussing rule of strict construction).

61 376 U.S. 120, 121 (1964).

62 Costello v. United States, 365 U.S. 265, 272 (1961) (finding no doubt about misrepresentation of occupation so as to uphold denaturalization).

63 Costello v. I.N.S., 376 U.S. at 121.

64 *See* Brief for the Petitioner at 6, 7, 16, 17, 20, 24, 29, Costello v. I.N.S., 376 U.S. 120 (No. 83) [https://perma.cc/Y6B4-D3HN]; Reply Brief for the Petitioner at 3, Costello v. I.N.S., 376 U.S. 120 (No. 83) [https://perma.cc/7YC2-TRYW].

65 *See* Brief for the Respondent at 3–42, Costello v. I.N.S., 376 U.S. 120 (No. 83) [https://perma.cc/V7Q8-FBT7].

66 Costello v. I.N.S., 376 U.S. at 128.

not apply. In dissent, Justice White wrote: "I have no quarrel with the doctrine that where the Court is unable to discern the intent of Congress, ambiguities should be resolved in favor of the deportee, but here there is a clear expression of congressional purpose."[67]

By 1966, the Solicitor General's office expressly recognized the strict construction rule and made arguments about why it should not apply due to the clarity of congressional intent.[68] In *I.N.S. v. Errico*, the Court considered whether persons who entered the United States through misrepresentation in order to avoid quotas could later obtain protection from deportability under a provision for those who were "otherwise admissible" and had a family relationship to a United States citizen or permanent resident.[69] In the consolidated cases before the Supreme Court, one noncitizen had misrepresented his skills to avoid restrictive quotas; the other had misrepresented a marriage to a United States citizen.[70] In each case, the noncitizen subsequently had a United States citizen child and sought exemption from deportation under the exemption provision.[71] The government argued that these persons were not "otherwise admissible" because they were not admissible under restrictive quotas.[72]

In the briefing in *Errico*, the government did not question the existence of a rule of strict construction of deportation statutes. It wrote: "The familiar rule that doubts concerning the interpretation of deportation laws must be resolved in favor of the alien did not authorize the court below to expand the language and purpose of the statute beyond the limits clearly fixed . . . ."[73] Ultimately, the Court did not agree with the government's view on the ambiguity of the statute. Citing to *Fong Haw Tan* and *Barber*, the Court repeated that some doubt about the correct construction should be resolved in favor of the noncitizen.[74]

Notably, the line of cases establishing the rule of strict construction did not treat agency interpretations as relevant to the applicability of the rule. In two of the strict construction cases, the government argued that its view of the statute was supported by agency interpretations which, under then-existing law, were entitled to consideration by courts in ordinary cases of statutory interpretation.[75] In *Barber*, the government argued that its reading

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67 *Id.* at 148 (White, J., dissenting).

68 *See, e.g.*, Brief for the Petitioner, *Errico*, 385 U.S. 214 (No. 54) [https://perma.cc/SL28-K2AR].

69 I.N.S. v. Errico, 385 U.S. 214, 217 (1966).

70 *Id.* at 215–16.

71 *Id.*

72 *See* Brief for the Petitioner at 16–17, *Errico*, 385 U.S. 214 (No. 54) [https://perma.cc/SL28-K2AR].

73 *Id.* at 36–37 (citations omitted).

74 *See Errico*, 385 U.S. at 225.

75 *Fong Haw Tan*, decided in 1948, post-dated Skidmore v. Swift & Co., 323 U.S. 134 (1944),

of the statute was supported by twelve years of administrative construction that had not been repudiated by Congress.[76] The Court's opinion did not even mention this argument. It instead relied on its own reading of the statute and the rule of strict construction of deportation statutes.[77] Similarly, in *Errico*, the government argued that its reading of the statute was supported by three decisions of the Board of Immigration Appeals.[78] Once again, the Court's opinion did not discuss whether to defer to the agency construction, and only cited two agency decisions as showing a concession in the government's argument.[79] These decisions show that the Court did not view ordinary principles of respect for agency interpretations of statutes to apply to the substantive rule of strict construction. This does not appear to have been an oversight. Instead, it follows from the strict construction rule's emphasis that its purpose is to assure that Congress, through a duly enacted statute, has determined that the harsh consequences of deportation are warranted.[80]

Thus by 1966, majority and dissenting opinions, as well as briefs by the Solicitor General supported application of a strict construction rule to ambiguous deportation statutes and did so despite government arguments supported by an administrative construction. The Supreme Court has continued to cite the rule of strict construction and has never disavowed it.[81]

*Chevron* deference muddied the waters. In the early years after *Chevron*, before the now infamous two-step process was ingrained,[82] the Court treated the rule of strict construction as fully applicable to questions of statutory interpretation. In the 1987 case of *I.N.S. v. Cardoza-Fonseca*, the majority presumed that *Chevron* did not apply to questions of law.[83] It proceeded to rule in favor of the noncitizen based on its textual analysis and evidence of congressional purpose and noted that it had no need to make use of "the longstanding principle of construing any lingering ambiguities in

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by four years. As explained in *Loper Bright*, *Skidmore* provides grounds for respect to agency views and factors for considering the degree of respect. Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2284 (2024). *See also supra* text accompanying notes 20–22 (discussing tension between *Skidmore* and *Loper Bright*).

76 Brief for the Petitioner at 24–25, Barber v. Gonzales, 347 U.S. 637 (1954) (No. 431) [https://perma.cc/MBR5-25FP].

77 *Barber*, 347 U.S. at 641–43.

78 Brief for the Petitioner at 16–17, *Errico*, 385 U.S. 214 (No. 54) (citing *In re* D'O, 8 I. & N. Dec. 215 (B.I.A. 1958); *In re* Slade, 10 I. & N. Dec. 128 (B.I.A. 1962); and *In re* S, 7 I. & N. Dec. 715 (B.I.A. 1958)) [https://perma.cc/SL28-K2AR].

79 *Errico*, 385 U.S. at 217 & n.5.

80 *Id*. at 225 ("[S]ince the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.") (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

81 *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987); I.N.S. v. St. Cyr., 533 U.S. 289, 320 (2001); Dada v. Mukasey, 554 U.S. 1, 18–19 (2008).

82 As Chief Justice Roberts noted in *Loper Bright*, *Chevron* was not seen as a watershed decision when it was decided. 144 S. Ct. at 2264.

83 *Cardoza-Fonseca*, 480 U.S. at 446–48.

deportation statutes in favor of the alien[,]" citing *Errico*, *Costello*, and *Fong Haw Tan*.[84] Justice Scalia, in his concurrence, took issue with the majority opinion's reliance on legislative history as being in tension with *Chevron*, while agreeing with the result as a matter of textual analysis and the structure of the statute and not questioning the reference to the rule on ambiguities.[85] No later case rejected the rule of strict construction. Indeed, it was cited favorably in a majority opinion as late as 2008.[86]

In later years, lower courts saw real conflict between the rule of strict construction and the *Chevron* framework that deferred to reasonable agency views in the context of ambiguity. For example, one court stated that "[i]t cannot be the case . . . that the doctrine of lenity must be applied whenever there is an ambiguity in an immigration statute because, if that were true, it would supplant the application of *Chevron* in the immigration context."[87] This conflict is echoed in the academic literature that explored the interplay of *Chevron* with the rule of strict construction.[88]

As Michael Kagan has noted, the Supreme Court stayed out of the fray with respect to statutes that directly bore on grounds of deportation.[89] But as counsel pressed the applicability of the rule of strict construction in several cases, the Court appears to have recognized the importance of the question. In the 2017 case *Esquivel-Quintana v. Sessions*,[90] members of the Court mused at length during oral argument about the relation between a rule of lenity and deference under *Chevron*.[91] But they were able to sidestep the questions by concluding that the statute was clear and supported the position of the noncitizen, so that neither lenity nor *Chevron* was relevant to the disposition of the case.[92]

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84 *Id.* at 449.

85 *Id*. at 453, 454 (objecting that the Court's approach of using "traditional tools of statutory construction" would make deference a "doctrine of desperation").

86 *Dada*, 554 U.S. at 18–19.

87 Ruiz-Almanzar v. Ridge, 485 F.3d 193, 198 (2d Cir. 2007).

88 *See supra* notes 8–15 and accompanying text.

89 *See* Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 527–28 (2019) (listing deportation cases where the Supreme Court did not apply *Chevron* deference).

90 581 U.S. 385 (2017).

91 *See* Transcript of Oral Argument, Esquivel-Quintana v. Sessions, 2017 WL 749022, at *11–12 (Roberts, C.J.) (questioning whether lenity and *Chevron* can co-exist); *id*. at *12 (Kagan, J.) (suggesting a middle view that ambiguity does not mean the same thing for *Chevron* and the rule of lenity).

92 *Esquivel-Quintana*, 581 U.S. at 397–98. The Court once again sidestepped the issue in Pugin v. Garland, where the petitioner had argued both for application of the criminal rule of lenity and the rule of strict construction. Brief for Petitioner at 43–49, Pugin v. Garland, 599 U.S. 600 (2023) (No. 22-23). The Court gave this argument short shrift, stating that the lack of sufficient ambiguity meant that it did not have to consider the question of how lenity principles might apply. *Pugin*, 599 U.S. at 610 (citing cases about the criminal rule of lenity and Kawashima v. Holder, 565 U.S. 478, 489 (2012), which states that the rule of strict construction of deportation statutes does not apply where the statute is clear).

## II
## THE CASE FOR STRICT CONSTRUCTION OF IMMIGRATION STATUTES

Now that the Court has overturned *Chevron*, the rule of strict construction of immigration statutes should spring back in full force as a substantive rule of statutory construction.[93] As shown above, the Court has repeatedly recognized this rule as applicable both in cases where all sides viewed the statute as ambiguous, and in some cases where it overcame government arguments that the statute was best read against the noncitizen. It therefore has a valid pedigree as precedent, setting forth a substantive rule of statutory construction. This Part looks at justifications for the rule.

### *A. Strict Construction and the Severity of Deportation*

From the start, the prime justification that the Court offered for the rule of strict construction was that deportation, even if not criminal punishment, is an extremely severe penalty.[94] Throughout the decisions are references to deportation being the equivalent of "banishment" or "exile."[95] The agreed-upon severity of deportation is evident in both decisions applying the strict construction rule for statutes and in then-contemporary constitutional cases in which the Court recognized the severity of deportation, but nonetheless upheld Congress's broad powers to impose deportation.[96] These cases show that, for the majority that reaffirmed broad congressional powers over immigrants, the rule of strict construction served as a counterweight to the power of Congress to impose penalties on noncitizens that would be unacceptable if applied to citizens. The rule stood for the proposition that Congress, which has broad powers in drafting deportation statutes, should at a minimum be clear about its decisions to impose banishment or exile.

The equating of deportation with banishment traces back to the dissenters in the 1893 case of *Fong Yue Ting v. United States*.[97] Using language of banishment, the dissenters argued that deportation is punishment.[98] They also made clear that they saw deportation as a

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93 *See supra* notes 17–22 and accompanying text.

94 The Courts' focus on the harshness of deportation as a penalty echoes historical justifications for the criminal rule of lenity, which in its origins applied to particularly harsh punishments. *See* Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. REV. 918, 924–25 (2020).

95 *See, e.g.*, Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (citing Delgadillo v. Carmichael, 332 U.S. 388 (1947)); I.N.S. v. Errico, 385 U.S. 214, 225 (1966) (Stewart, J., dissenting); Barber v. Gonzales, 347 U.S. 637, 642 (1954); Costello v. I.N.S., 376 U.S. 120, 128 (1964).

96 *See* Jordan v. De George, 341 U.S. 223, 229–32 (1951) (applying vagueness analysis in light of severity of deportation but finding statute not vague as applied to fraud crimes); *see also* Galvan v. Press, 347 U.S. 522, 530–31 (1954) (recognizing "drastic" quality of deportation but concluding that Congress has the power to enact retroactive laws).

97 149 U.S. 698, 740 (1893).

98 *See, e.g.*, *id.* at 740 (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away

particularly cruel form of punishment. Justice Field commented: "As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family and business there contracted."[99]

This theme of deportation as a cruel form of punishment is echoed in the first strict statutory construction case, *Fong Haw Tan*, where the Court says that "deportation is a drastic measure and at times the equivalent of banishment or exile."[100] It is repeated in subsequent cases, which cite to this specific paragraph in *Fong Haw Tan*.[101]

Strikingly, recognition of the severity of deportation also appears in the majority opinions in constitutional cases that reject the claims of noncitizens.[102] In the 1951 case *Jordan v. De George*, the Court considered a challenge to application of the crime involving moral turpitude category in immigration law.[103] Although the Court ruled against the noncitizen, both the majority and the dissent spoke to the severity of deportation as a reason to apply vagueness doctrine to deportation.[104] The majority ultimately ruled against the noncitizen, finding that his crime was a fraud crime and that fraud crimes had long been categorized as crimes involving moral turpitude.[105] But before doing so, it stated that the vagueness doctrine should be applied due to the grave nature of deportation, relying expressly on *Fong Haw Tan* for how deportation is the equivalent of banishment or exile.[106] The Court has more recently reaffirmed *De George*'s limits on vague deportation laws, striking down a portion of the "aggravated felony"[107] category from the 1996 laws as void for vagueness.[108]

The Court returned to constitutional challenges in 1952 and 1954 where it considered Congress's power to enact retroactive deportation laws making

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from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel."); *see also id.* at 749 (Field, J., dissenting) ("[I]f a banishment of this sort be not a punishment, and among the severest of punishments, it would be difficult to imagine a doom to which the name can be applied.") (quoting Madison at 4 Elliot's Deb. 554, 555 (1787)).

99 *Fong Yue Ting*, 149 U.S. at 759 (Field, J., dissenting).

100 *Fong Haw Tan*, 333 U.S. at 10.

101 *See supra* note 95.

102 *See* Jordan v. De George, 341 U.S. 223, 231 (1951); *see also* Galvan v. Press, 347 U.S. 522, 532 (1954).

103 341 U.S. at 223–24.

104 *See id.* at 231 (applying vagueness analysis due to the severity of the penalty of deportation); *see also id.* at 243 (Jackson, J., dissenting) (referring to deportation as a "savage" penalty).

105 *Id.* at 232.

106 *Id.* at 231.

107 8 U.S.C. § 1101(a)(43).

108 *See* Sessions v. Dimaya, 584 U.S. 148, 157 (2018) (invalidating the residual clause in the crime of violence aggravated felony category as void for vagueness and noting that deportation is a particularly severe penalty).

past membership in the Communist Party grounds for deportation.[109] The Court upheld the laws finding that the Ex Post Facto clause does not apply to penalties that are not punishment, thereby reaffirming *Fong Yue Ting*'s holding that deportation is civil and not a form of punishment.[110] But notably, the decision in *Galvan v. Press* in 1954 did not shy away from recognition that deportation is a cruel sanction. Writing for the majority, Justice Frankfurter stated: "[D]eportation may, as this Court has said in *Ng Fung Ho v. White*, deprive a man 'of all that makes life worth living'; and, as it has said in *Fong Haw Tan v. Phelan*, 'deportation is a drastic measure and at times the equivalent of banishment or exile'."[111] The Court proceeded to muse that if it were "writing on a clean slate" there would be good arguments that Due Process sets limits on the power to deport.[112] But the Court concluded that "the slate is not clean" and reaffirmed Congress's broad powers to deport, including through retroactive legislation.[113]

These cases show widespread agreement on the Court about the harshness of deportation and the role of that harshness in justifying strict construction rules, if not greater constitutional protections against punitive deportation laws. Through the rule of strict construction, the Court could protect noncitizens from expansive interpretations of deportation statutes without questioning that a properly enacted statute could impose deportation in a broad range of circumstances.[114]

### *B. Strict Construction and Separation of Powers*

Coupled with its concern about the harshness of deportation was *Fong Haw Tan*'s conclusion that Congress, through duly enacted laws, should determine what conduct warrants such harsh treatment.[115] In this discussion, the Court adopted the historical rationale for the rule of lenity in the criminal context, namely that Congress should be responsible for clearly delineating who is subject to a penalty for their conduct.

As others have chronicled, the rule of lenity for penal statutes is one of

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109 *See* Harisiades v. Shaughnessy, 342 U.S. 580, 591 (1952) (upholding retroactive deportation provisions of the Alien Registration Act); *see also* Galvan v. Press, 347 U.S. 522, 530–31 (1954) (upholding retroactive deportation provisions of the Internal Security Act). *See supra* notes 40–44 and accompanying text (discussing application of the rule of strict construction at the time of these constitutional challenges).

110 *See Harisiades*, 342 U.S. at 591; *see also Galvan*, 347 U.S. at 531.

111 *Galvan*, 347 U.S. at 530 (citations omitted).

112 *Id.* at 530–31.

113 *Id.* at 531.

114 As Hiroshi Motomura has described at length, the Court's norms for evaluating immigration statutes often depart from its willingness to enforce broader constitutional protections for noncitizens. *See* Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 567–75 (1990).

115 *See Fong Haw Tan*, 333 U.S. at 9–10.

the oldest and most well-established rules of statutory construction.[116] In 1880, Justice Marshall, writing in *United States v. Wiltberger*, explained:

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.[117]

*Fong Haw Tan* and its progeny plainly reference this emphasis on the role of the legislature.[118] By saying that the Court will not assume that Congress meant to "trench on" the noncitizen's freedom beyond "that which is required by the narrowest of several possible meanings of the words used,"[119] the Court requires that the legislative branch, through a statute signed by the President, take full responsibility for the outer scope of deportation laws. For the *Fong Haw Tan* Court, the need for Congress to be clear about the scope of deportation statutes sprung directly from its assessment of the harshness of deportation as "a drastic measure and at times the equivalent of banishment or exile."[120]

Notably, during the time when the Court developed and applied the rule of strict construction for deportation statutes, it was deeply enmeshed in questions about the degree to which statutes could require the deportation of noncitizens. Its decision in *Jordan v. De George*,[121] applying vagueness doctrine to deportation grounds, demanded that statutes be clear about conduct that could lead to deportation. But the majority opinions in

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116 *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 128 (2010) (recognizing that the criminal rule of lenity is one of the oldest canons of statutory construction); *see also* Hopwood, *supra* note 94, at 918 (arguing for restoration of the historical rule of the criminal rule of lenity). The Court has equivocated about whether the rule of lenity applies broadly to ambiguous statutes or only applies in cases of "grievous ambiguity," so that the rule's proper application remains a subject of dispute among the current Justices. *Compare* Wooden v. United States, 595 U.S. 360, 388–92 (2022) (Gorsuch, J., concurring) (arguing that case should be resolved under the rule of lenity which "reasonable doubt about the application of a penal law must be resolved in favor of liberty"), *with id.* at 377–79 (Kavanaugh, J., concurring) (defending the more restrictive "grievous ambiguity" test). *See also* Nina Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018) (reviewing inconsistencies in the Court's application of the rule of lenity in criminal cases); Brandon Hasbrouck, *On Lenity: What Justice Gorsuch Didn't Say*, 108 VA. L. REV. 1289, 1292 (2022) (arguing that the narrowing of the criminal rule of lenity is "one tool courts use to lock up Black, Brown and poor people, and to keep them locked up").

117 18 U.S. (5 Wheat.) 76, 95 (1820). *Accord* United States v. Davis, 588 U.S. 445, 464–65 (2019) (quoting *Wiltberger*).

118 *See, e.g.*, *Fong Haw Tan*, 333 U.S. at 10; I.N.S. v. Errico, 385 U.S. 214, 225 (1966) (Stewart, J., dissenting); Barber v. Gonzales, 347 U.S. 637, 642–43 (1954); Costello v. I.N.S., 376 U.S. 120, 128 (1964); I.N.S. v. St. Cyr, 533 U.S. 289, 320 (2001).

119 *Fong Haw Tan*, 333 U.S. at 10.

120 *Id.*

121 341 U.S. 223, 231 (1951).

*Harisiades v. Shaughnessy*[122] and *Galvan v. Press*[123] granted Congress and the President sweeping power to enact deportation statutes that operated retroactively, thereby leaving far fewer limits on when statutes can require deportation than when they can define crimes.[124] In this setting, the rule of strict construction simply requires that these powers to enact deportation statutes be exercised with clarity. Despite the Court's deep divisions in the constitutional cases, reflected in sharp dissents from Justices Douglas[125] and Black,[126] the Court's contemporaneous opinions reflected unanimity around the rule of strict construction.[127] The rule might have served different purposes for different Justices, with Justices Douglas and Black seeing it as a corollary to their more protective constitutional stance, and Justice Frankfurter seeing it as a more modest judicial rule that showed deference to the political branches in enacting statutes. Regardless of the Justices' views of the constitutional limits on deportation laws, they were united in insisting that statutes be written clearly in identifying who would face the penalty of banishment.

### *C. Strict Construction, Fair Warning, and Retroactivity*

Beyond the rationales expressly invoked by the Court in *Fong Haw Tan* and its progeny, the strict construction rule for deportation statutes implements basic fair notice principles in an area of the law where courts have protected fair notice rights even in the shadow of Congress's powers to enact retroactive laws.[128] As developed in cases about the rule of lenity for criminal statutes, rules of strict construction serve to inform people of the consequences they face for their actions.[129] The criminal lenity rule is reinforced by the Ex Post Facto clause, which limits Congress's powers to

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122 342 U.S. 580, 591 (1952).

123 347 U.S. 522, 531 (1954).

124 *See* U.S. CONST. art. I, § 9 (prohibition on ex post facto laws); *see also* Weaver v. Graham, 450 U.S. 24, 33 (1981) (holding that the Ex Post Facto Clause prohibits after the fact expansions of criminal punishment).

125 Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting) ("The right to be immune from arbitrary decrees of banishment certainly may be more important to 'liberty' than the civil rights which all aliens enjoy when they reside here. Unless they are free from arbitrary banishment, the 'liberty' they enjoy while they live here is indeed illusory.").

126 Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting) ("I am unwilling to say . . . this man may be driven from our land because he joined a political party that California and the Nation then recognized as perfectly legal.").

127 *See supra* Part I.

128 *See generally* Peter Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1308–25 (2011) (describing doctrinal development and incoherence around treating deportation as civil).

129 *See* McBoyle v. United States, 283 U.S. 25, 27 (1931) (holding that the National Motor Vehicle Theft Act's prohibition on "motor vehicle" theft did not naturally include "aircraft," and thus overturning a conviction for aircraft theft under the Act as lacking sufficient fair warning).

impose new sanctions for past conduct.[130] To the extent that immigration statutes serve as predicates to criminal statutes, the criminal rule of lenity should apply fully.[131] But because constitutional protections for criminal prosecutions do not map onto the immigration context, fair notice operates somewhat differently. The Court has repeatedly recognized that noncitizens are entitled to fair notice of the deportation consequences of their actions.[132] At the same time, it has rejected the call to apply Ex Post Facto principles and allowed new deportation sanctions for past actions.[133] But through statutory interpretation, the Court requires fair notice absent a clear congressional choice to impose retroactive consequences.[134] The rule of strict construction serves these fair warning interests, albeit imperfectly, by protecting reasonable expectations in the absence of clearly retroactive legislation.[135]

The Court has recognized the importance of fair notice of deportation consequences in several lines of cases. The first line of cases applied due process vagueness standards to deportation statutes. *Jordan v. De George*, decided in 1951 after *Fong Haw Tan* and before the other strict construction decisions discussed in Part I, recognized a right to fair warning of deportation consequences.[136] After finding that the harshness of deportation justified the application of vagueness doctrine, the Court stated that the test for a vague deportation statute was whether it provided "sufficiently definite warning" of the consequences. This right was reaffirmed by the Court in 2018 in *Sessions v. Dimaya*.[137] Rejecting a vaguely worded deportation statute, Justice Gorsuch noted that vague laws "leav[e] the people in the dark about what the law demands and allow[] prosecutors and courts to make it up."[138]

The Court also has applied fair notice principles to require that lawyers for noncitizen defendants provide their client with advice about the deportation consequences of a plea. In 2010, in *Padilla v. Kentucky*, the

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130 U.S. CONST. art. I, § 9.

131 *See, e.g.*, Bittner v. United States, 598 U.S. 85, 102–03 (2023) (Gorsuch, J.) (discussing, in a part joined by Justice Jackson, how the rule of lenity applies where a civil penalty involves an interpretation of a provision with parallel criminal penalties); Carter v. Welles-Bowen Realty, Inc., 736 F.3d 722, 729–32 (6th Cir. 2013) (Sutton, J., concurring) (discussing, prior to *Loper Bright*, why the rule of lenity must apply with full force in interpreting civil statutes with criminal consequences).

132 *See, e.g.*, Jordan v. De George, 341 U.S. 223, 230 (1951); Sessions v. Dimaya, 584 U.S. 148, 156 (2018); *id.* at 177 (Gorsuch, J., concurring).

133 *See* Galvan v. Press, 347 U.S. 522, 531 (1954).

134 *See* I.N.S. v. St. Cyr, 533 U.S. 289, 320 (2001).

135 *Cf. Bittner*, 598 U.S. at 102 (Gorsuch, J.) (citing Antonin Scalia & Brian Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 297 (2012) for the proposition that the rule of lenity applies to civil penalties).

136 341 U.S. at 231.

137 584 U.S. at 157.

138 *Id.* at 175 (Gorsuch, J., concurring).

Court observed that deportation is often the most important part of a noncitizen's decision whether to take a plea, thereby requiring that attorneys provide advice about immigration consequences.[139] The Court re-emphasized the importance of notice of deportation consequences seven years later when it found that counsel was ineffective in providing notice of deportation consequences, even in the face of limited chances at trial. As Chief Justice Roberts explained in *Lee v. United States*, avoiding deportation might be the most important factor for a noncitizen entering a plea:

> There is no reason to doubt the paramount importance Lee placed on avoiding deportation . . . . At the time of his plea, Lee had lived in the United States for nearly three decades, had established two businesses in Tennessee, and was the only family member in the United States who could care for his elderly parents—both naturalized American citizens. In contrast to these strong connections to the United States, there is no indication that he had any ties to South Korea; he had never returned there since leaving as a child.[140]

Implicit in these cases about ineffectiveness is the need for a noncitizen to have clarity about the deportation consequences of a statute. This interest is furthered by the rule of strict construction of deportation statutes.

Finally, the Court has emphasized fair warning principles in the context of retroactive legislation, requiring that Congress be clear before altering the consequences of past convictions. In *I.N.S. v. St. Cyr*, the Court considered whether sweeping changes to deportation laws should operate retroactively to cut off relief from deportation. In concluding that Congress must be clear about such changes, the Court observed that the presumption against retroactive application of new legislation is rooted in considerations of fair notice, settled expectations, and reasonable reliance.[141] The Court once again invoked the importance of fair notice for noncitizens facing deportation consequences.[142] The Court rejected the idea that the non-criminal categorization of deportation mattered in applying the presumption against reading a statute retroactively without clear language requiring that reading.

Fair warning has special relevance to deportation statutes because they generally lack a statute of limitations.[143] This feature of deportation law is

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139 559 U.S. 356, 374 (2010) (holding that counsel has an obligation to inform a client of deportation risks).

140 Lee v. United States, 582 U.S. 357, 370 (2017).

141 I.N.S. v. St. Cyr, 533 U.S. 289, 321 (2001).

142 *Id.* at 320 (finding that the presumption against retroactive laws is buttressed by the "longstanding principle of construing any lingering ambiguities in deportation statutes" in favor of the noncitizen).

143 The Immigration Act of 1917 included a provision which permitted deportation due to improper entry within five years of entry. Pub. L. No. 301, 64th Cong., 39 Stat. 874 § 19 (1917) (providing for deportation of a person who was not admissible at the time of entry). The statute of limitations for this provision was eliminated in 1952. Immigration and Nationality Act, Pub. L. No.

unusual as compared to almost all civil and criminal penalties.[144] It means that the threat of deportation hangs over any person who might be deportable, even if the scope of the law is unclear. As a result, a noncitizen can live in the country for decades after the allegedly deportable offense before an immigration prosecutor chooses to seek deportation and remains vulnerable to deportation even when earlier prosecutors have declined to pursue deportation. Under these circumstances, a rule of strict construction offers a modicum of fair notice that a statute will not be extended beyond its obvious reach.

## CONCLUSION

With *Loper Bright*'s call on courts to interpret statutes without the constraints of *Chevron* deference, it is once again critical for courts to employ the full range of statutory interpretation tools. For deportation cases, the well-established rule of strict construction, as laid out in *Fong Haw Tan v. Phelan* and repeatedly reaffirmed in subsequent cases, is an essential tool. As the Court emphasized in the cases in which it developed the rule, deportation is an extreme consequence requiring clarity about when that sanction applies. The strict construction rule is justified on all the grounds that apply to the rule of lenity in criminal cases. It recognizes the harshness of the penalty and requires that those entrusted with enacting laws be clear about the scope of the penalties they are imposing. The rule is further supported by the fair notice interests underlying the criminal rule of lenity, as illustrated by the need for noncitizen defendants engaged in plea negotiations to understand the consequences of a plea. Similarly, the lack of a statute of limitations for deportation makes it important for people to be able to rely on a fair reading of statutes as they invest in their lives in the United States. Moreover, the political branches' extreme powers over deportation grounds, reaching even to retroactive provisions, makes it more critical that those who draft deportation statutes have squarely considered the breadth of their deportation sanctions. With *Chevron* deference a thing of the past, courts can return to the strict construction rule to assure a modicum of deliberation by Congress when drafting laws that impose harsh deportation

415, 66 Stat. 163 § 241(a)(1) (1952). Other grounds of deportation have never had a statute of limitations. *See, e.g.*, Immigration Act of 1917 § 19 (stating deportability ground for two convictions for crimes involving moral turpitude). The year following passage of the 1952 Act, the President's Commission on Immigration and Naturalization severely criticized the lack of a statute of limitations in its report and called for the reinstitution of statutes of limitations. *See* PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION, WHOM WE SHALL WELCOME: REPORT OF THE PRESIDENT'S COMMISSION ON IMMIGRATION AND NATURALIZATION 197–98 (1953).

144 *See, e.g.*, 18 U.S.C. § 3282 (default five year statute of limitations for federal felony prosecutions); 18 U.S.C. § 3286 (eight year statute of limitations for certain terrorism offenses); 28 U.S.C. § 1658 (default limitations of four years for civil actions under federal statutes).

consequences on noncitizens.