



2-21-2018

An Essay Concerning Some Problems with the Constitutional-Doubt Canon

Benjamin M. Flowers
Jones Day

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr-online>



Part of the [Constitutional Law Commons](#)

Recommended Citation

Benjamin M. Flowers, *An Essay Concerning Some Problems with the Constitutional-Doubt Canon*, 74 WASH. & LEE L. REV. ONLINE 248 (2018), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss2/2>

This Development is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review Online by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

An Essay Concerning Some Problems with the Constitutional-Doubt Canon

Benjamin M. Flowers*

Abstract

The constitutional-doubt canon instructs that statutes should be interpreted in a way that avoids placing their constitutionality in doubt. This canon is often said to rest on the presumption that Congress does not intend to exceed its constitutional authority. That presumption, however, is inconsistent with the notion that government actors tend to exceed their lawful authority—a notion that motivates our constitutional structure, and in particular the series of checks and balances that the Constitution creates. This tension between the constitutional-doubt canon and the Constitution’s structure would be acceptable if the canon accurately reflected the manner in which the public understands legislative enactments. But it doesn’t. Thus, the only possible justification for the constitutional-doubt canon is stare decisis.

Table of Contents

I. Introduction	249
II. The Constitutional-Doubt Canon and Expected Meaning	250
III. The Constitutional-Doubt Canon and Constitutional Structure	252
IV. The Constitutional-Doubt Canon and Stare Decisis.....	254

* Associate, Jones Day, Columbus, Ohio. All view expressed are those of the author alone.

I. Introduction

Our Constitution is built on a profound distrust of government. Members of the founding generation understood that government officials are mortals, not angels.¹ And they understood that all mortals, even well-meaning ones, will tend to aggrandize their power, exercising authority they do not have. So the founding generation wrote and ratified a constitution that harnessed that temptation: It established three co-equal branches, divided sovereignty between the state and federal governments, and empowered each to check overreach by the others.² Thus, the natural tendency of government officials to vigorously enforce and protect their *own* authority would cause them to resist encroachment (that is, overreach) by those in other branches and levels of government.³

The constitutional-doubt canon is in tension with this design. That interpretive rule instructs that “[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt.”⁴ In other words, the canon presumes that Congress did not exceed its constitutional authority. This presumption contradicts the skepticism toward government actors that our

1. See THE FEDERALIST NO. 51 at 349 (James Madison) (J. Cooke ed., 1961) (“It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government If men were angels, no government would be necessary.”).

2. See *id.* (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.”); *id.* (describing the “constant aim” of our constitution “to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a centinel over the public rights”); see also U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

3. See *Morrison v. Olson*, 487 U.S. 654, 697–99 (1988) (Scalia, J., dissenting) (explaining that “the parchment delineation of the boundaries” between the branches of government would be ineffective without our system of checks and balances) (quoting THE FEDERALIST NO. 73 at 494 (Alexander Hamilton)).

4. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* § 38, at 247 (2012).

Constitution embodies. That would be tolerable if the canon reflected the way that statutes were naturally understood. But it does not, and so the only justification for the canon's existence is *stare decisis*. Or so I will argue.

II. *The Constitutional-Doubt Canon and Expected Meaning*

The constitutional-doubt canon is sometimes described as resting on the “presumption that Congress did not intend” to enact a statute that “raises serious constitutional doubts.”⁵ Thus, the thinking goes, when a statute is susceptible of multiple interpretations, courts ought to choose the constitutionally permissible one.

The justification fails at the outset, because it is based on the false notion that courts ought to give statutes the meaning that Congress *intended* rather than the one it *enacted*. This notion is false because we are governed by the laws that Congress passes, not the ones it wanted to pass.⁶ And even if Congressional intent mattered, it is often (always?) doubtful that Congress had any one intention.⁷

Properly interpreting a statute means giving the statute whatever meaning it had at the time of its enactment.⁸ Canons of interpretation, to the extent they are valid, assist this task; they provide heuristics that judges can use for determining the manner in which the public would have understood the legislation at the time of its enactment. An interpretive canon's validity thus turns on how reliably it points courts to the original public meanings of the statutes they interpret. And on that score,

5. *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

6. *See, e.g., Hall v. United States*, 566 U.S. 506, 523 (2012) (finding that statute meant what it said, notwithstanding evidence that the chief legislative sponsor *intended* to enact the opposite of what the plain meaning required).

7. *See generally* Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

8. *See Whitfield v. United States*, 135 S. Ct. 785, 788 (2015) (recognizing that statutes retain the meaning they had at the time of their enactment); SCALIA & GARNER, *supra* note 4, § 7, at 78–92 (explaining the “fixed-meaning canon,” according to which statutes “must be given the meaning they had when” they were “adopted”).

the constitutional-doubt canon fails miserably. I am aware of no evidence that presumptions regarding constitutionality are somehow baked into public perceptions regarding statutory meaning. Again, the founding generation recognized that legislatures (indeed, all governments and government actors) would tend to *exceed* their authority. Nothing in the time since has happened to prove them wrong. The suggestion that the constitutional-doubt canon reflects public understanding is therefore difficult to take seriously—which is perhaps why, so far as I can tell, no one has ever tried to mount this defense.

One might object that canons of interpretation do more than function “as empirical heuristics for interpreting new texts.”⁹ At least some substantive canons are “distinct rules of unwritten law, which act of their own force in future cases unless abrogated or impliedly repealed.”¹⁰ So it is with the constitutional-doubt canon, the argument goes.

This is surely an accurate description of the way in which substantive canons work in practice. But it seems to me there are only two justifications for such rules. First, the substantive background rules may be so well established that they accurately reflect the manner in which the public understands statutory text. That justification cannot work here, since there is no basis for inferring that the constitutional-doubt canon accurately captures public understanding. And at the time of the Constitution’s ratification, the constitutional-doubt canon could not possibly have been so well-established a rule, since Anglo-American jurisprudence had not previously required assessing the constitutionality of statutes against a written constitution. The second justification is *stare decisis*. That justification is quite powerful, as I’ll discuss later, but its force has nothing to do with the canon’s interpretive accuracy.

The foregoing assumes that legislative intent is irrelevant to the interpretive task. But even if we assume that intent *does* matter, does the canon fare any better? That is, is there any

9. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1105 (2017).

10. *Id.* at 1106.

reason to suppose that Congress does generally intend not to pass unconstitutional laws?

No. The framers rightly realized that government actors will tend to *exceed* their lawful authority, not hew to it. Two-hundred-plus years of experience with state and federal legislatures exceeding their authority again¹¹ and again¹² (and again¹³ and again¹⁴) confirms the founding generation's wisdom. This is no slight to legislators, the vast majority of whom are no doubt motivated by a good-faith belief that the legislation they propose will improve public welfare. But that is precisely the problem: Legislators—indeed, *all* elected officials—obtain and keep their jobs by promising to deliver results for their constituents. If the Constitution stands in the way of delivering those results, one would expect them to violate the Constitution. Moreover, as discussed below, the form of judicial restraint on which the canon arguably rests may have the effect of exacerbating this tendency in legislators and executive officers.

The upshot of this is that this canon cannot be justified by Congressional intent: Assuming there is any such thing, it is doubtful that legislators can fairly be *presumed* to intend to act constitutionally.

III. The Constitutional-Doubt Canon and Constitutional Structure

The more plausible justifications for the constitutional-doubt canon are not interpretive justifications at all. Rather, most who are candid will admit that it “represents judicial policy—a

11. See *Marbury v. Madison*, 5 U.S. 137, 176 (1803) (holding section 13 of the Judiciary Act of 1789 unconstitutional).

12. See *Ward v. Maryland*, 79 U.S. 418, 432 (1870) (holding that a Maryland law, which “impose[d] a discriminating tax upon all persons trading in” a particular manner “who are not permanent residents in the State,” violated the Privileges and Immunities Clause).

13. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954) (holding that state laws segregating students on the basis of race violate the Equal Protection Clause).

14. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 504 (2010) (holding that Congress exceeded its authority when it imposed “dual for-cause limitations” on the President’s removal power).

judgment that statutes *ought not* to tread on questionable constitutional grounds unless they do so clearly.”¹⁵ Let’s suppose that “judicial policy” has any place in statutory interpretation. Does judicial policy support the canon?

Still no. Start with the notion that “statutes ought not to tread on questionable constitutional grounds unless they do so clearly.”¹⁶ Why would that be? Our Constitution gives to each branch a set of limited powers. But each branch is free to exercise those powers to their limits. To use a driving analogy, government actors receive either a green light or a red light; there is no yellow light that requires them to use caution as they approach the limits of their powers. And to pretend there is to permit the judiciary to overstep *its* powers in the guise of judicial restraint; to limit the authority of the other branches (and the states) based on a “judicial policy” with no place in the Constitution’s text.¹⁷

Some have also suggested that the canon is justified by a different policy: “courts should minimize the occasions on which they confront and perhaps contradict the legislative branch.”¹⁸ This rationale cannot be reconciled with our constitutional structure. Once again, our Constitution is designed to pit the branches against one another. They are *supposed to* forthrightly confront and contradict one another. (Again, the constitutional-doubt canon sometimes causes courts to contradict Congress by

15. SCALIA & GARNER, *supra* note 4, § 38, at 249.

16. *Id.*

17. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983)

The practical effect of interpreting statutes to avoid raising constitutional questions is therefore to enlarge the already vast reach of constitutional prohibition beyond even the most extravagant modern interpretation of the Constitution—to create a judge-made constitutional “penumbra” that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.

See also *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (en banc) (“The canon about avoiding constitutional decisions, in particular, must be used with care, for it is a closer cousin to invalidation than to interpretation. It is a way to enforce the constitutional penumbra, and therefore an aspect of constitutional law proper.”).

18. SCALIA & GARNER, *supra* note 4, at 249.

giving its statutes an unfair reading.¹⁹ But thwarting other branches in the legitimate exercise of their authority, and doing so while pretending to exercise restraint, is neither forthright nor a permissible exercise of the constitutional check.) When their willingness to do so wanes, the likelihood that constitutional actors will exceed their constitutional authority waxes. So, perhaps it is no surprise that, in the decades after the constitutional-doubt canon received its most famous endorsement,²⁰ the Court repeatedly deferred to Congress's exercise of legislative authority; thus permitting the exercise of legislative power unimaginable for the first hundred and fifty years of American history. This is not to say that the constitutional-doubt canon necessarily (or even usually) means deferring to Congress; once again, it often means unlawfully trimming Congress's work. What I mean to say is that the constitutional-doubt canon, insofar as it springs from the notion that the branches ought to avoid conflict, springs from the same misguided concept of "judicial restraint" that resulted in a vast expansion of federal authority.

Judges should not needlessly *seek out* conflict. Judicial usurpation is no better than judicial abnegation. My point is simply that courts ought not actively avoid confrontation: Legislation should be given a fair reading, and should be held unconstitutional when (and only when) it is.

IV. *The Constitutional-Doubt Canon and Stare Decisis*

19. See *supra* note 17; Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2112 (2015) (criticizing the canon on the ground that it "leads to tortured constructions of statutes that bear little resemblance to laws actually passed by the elected branches").

20. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))).

The foregoing establishes, at most, that the constitutional-doubt canon should never have been adopted. But it does not follow that courts ought to abandon it now. The reason is *stare decisis*. Courts began using the constitutional-doubt canon no later than the 1800s.²¹ Since the 1940s, at least, it has been a staple of judicial opinions. Congress and state legislatures have thus legislated in the shadow of this canon. As a result, it is quite likely that at least *some* laws have been passed in reliance on the canon's existence. That is, legislatures may have passed constitutionally dubious laws because their members knew or believed that the courts would bail them out if push came to shove.

What to do about this? That goes far beyond the scope of this paper. Whether and when to defer to precedent has left people much smarter than I am with little to offer.²² For my purposes, it suffices to say that *stare decisis* is an important consideration—one that even originalists ought to take seriously²³—and that it may well end up requiring courts to go on applying the constitutional-doubt canon. But if *stare decisis* is not a good defense, then the canon is indefensible.

21. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 73 n.9 (1995) (tracing the canon's history).

22. See Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 433 (1988)

I have brought you a few contentions: that the role of precedent should be similar for all decisions interpreting texts, with any difference in the direction of making it harder to revise constitutional interpretation, and that precedent can be a destabilizing as well as a stabilizing influence. Beyond those affronts to accepted wisdom I have little to say. I began without a theory of *stare decisis* and end that way.

23. See generally John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).