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DELAWARE & HUDSON REVISITED

John Copeland Nagle*

Four score and eight years ago, the Supreme Court decided *United States v. Delaware & Hudson Co.*,¹ a little remembered case holding that a federal statute prohibited railroads from shipping coal that they own across state lines. The statute at issue—the Commodities Clause of the Hepburn Act—seemed to bar any railroad company from transporting any article that it had produced,² but a group of Pennsylvania railroads objected that the statute violated numerous provisions of the Constitution. The Court dodged those constitutional questions by reading the Act narrowly to apply only if the railroad still owned the coal at the time of shipment. Justice Edward White defended this approach by explaining that “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”³

That canon of statutory interpretation has long survived *Delaware & Hudson*. But instead of Justice White, it is Justice Brandeis who most often gets the credit for the rule as he restated it in his famous concurring opinion in *Ashwander v. Tennessee Valley Authority*.⁴ Judge Friendly once wrote that questioning the *Ashwander* principle “is

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1 213 U.S. 366 (1909).

2 See Hepburn Act, ch. 3591, § 1, 34 Stat. 584 (1906).

3 *Delaware & Hudson*, 213 U.S. at 408 (citation omitted).

4 297 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))). For a recent illustration of the endurance of Justice Brandeis’s concurrence in *Ashwander*, see *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1074 (1997), which cites *Ashwander* twice for this principle.

rather like challenging Holy Writ⁵—but he did so anyway, and so have such eminences as Harry Wellington, Richard Posner, and Antonin Scalia.⁶ Now Frederick Schauer has suggested abandoning the principle altogether. In *Ashwander Revisited*,⁷ Schauer contends that the rule is “triply problematic”: first, because it disguises the fact that a court actually makes a constitutional decision by the very act of determining that the rule applies; second, because legislators equate a judicial decision avoiding a constitutional question with a judicial holding of unconstitutionality; and third, because courts invoke the rule without really analyzing the pending constitutional issue.⁸ When these costs are balanced against the presumed benefits of avoiding constitutional decisions, Schauer suggests that the rule comes out well behind.⁹

I agree with much of what Schauer so forcefully argues, but he has told only half of the story. *Ashwander* is not to blame. In fact, neither the Court nor Justice Brandeis had any occasion in *Ashwander* to consider whether the Tennessee Valley Authority Act needed to receive a different interpretation to render it constitutional. The true culprit is *Delaware & Hudson*, where Justice White stated two different rules in his opinion. The second rule that he stated—the rule quoted above, and questioned by Schauer and others—can be termed the “doubts” canon because it directs a court to interpret a statute to avoid any constitutional doubts about the law. The other rule—what I will call the “unconstitutionality” canon—instructs that “if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity.”¹⁰

The most noticeable difference between the two rules is that the unconstitutionality canon requires a court to decide the constitutional question while the doubts canon allows a court to avoid any such deci-

5 HENRY J. FRIENDLY, *BENCHMARKS* 210 (1967).

6 See *Reno v. Flores*, 507 U.S. 292, 314 n.9 (1993) (Scalia, J.) (characterizing the rule as “the last refuge of many an interpretive lost cause”); RICHARD A. POSNER, *THE FEDERAL COURTS CRISIS AND REFORM* 284–85 (1985); Harry H. Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 67–71. For the most recent critique of the principle, see Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court’s Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1 (1996).

7 Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71.

8 See *id.* at 89.

9 See *id.* at 97 (discussing the results of scrapping the principle in its entirety); *id.* at 98 (contending that “[I]ittle would be lost by abandoning *Ashwander* entirely”).

10 *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407 (1909).

sion. That is why *Delaware & Hudson* invoked the doubts canon, not the unconstitutionality canon. Justice White followed his recitation of the unconstitutionality canon, and preceded his statement of the doubts canon, with this sentence:

And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean . . . [that constitutional doubts alone suffice to interpret a statute differently.]¹¹

That is the claim I want to put to rest in this Article. Before *Delaware & Hudson*, courts routinely interpreted statutes to avoid holding them unconstitutional. A court first decided that a statute was unconstitutional, and then the court proceeded to adopt an interpretation of the statute that avoided the constitutional problem altogether—the exact approach that Justice White rejected out of hand. In fact, I have located only a few decisions invoking the doubts canon before *Delaware & Hudson* was decided.¹² Thus Justice White's assertion that the unconstitutionality canon "plainly must mean" the doubts canon is both historically and logically false. Nonetheless, courts since *Delaware & Hudson* have employed the more prudential doubts canon. Justice White's fear of unnecessary constitutional adjudication found a clearer voice in Justice Brandeis's concurring opinion in *Ashwander*, which listed the doubts canon as one of several devices by which a court can avoid deciding a difficult constitutional question.¹³ And the doubts canon has carried the day. Cases such as *Rust v. Sullivan*¹⁴ and *NLRB v. Catholic Bishop*¹⁵ divided the Court because of disputes about when to interpret a statute simply because it raises constitutional doubts, without deciding whether those doubts were ultimately justi-

11 *Id.* at 408.

12 See *infra* text accompanying notes 68–72.

13 The seven rules instruct the Court (1) not to decide the constitutionality of legislation in a friendly, non-adversarial proceeding; (2) not to anticipate a constitutional question before the necessity of deciding it; (3) not to formulate rules of constitutional law broader than what is needed to decide the particular case; (4) to decide cases on non-constitutional grounds if possible; (5) not to decide the constitutionality of a statute if the party has not been injured by that statute; (6) not to decide the constitutionality of a statute if the party has benefited from the statute; and (7) to interpret a statute, if fairly possible, to avoid serious constitutional doubts. See *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

14 500 U.S. 173 (1991).

15 440 U.S. 490 (1979).

fied. By contrast, applications of the "unconstitutionality" rule since *Delaware & Hudson* are much harder to find.¹⁶

Now the doubts canon is under siege from Schauer and others. The unconstitutionality canon offers another approach to statutory interpretation and to constitutional adjudication. It has its own problems, of course, which demand serious attention before it is resurrected today. But since Schauer has so effectively questioned the doubts canon, it may be time to consider the work that the unconstitutionality canon can do that the doubts canon cannot. That requires an investigation of the judicial practice before *Ashwander*, before *Delaware & Hudson*, and in state and federal constitutional decisions lost in the mists of the nineteenth century.

I. THE UNCONSTITUTIONALITY CANON BEFORE *DELAWARE & HUDSON*

The unconstitutionality canon appeared in decisions throughout the nineteenth century. The typical expression of the canon—like that stated but not applied in *Delaware & Hudson*—instructed a court confronted with two alternative interpretations of a statute to adopt the interpretation that was not unconstitutional.¹⁷ In its more color-

16 See, e.g., *Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F. Supp. 975 (S.D. Ind. 1996) (interpreting an Indiana campaign finance statute to not cover groups that only engage in "issue advocacy" so that the statute would not be held unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976)); *Boaden v. Department of Law Enforcement*, 664 N.E.2d 61, 66 (Ill. 1996) (Freeman, J., concurring) (interpreting "marital status" narrowly to avoid holding the Illinois Human Rights Act unconstitutional); *Ohio v. Linner*, 665 N.E.2d 1180, 1184 (Hamilton Mun. Ct. 1996) (interpreting Ohio's domestic violence statute to apply to violence between homosexuals in order to avoid holding the statute unconstitutional under the Equal Protection Clause); *Texas ex. rel. Angelini v. Hardberger*, 932 S.W.2d 489, 499 (Tex. 1996) (Baker, J., dissenting) (interpreting the Texas election code to avoid "the conclusion that the Legislature intended to unconstitutionally" allow an officeholder to determine his or her successor, contrary to the governor's appointment power).

17 See, e.g., *Hooper v. California*, 155 U.S. 648, 657 (1895); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 309 (1870); *United States v. Coombs*, 37 U.S. (12 Pet.) 72, 76 (1838); *Kelley v. Great N. Ry. Co.*, 152 F. 211, 229 (C.C.D. Minn. 1907); *Marvin v. Maysville St. R.R. & Transfer Co.*, 49 F. 436, 438 (C.C.D. Ky. 1892); *St. Louis Nat'l Bank v. Papin*, 21 F. Cas. 203, 205 (C.C.E.D. Mo. 1876) (No. 12,239); *Singer Mfg. Co. v. M'Collock*, 24 F. 667, 668 (E.D. Ark. 1884); *Huggins v. Ball*, 19 Ala. 587, 589 (1851); *Road Improvement Dist. No. 1 v. Glover*, 110 S.W. 1031, 1033 (Ark. 1908); *Cheeseborough v. City & County of S.F.*, 96 P. 288, 291 (Cal. 1908); *People v. Frisbie*, 26 Cal. 135, 139 (1864); *French v. Teschemaker*, 24 Cal. 518, 554 (1864); *Park v. Candler*, 39 S.E. 89, 95-96 (Ga. 1901); *Robson v. Doyle*, 61 N.E. 435, 437 (Ill. 1901); *Newland v. Marsh*, 19 Ill. 376, 384 (1857); *Duncombe v. Prindle*, 12 Iowa 1, 8 (1861); *Conner v. Kentucky*, 76 Ky. 714, 722 (1878); *Grinage v. Times-Democrat Publ'g Co.*, 31 So. 682, 683 (La. 1902); *Massachusetts v. Intoxicating Liquors*, 52 N.E. 389, 390

ful form, the canon commanded that "[t]hat construction must obtain which would give [the statute] constitutional life, rather than another construction, of which it might be susceptible, which would strike it with constitutional death."¹⁸ However stated, the canon was firmly established well before the advent of the twentieth century.¹⁹

This was not idle rhetoric. The courts stating the unconstitutionality canon routinely applied that rule just as its terms would suggest. Thus, a court would announce that because interpretation *x* of a statute was unconstitutional, interpretation *y* should be adopted instead. In sharp contrast to the doubts canon, courts applying the unconstitutionality canon actually decided the constitutional question before turning to the constitutionally safe interpretation. Because this is the very course that *Delaware & Hudson* found implausible, I want to pause to describe how the canon actually operated in a number of those cases.

(1) Several free blacks were original shareholders in the Citizens' Bank of Louisiana. After the bank was established, the state legislature amended its charter to prohibit anyone who was not a "free white citizen" of the United States from owning any stock in the bank. The leaders of the bank then refused to consider the blacks as valid shareholders. The court responded that

(Mass. 1899); *Commonwealth v. People's Five Cents Sav. Bank*, 87 Mass. 428, 432 (1862); *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308, 323 (1874); *Sykes v. Mayor & Aldermen*, 55 Miss. 115, 144 (1877); *Cass County v. Sarpy County*, 92 N.W. 635, 636 (Neb. 1902); *Dow v. True Norris*, 4 N.H. 16, 18 (1827); *West Jersey Traction Co. v. Camden Horse R.R. Co.*, 29 A. 333, 339 (N.J. Ch. 1894); *Atlantic City Water-Works Co. v. Consumers' Water Co.*, 15 A. 581, 586 (N.J. Ch. 1888); *Colwell v. May's Landing Water Power Co.*, 19 N.J. Eq. 245 (1868); *State Water Supply Comm'n v. Curtis*, 85 N.E. 148, 152 (N.Y. 1908); *Nechamcus v. Warden of City Prison*, 39 N.E. 686, 688 (N.Y. 1895); *Staudacher v. Webb*, 23 Hun. 42, 46 (N.Y. 1878); *Metropolitan Bd. of Excise v. Barrie*, 34 N.Y. 657, 669 (1866); *Commissioners v. Ballard*, 69 N.C. 16, 17 (1873); *Anderson v. Brewster*, 9 N.E. 683, 685 (Ohio 1887); *Pennsylvania ex rel. Wolfe v. Butler*, 99 Pa. 535, 540 (1882); *Pennsylvania ex rel. Rogers v. Bennett*, 16 Serg. & Rawle 243, 244 (Pa. 1827); *Hayes v. Clinkscales*, 9 S.C. 441, 452 (1877); *Tennessee ex rel. Morrell v. Fickle*, 71 Tenn. 79, 81 (1879); *Coleman v. Yesler*, 1 Wash. Terr. 591, 594 (1879); *Palms v. Shawano Co.*, 21 N.W. 77, 79 (Wis. 1884); *see also Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804) (Marshall, C.J.) (asserting that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

18 *Grinage v. Times-Democrat Publ'g Co.*, 31 So. 682, 683 (La. 1902).

19 *See People ex rel. Johnson v. Peacock*, 98 Ill. 172, 177 (1881) (describing the unconstitutionality canon as a "well recognized principle"); *Bigelow v. West Wis. Ry. Co.*, 27 Wis. 479, 486 (1871) (stating that the unconstitutionality canon "requires neither argument nor reference to authorities").

[i]f this [statute] be susceptible of two interpretations, we consider ourselves bound to give it that which would not involve the destruction of a vested right, the impairing of an obligation, because if that were its clear import, we should be compelled to say that it is unconstitutional and void.²⁰

Instead, the court concluded that the legislature intended the statutory amendment to apply prospectively, "leaving the rights of all who were at that time shareholders unimpaired."²¹

(2) The California Constitution provided that all property—including stock—shall be taxed in proportion to its assessed value. Section 3608 of the California Political Code stated:

Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent; and the assessment and taxation of such shares, and also all the corporate property, would be double taxation. Therefore, all property belonging to corporations . . . shall be assessed and taxed. But no assessment shall be made of shares of stock in any corporation . . .²²

When an estate challenged the state's taxation of stock, the court asserted that an interpretation of section 3608 that exempted stock from taxation even if the corporation's property had not been taxed in California would be unconstitutional.²³ Therefore, the court read section 3608 to subject the stock to taxation.

(3) An 1846 New Jersey statute authorizing the construction of dams provided for the payment of damages caused by the erection of a dam, but it did not provide for compensation for other losses caused by a dam. Because the failure to provide just compensation "would therefore be clearly against the constitution . . . this construction will not be given."²⁴ Instead, the court interpreted the statute to authorize compensation for injuries that an upstream user would suffer if a downstream dam flooded his property.

(4) The North Carolina Constitution prohibited race discrimination. Black residents of Kernersville, North Carolina objected that a 1905 statute authorizing a grade school in the town was being used to establish a school for whites only. The court indicated that the statute

20 *Boisdere v. Citizens' Bank*, 29 Am. Dec. 453, 455 (La. 1836).

21 *Id.* at 456.

22 *Cheeseborough v. City & County of S.F.*, 96 P. 288, 289 (Cal. 1908).

23 *Id.* at 291.

24 *Colwell v. The May's Landing Water Power Co.*, 19 N.J. Eq. 245, 249 (1868).

would be unconstitutional if interpreted in that manner, so the court read the law to establish a school district that included both races.²⁵

(5) An 1865 Mississippi statute established an exclusive ferry franchise and directed that "no person, except the railroad, shall be permitted to transport any person, animal or property" across a section of the Mississippi River near Vicksburg. William Grimes continued to transport materials across the river despite the exclusive franchise held by Charles Marshall. The court said that the statute would be unconstitutional if it "deprive[d] an individual of the right to take himself or his personal property in his own vessel, or in that of another, whether used for public or private business; provided such boat was not kept and used for the purpose of a ferry-boat."²⁶ The court thus read the statute's general prohibition on "any person" more narrowly to avoid invalidating the statute.

(6) In 1867, Sylvester Van Horn subscribed to two shares of a railroad's stock and declared that he had paid ten percent down as required by an 1850 New York railroad statute. In fact, he did not pay any money down, so his stock purchase was invalid under the statute. An 1869 statute, however, waived the down payment requirement and further provided that no subscription to the railroad's stock shall be invalidated for failure to pay ten percent down. Van Horn thus argued that his stock purchase was valid. The court disagreed, reasoning that the 1869 statute should not be interpreted to create a binding contract where none existed before because such a reading would be "in direct conflict with the constitutional provision that 'no person shall be deprived of life, liberty or property without due process of law.'"²⁷ To avoid that result, the court interpreted the 1869 statute prospectively, with the effect of invalidating Van Horn's purchase.

(7) The Georgia Constitution directed that the proceeds of the sale of railroads by the state could only be applied to the state's debt. An 1897 statute authorized the state treasurer "to draw on any funds in the state treasury to the amount of \$400,000, to be used in paying the teachers as provided by law, and for other purposes." The court concluded that it would be unconstitutional to pay teachers from the railroad proceeds, and therefore, the phrase "any funds in the state treasury" must "mean any funds in the treasury which can be lawfully applied to the purposes indicated in the acts."²⁸

25 *Lowery v. Board of Graded Sch. Trustees*, 52 S.E. 267, 269-70 (N.C. 1905). Alas, the state constitution also mandated that "the schools be separated and the children of each race be taught in a separate school." *Id.* at 270.

26 *Marshall v. Grimes*, 41 Miss. 27, 31 (1866).

27 *New York & Oswego Midland R.R. Co. v. Van Horn*, 57 N.Y. 473, 477 (1874).

28 *Park v. Candler*, 39 S.E. 89, 95-96 (Ga. 1901).

(8) A statute enacted by the Texas Congress in 1837 authorized "any person from whom property was wrongfully taken, to sue out for an attachment" to recover the property. The preamble to the statute recited that "many Mexicans residing in our frontier stole and drove off large herds of cattle, and took and carried off other property belonging to the citizens of the Republic," and that "those Mexicans have abandoned the country and removed beyond the Rio Grande, so that persons from whom they have taken property are wholly without remedy." Fernando DeLeon argued that the statute was unconstitutional because it applied to Mexicans alone. The court agreed that "if the preamble was substantially carried into the enacting part of the statute, and we should construe it to mean Mexican citizens of Texas," the statute would be unconstitutional.²⁹ But, the court added, "the more reasonable construction would be to refer it to such Mexicans as adhered to the enemy," which would render the statute constitutional.³⁰

(9) An Alabama statute authorized the executor of an estate to obtain an order from the probate court to settle the debts on the decedent. When Martha McCalley died, her husband obtained such an order from the probate court in his capacity as the executor of her estate, but her children objected to the use of their inheritance to satisfy the debts. The court opined that if the statute was construed to authorize *ex parte* orders without notice to the³¹ The court thus interpreted the statute to require compliance with the demands of due process, and it remanded to the probate court for a determination of whether such compliance had occurred.

(10) A train sparked a fire which burned a farmer's hay. Under the majority common law rule, the railroad would not be liable unless the plaintiff could establish some act of negligence. The Colorado territorial legislature, however, reversed that rule in a statute providing "[t]hat every railroad corporation operating its line of road, or any part thereof, in this state shall be liable for all damages by fire that is set out or caused by operating any such line of road."³² The railroad complained that the statute violated the Equal Protection Clause because it discriminated against corporations that operated railroads. The court disagreed because the statutory term "railroad corporation" could be read "to mean any body, company or association of persons, whether technically incorporated or not, engaged in the operation of

29 Sutherland v. DeLeon, 1 Tex. 250, 303 (1846).

30 *Id.*

31 Wilburn & Co. v. McCalley, 63 Ala. 436, 444 (1879).

32 Union Pac. Ry. Co. v. DeBusk, 20 P. 752, 755 (Colo. 1889).

railroads.”³³ The court adopted this construction to avoid the equal protection objection that had caused a federal court to strike down a similar California statute.³⁴

(11) Finally, on April 11, 1903, the *Cincinnati Post* reported that the famous sharpshooter Annie Oakley had been arrested for robbery and that she was a drug addict. A day later, the newspaper retracted that story and explained that “Annie Oakley in private life is Mrs. Frank Butler, and she is living peacefully in Nutley, N.J.”³⁵ Notwithstanding the retraction, Butler sued for libel and received a verdict for \$2,500. The newspaper challenged the award on the basis of an Ohio statute that eliminated the presumption of malice accompanying a slanderous statement provided that “the publisher, upon demand and within a reasonable time thereafter, published a full and complete retraction in as public a manner as that in which said original publication was made.”³⁶ Butler insisted that the statute did not apply because she had not sought a retraction. She argued that the statute would be unconstitutional if it were interpreted to allow a publisher to escape liability by publishing an unrequested retraction because the Ohio Constitution guaranteed all injured persons a legal remedy.³⁷ The court held that the newspaper’s interpretation of the statute as allowing a unilateral retraction violated the Ohio Constitution, and therefore, it read the statute to provide a libeled party with a choice of a legal remedy or a retraction, as Butler had proposed.

In each of these cases, and others like them,³⁸ the courts decided that one interpretation of a statute would render it unconstitutional,

33 *Id.* at 757.

34 *See id.* at 756–57; *see also* County of San Mateo v. Southern Pac. Ry. Co., 13 F. 722 (C.C.D. Cal. 1882) (invalidating the California statute).

35 *Post Publ’g Co. v. Butler*, 137 F. 723, 724 (6th Cir. 1905).

36 *Id.* at 725.

37 *See id.* (citing OHIO CONST. art. I, § 16) (“All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay.”).

38 *See, e.g.,* Sohn v. Waterson, 84 U.S. 596 (1873) (interpreting a Kansas statute of limitations act prospectively to avoid holding it unconstitutional); *Alexander v. Gordon*, 101 F. 91, 98 (8th Cir. 1900) (interpreting an Arkansas statute of limitations narrowly to avoid holding it unconstitutional under the Due Process Clause); *Huggins v. Ball*, 19 Ala. 587 (1851) (interpreting an Alabama statute authorizing a sheriff to bring certain actions to avoid holding it unconstitutional); *Harrison v. Colgan*, 82 P. 674, 676 (Cal. 1905) (interpreting a California statute establishing judicial salaries as not applying to current judges in order to avoid a conflict with a state constitutional provision); *People v. Frisbie*, 26 Cal. 135, 139–40 (1864) (interpreting a California statute authorizing the reopening of judgments to avoid holding it unconstitutional); *Newland v. Marsh*, 19 Ill. 376, 381–86 (1857) (interpreting an Illinois law prohibiting ejectment actions as operating prospectively only to avoid an unconstitutional retroac-

and only then did they adopt an alternative interpretation. Other decisions applying the unconstitutionality canon determined that interpretation *x* was constitutional, and therefore, that interpretation could be adopted instead of the less obvious interpretation *y*. For example, an 1825 federal statute made it a crime to steal from a ship that was in distress within the admiralty or maritime jurisdiction of the United States.³⁹ Lawrence Coombs was indicted for stealing a variety of goods from the *Bristol*, a ship that was stranded near Rockaway Beach, New York.⁴⁰ He argued that the statute did not apply to goods

tive application); *Iowa Homestead Co. v. Webster County*, 21 Iowa 221, 226–27 (1866) (interpreting an Iowa taxation statute to treat individuals and corporations equally in order to satisfy a state constitutional requirement); *Duncombe v. Prindle*, 12 Iowa 1, 7–9 (1860) (interpreting a statute establishing the boundaries of several Iowa counties in order to avoid a violation of a state constitutional provision mandating a minimum county size); *Conner v. Kentucky*, 76 Ky. 714, 720–22 (1878) (interpreting a Kentucky murder statute to avoid a violation of the state constitutional requirements for the definition of criminal offenses); *Tabor v. Cook*, 15 Mich. 322, 323–26 (1867) (Cooley, J.) (interpreting a Michigan quiet title statute as permitting jury trials in order to avoid violating the right to jury trials guaranteed by the state constitution); *Cass County v. Sarpy County*, 92 N.W. 635, 636 (Neb. 1902) (interpreting a Nebraska statute governing bridge repairs to avoid holding it unconstitutional); *Atlantic City Water-Works Co. v. Consumers' Water Co.*, 15 A. 581, 586 (N.J. 1888) (interpreting a New Jersey statute authorizing the establishment of water supply corporations to allow competing franchises in order to avoid a violation of the state constitutional prohibition on special legislation); *Hayes v. Clinkscales*, 9 S.C. 441, 449–54 (1878) (interpreting a South Carolina statute limiting contract enforcement actions to apply prospectively only in order to avoid an unconstitutional impairment of contracts and unconstitutional retroactive legislation); *Martin v. South Salem Land Co.*, 33 S.E. 600, 601–02 (Va. 1899) (broadly interpreting the term “final decree on merits” in a Virginia statute depriving equity courts of jurisdiction over certain securities cases in order to avoid an unconstitutional interference with the judicial power).

39 See Act of Mar. 3, 1825, ch. 65, § 9, 4 Stat. 116 (1825)

[I]f any person or persons shall plunder, steal, or destroy, any money, goods, merchandise, or other effects, from or belonging to any ship or vessel, or boat, or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or case away, upon the sea, or upon any reef, shoal, bank, or rocks, of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States

that person or persons shall be guilty of a felony punishable by a fine of \$5,000 and ten years imprisonment. *Id.*

40 To be precise, Coombs allegedly stole “one trunk of the value of five dollars, one package of yarn of the value of five dollars, one package of silk of the value of five dollars, one roll of ribbons of the value of five dollars, one package of muslin of the value of five dollars, and six pairs of the value of five dollars.” *United States v. Coombs*, 37 U.S. 72, 74 (1838). Rockaway Beach yielded an even more memorable case nearly a century later. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928).

stolen from ships like the *Bristol* that were stranded above the high water mark. Justice Story agreed that the Admiralty Clause did not authorize jurisdiction above the high water mark, but he also concluded that the Commerce Clause did authorize such jurisdiction. With the statute's constitutionality established, the Court interpreted the statute to apply to ships above the high water mark.⁴¹

Both sets of cases involve the resolution of a constitutional challenge before determining the appropriate interpretation of a statute. That unifying theme cannot be explained away by the nature of the constitutional objections at issue. The types of constitutional objections that justified a different reading of a statute included due process,⁴² state single-subject rules,⁴³ retroactivity,⁴⁴ takings of property without just compensation,⁴⁵ qualifications for office,⁴⁶ and equal protection.⁴⁷ More importantly, these constitutional issues were previously undecided by the courts. If a constitutional question has already been decided, then there is little to be gained by avoiding that question, which suggests one possible justification for invoking the unconstitutionality canon. But that was not the case with these nineteenth century decisions. Few decisions cited any precedent for their conclusion that a certain interpretation of a statute would render it unconstitutional.⁴⁸ Nor was the answer to the constitutional question so obvious that a court was adding little by saying so. Under these cir-

41 See *Coombs*, 37 U.S. at 79-83.

42 See *Alexander v. Gordon*, 101 F. 91, 98 (8th Cir. 1900); *Wilburn & Co. v. McCalley*, 63 Ala. 436, 443-44 (1879); *Road Improvement Dist. No. 1 v. Glover*, 110 S.W. 1031, 1033 (Ark. 1908); *Camp v. Rogers*, 44 Conn. 291, 296-97 (1877); *New York & Oswego Midland R.R. Co. v. Van Horn*, 57 N.Y. 473, 477 (1874).

43 See *County of Cherokee v. Kansas*, 13 P. 558, 558-59 (Kan. 1887); *Tennessee ex rel. Morrell v. Fickle*, 71 Tenn. 79, 82-86 (1879); *Slack v. Jacob*, 8 W. Va. 612, 640-54 (1875).

44 See *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562, 566 (1876); *Newland v. Marsh*, 19 Ill. 376, 384-85 (1857); *Boisdere v. Citizens' Bank*, 29 Am. Dec. 453, 455-56 (La. 1836); *Dow v. True Norris*, 4 N.H. 16 (1827); *New York & Oswego Midland R.R. Co.*, 57 N.Y. at 476-78; *Hayes v. Clinkscales*, 9 S.C. 441, 451-54 (1877).

45 See *State Water Supply Comm'n v. Curtis*, 85 N.E. 148, 151-52 (N.Y. 1908); *Beckwith v. Beckwith*, 22 Ohio St. 180, 188 (1871); *Bigelow v. West Wis. Ry. Co.*, 27 Wis. 479, 486-87 (1871).

46 See *McComas v. Krug*, 81 Ind. 327, 331-34 (1882).

47 See *Union Pac. Ry. Co. v. De Busk*, 20 P. 752, 755-59 (Colo. 1889); *Lowery v. Board of Graded Sch. Trustees*, 52 S.E. 267, 269-70 (N.C. 1905).

48 For cases that did cite previous judicial authority on the constitutional question, see, for example, *Post Publ'g Co. v. Butler*, 137 F. 723, 725-27 (6th Cir. 1905), *Road Improvement Dist. No. 1 v. Gover*, 110 S.W. 1031, 1033 (Ark. 1908), *Union Pac. Ry. Co.*, 20 P. at 755-59, *Tabor v. Cook*, 15 Mich. 332, 325 (1867), and *New York & Oswego Midland R.R. Co.*, 57 N.Y. at 477.

cumstances, the unconstitutionality canon cannot be distinguished as a special rule for certain easy constitutional questions.

The statutory language that was interpreted according to the unconstitutionality canon displays a similar diversity. The level of ambiguity that would allow for another interpretation—and conversely, the level of statutory clarity that precluded another interpretation—was described differently in different cases. The courts agreed that a statute must be susceptible of two interpretations before the unconstitutionality canon could be applied.⁴⁹ Conversely, courts refused to apply the unconstitutionality canon to an unambiguous statute.⁵⁰ Also, using the unconstitutionality canon to read a statute to avoid holding it unconstitutional meant that the courts rejected the statute's most natural reading—the unconstitutional one—in favor of an alternative interpretation.⁵¹ Beyond those basic commands, courts went to

49 See *Cheeseborough v. City & County of S.F.*, 96 P. 288, 291 (Cal. 1908); *Park v. Candler*, 39 S.E. 89, 96 (Ga.1901); *Conner v. Kentucky*, 76 Ky. 714, 722 (1878); *Boisdere*, 29 Am. Dec. at 455; *Cass County v. Sarpy County*, 92 N.W. 635, 636 (Neb. 1902); *State Water Supply Comm'n*, 85 N.E. at 152; *Nechamcus v. Warden of City Prison*, 39 N.E. 686, 688 (N.Y. 1895); *Palms v. Shawano*, 21 N.W. 77, 79 (Wis. 1884); *Attorney Gen. v. City of Eau Claire*, 37 Wis. 400, 438 (1875).

50 See, e.g., *Howard v. Illinois Cent. R.R. Co.*, 207 U.S. 463, 501 (1908); *Miller v. United States*, 78 U.S. 268, 310 (1870); *Maysville St. R.R. & Transfer Co. v. Marvin*, 59 F. 91, 95 (6th Cir. 1893); *French v. Teschemaker*, 24 Cal. 518, 554 (1864); *Sutherland v. DeLeon*, 1 Tex. 250, 304 (1846); *Bacon v. Locke*, 83 P. 721, 723 (Wash. 1906); *Palms*, 21 N.W. at 79; see also HENRY CAMPBELL BLACK, *HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS* 115 (2d ed. 1911) ("Where the language is not ambiguous, and the meaning is clear and obvious, an unconstitutional consequence cannot be avoided by forcing upon the language of the act a meaning which, upon a fair test, is repugnant to its terms."); G.A. ENDLICH, *A COMMENTARY ON THE INTERPRETATION OF STATUTES* § 180 (1888) (agreeing that the unconstitutionality canon does not permit an interpretation that the statutory language cannot bear).

51 For decisions emphasizing that the unconstitutionality canon requires a court to adopt a reading of the statute that is not the most obvious or natural, see *Post Publ'g Co.*, 137 F. at 725, *French*, 24 Cal. at 554, *Townsend Gas & Elec. Co. v. Hill*, 64 P. 778, 780 (Wash. 1901), and *Slack v. Jacobs*, 8 W. Va. 612 (1875). As Judge Cooley explained:

The duty of the court to uphold a statute when the conflict between it and the constitution is not clear, and the implication which must always exist that no violation has been intended by the legislature, may require it in some cases, where the meaning of the constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem the most obvious and natural.

THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 255 (7th ed. 1903); accord BLACK, *supra* note 50, at 66–67 (agreeing that the unconstitutionality canon authorizes a court "to disregard the natural and usual import of the words used").

different lengths to avoid an unconstitutional interpretation of a statute. Justice Story once wrote that a court should adopt a less obvious, constitutional interpretation of a statute instead of an unconstitutional, more obvious interpretation unless the unconstitutional interpretation "is forced upon the Court by language altogether unambiguous."⁵² Several decisions construed general statutory terms narrowly to avoid holding the statute unconstitutional.⁵³ Other decisions rejected the literal meaning of statutory language in order to achieve a constitutional interpretation.⁵⁴ Courts also read additional provisions into a statute in order to sustain its constitutionality.⁵⁵

These are the very techniques that Schauer has criticized in the context of the doubts canon. Schauer hypothesizes that the doubts canon necessarily operates to displace the better interpretation of a statute:

It is hard to imagine a case in which, constitutional considerations aside, there would be two identically plausible interpretations, such that, constitutional considerations again aside, the rational judge would be reduced to something akin to tossing a coin. In almost any case we can imagine, the constitution-free principles of statutory interpretation will likely favor one result over another. And thus in almost any case likely to arise, a constitutional or prudential principle directing courts to reach conclusions other than the ones they would have reached absent that principle involves a cost measured in the value of those considerations of policy and principle that generated what would otherwise have been the result.⁵⁶

Thus, in Schauer's example of *United States v. X-Citement Video, Inc.*,⁵⁷ all members of the Court agreed that the most natural reading of a federal child pornography statute would not require a showing that a

52 *United States v. Coombs*, 37 U.S. 72, 76 (1838).

53 See, e.g., *Carlisle v. United States*, 83 U.S. 147, 153 (1872); *Rutherford v. Greene*, 15 U.S. (2 Wheat.) 196, 203 (1817); *Marshall v. Grimes*, 41 Miss. 27, 31-32 (1866); *Townsend Gas & Elec. Co.*, 64 P. at 779-80.

54 See, e.g., *Camp v. Rogers*, 44 Conn. 291, 296-99 (1877) (applying the canon to interpret "owner" to mean "driver"); *Newland v. Marsh*, 19 Ill. 376 (1857) (reading a provision in a statute of limitations to not affect any available remedies); *Clare v. State*, 68 Ind. 17 (1879) (concluding that a statutory reference to "section 74" was a mistake); *Palms*, 21 N.W. at 79-80 (applying the unconstitutionality canon to a Wisconsin statute defining county borders to follow the statute's intent, not its letter).

55 See, e.g., *Road Improvement Dist. No. 1 v. Glover*, 110 S.W. 1031, 1033-34 (Ark. 1908) (applying the unconstitutionality canon to imply a statutory notice requirement in order to satisfy due process); *West Jersey Traction Co. v. Camden Horse R.R. Co.*, 29 A. 333 (N.J. Ch. 1894) (reading a corporate charter statute as if words creating an exception had been included).

56 Schauer, *supra* note 7, at 83.

57 513 U.S. 64 (1994).

defendant knew the age of the child, but a majority of the Court invoked the doubts canon to reject that interpretation and adopted an interpretation including such a scienter requirement instead.⁵⁸ That approach requires a justification, but none of the possible explanations are convincing to Schauer. He asserts that the doubts canon cannot be based on an empirical claim that Congress seeks to avoid enacting unconstitutional legislation, or on a congressional desire for the Court to rewrite statutes if necessary, or on the judicial need to respect the decisions of a coordinate branch of government.⁵⁹ The doubts canon involves the judicial rewriting of a statute, and Schauer doubts that Congress finds that course less objectionable than the constitutional decisions that the courts are trying to avoid.⁶⁰

Powerful though Schauer's criticisms are, they cannot simply be transposed into the application of the unconstitutionality canon. Unlike the doubts canon, the unconstitutionality canon does not depend upon contested assumptions about the likelihood that the legislature enacts legislation pressing near the boundaries of the Constitution. Rather, the unconstitutionality canon depends upon the presumption that the legislature has not actually violated the Constitution—that the members of the legislature heed their oath to uphold the Constitution, and that a coordinate branch of the government takes the Constitution seriously. Such a separation of powers argument offers greater support for the unconstitutionality canon than it does for the doubts canon. While Schauer rightly questions whether Congress would prefer judicial rewriting of a statute (via the doubts canon) to a potentially fatal constitutional decision, Congress is more likely to choose judicial rewriting (via the unconstitutionality canon) to nothing at all. The doubts canon asks Congress not to take a risk; the unconstitutionality canon allows Congress to salvage what it can. In the latter case, faced with an ambiguous statute that can survive only if it receives a second-best interpretation, the legislature might not even see the application of the unconstitutionality canon as judicial rewriting.

Moreover, this kind of argument was developed in many of the nineteenth century cases that discussed the unconstitutionality canon.

58 See *id.* at 478 (opinion for the Court of Rehnquist, C.J.); *id.* at 478 (Stevens, J., concurring). But see *id.* at 479–80 (Scalia, J., dissenting). For Schauer's discussion of the case, see Schauer, *supra* note 7, at 74–81.

59 See Schauer, *supra* note 7, at 92–94.

60 *Id.* at 94–95.

Courts sought to sustain a statute if possible.⁶¹ They referred to the legislature's duty to abide by the Constitution.⁶² Accordingly, courts presumed that the legislature did not intend to violate the Constitution,⁶³ or conversely, they refused to presume that the legislature intended to violate the Constitution.⁶⁴ As Judge Cooley put it, "the court must construe the statute in accordance with the legislative intent; since it is always presumed the legislature designed the statute to take effect, and not to be a nullity."⁶⁵ When this presumption conflicts with the statute's most natural reading, the unconstitutionality canon teaches that the presumption prevails unless the statute is too clear to permit another interpretation. The empirical basis for this presumption is not beyond dispute, but it is much stronger than the presumption underlying the doubts canon—that the legislature wants to avoid unnecessary constitutional litigation.

But the greatest difference between the unconstitutionality canon and the doubts canon concerns the way in which each rule treats doubts about the constitutionality of a statute. The doubts canon sees such doubts as a reason for adopting another interpretation of a statute. The courts applying the unconstitutionality canon in the nineteenth century responded to constitutional doubts in a much different fashion. The existence of constitutional doubts provided a sufficient

61 See *Wilburn & Co. v. McCalley*, 63 Ala. 436, 444 (1879); *Santo v. Iowa*, 2 Iowa 165, 208 (1855); *Portland & Willamette Valley R.R. Co. v. City of Portland*, 12 P. 265, 266 (Or. 1886).

62 See, e.g., *Cotton v. County Comm'rs*, 6 Fla. 610, 616 (1856) (observing that the legislature's "manifest duty is never to exercise a power of doubtful constitutionality"); see also *Brown v. Buzan*, 24 Ind. 194, 197 (1865) (asserting that "the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the constitution, and, also, a high capacity to judge of its meaning").

63 See, e.g., *Grenada County Supervisors v. Brogden*, 112 U.S. 261, 268–69 (1884); *United States v. Harris*, 106 U.S. 629, 635 (1882); *French v. Teschemaker*, 24 Cal. 518, 554 (1864); *Park v. Candler*, 39 S.E. 89, 95 (Ga. 1901); *Robson v. Doyle*, 61 N.E. 435, 437 (Ill. 1901); *Marshall v. Grimes*, 41 Miss. 27, 31 (1866); *New Jersey v. Haring*, 26 A. 915 (N.J. 1893); *Colwell v. The May's Landing Water Power Co.*, 14 N.J. Eq. 245, 249 (1868); *Metropolitan Bd. of Excise v. Barrie*, 34 N.Y. 657, 668 (1866); *Armour & Co. v. Western Constr. Co.*, 78 P. 1106, 1107 (Wash. 1905); *Slack v. Jacobs*, 8 W. Va. 612, 626 (1875).

64 See, e.g., *Presser v. Illinois*, 116 U.S. 252, 269 (1886); *United States v. Coombs*, 37 U.S. 72, 76 (1838); *Wilburn & Co.*, 63 Ala. at 444; *Robson*, 61 N.E. at 437; *Middleport v. Aetna Life Ins. Co.*, 82 Ill. 562, 566 (1876); *McComas v. Krug*, 81 Ind. 327, 332 (1882); *Tabor v. Cook*, 15 Mich. 322 (1867) (Cooley, J.); *Atlantic City Water-Works Co. v. Consumers' Water Co.*, 15 A. 581, 586 (N.J. Ch. 1888); *New York & Oswego Midland R.R. Co. v. Van Horn*, 57 N.Y. 473, 477 (1874).

65 COOLEY, *supra* note 51, at 255.

basis for rejecting an argument that a statute was unconstitutional. Statutes were presumed constitutional—often to the point that courts demanded that the unconstitutionality of a statute be proved “beyond a reasonable doubt.”⁶⁶ Therefore, if a court determined that an interpretation of a statute simply raised doubts about its constitutionality, the court abided by that interpretation and rejected the constitutional challenge.⁶⁷

There were few exceptions to this approach before *Delaware & Hudson*. The most unequivocal example of a court adopting a different interpretation of a statute simply to avoid constitutional doubts was *Harriman v. Interstate Commerce Commission*,⁶⁸ decided just six months before *Delaware & Hudson* and the only case cited in *Delaware & Hudson* for the doubts canon. *Harriman* involved the ICC’s authority to compel testimony from the chairman of the Union Pacific Railroad concerning his ownership of stock in other railroads. The ICC sought that testimony to learn whether additional legislation was needed in light of such stock ownership, but the ICC did not have a pending enforcement action against Harriman. Justice Holmes interpreted the statute establishing the ICC as authorizing only those investigations designed to uncover violations of the act. He did so because of concerns—including constitutional concerns—about a broader in-

66 See, e.g., *Union Pac. Ry. Co. v. DeBusk*, 20 P. 752, 756 (Colo. 1888); *Commonwealth v. People’s Five Cents Sav. Bank*, 87 Mass. 428, 432 (1862); *Staudacher v. Webb*, 23 Hun. 42, 46 (N.Y. 1878); *Ex parte McCollum*, 1 Cow. 550, 564 (N.Y. Sup. Ct. 1823); *Slack*, 8 W. Va. at 625–26; see also *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1882) (declaring that unconstitutionality must be “clearly established”); *Harris*, 106 U.S. at 635 (holding that unconstitutionality must be “clearly demonstrated”); cf. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810) (Marshall, C.J.) (asserting that “it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other”). But see *County of Cherokee v. Kansas*, 13 P. 558 (Kan. 1887) (holding that unconstitutionality must be demonstrated by the preponderance of the evidence). Professor Thayer is most identified with the reasonable doubt approach. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

67 See *Township of Pine Grove v. Talcott*, 86 U.S. (19 Wall.) 666, 673 (1873); *Legal Tender Cases*, 79 U.S. 457, 531 (1870); *French*, 24 Cal. at 554–58; *Cotton*, 6 Fla. at 613–16; *McComas*, 81 Ind. at 331–334; *Grinage v. Times-Democrat Publ’g Co.*, 31 So. 682, 683 (La. 1902); *Nechamcus v. Warden of City Prison*, 39 N.E. 686, 687–89 (N.Y. 1895); *Clarke v. City of Rochester*, 24 Barb. 446, 470–71 (N.Y. 1857); *Lowery v. Board of Graded Sch. Trustees*, 52 S.E. 267, 269–70 (N.C. 1905); see also *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 625 (1819) (noting that the Court should not pronounce a statute unconstitutional in a doubtful case).

68 211 U.S. 407 (1908).

terpretation of the statute, and notwithstanding the ICC's specific statutory authority to make any necessary recommendations to Congress regarding the need for additional legislation. Then, in the last sentence of his opinion, he added that "[i]f we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor admits."⁶⁹ This is the first direct statement of the doubts canon. It suffers, however, from a number of problems: it was probably dicta, it cited a precedent that stated but misapplied the unconstitutionality canon,⁷⁰ the resulting interpretation prompted three justices to dissent,⁷¹ and it failed to offer any explanation for the departure from the historic application of the unconstitutionality canon and the disregard of constitutional doubts.

Besides *Harriman*, only one other case can be counted as definitely relying on the doubts canon.⁷² The hints of the doubts canon in the nineteenth century cases are more ambiguous. Two cases suggested that constitutional doubts alone might justify a different interpretation, but it is not clear that they followed that course.⁷³ Several cases seem to have left the constitutional question undecided, but again, the decisions are hardly emphatic that constitutional doubts

69 *Id.* at 422.

70 In *Knights Templars' & Masons' Life Indemnity Co. v. Jarman*, 187 U.S. 197 (1902), the court avoided the retroactive application of a Missouri insurance statute. The court stated the unconstitutionality canon—"where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred"—but it relied instead on the "doubtfulness" of the constitutionality of a retroactivity question and specifically declined to decide that question. *Id.* at 205.

71 See *Harriman*, 211 U.S. at 423–29 (Day, J., joined by Harlan & McKenna, JJ., dissenting) (objecting that the majority's interpretation of the statutory power of the Interstate Commerce Commission was too narrow). Justice Moody did not participate in the case, see *id.* at 422, so Justice Holmes gained a bare majority of five votes for his opinion.

72 See *McNalley v. Field*, 119 F. 445, 447–48 (C.C.D.R.I. 1902) (interpreting an amendment to a Spanish-American War revenue statute in order to avoid deciding whether Congress has the constitutional power to tax the governmental instrumentality of a state).

73 See *Camp v. Rogers*, 44 Conn. 291, 298 (1877) (stating that "[i]f upon the construction we have been considering the law in question would be void, or even of doubtful validity, it is our duty to find, if we are able, some other construction that will relieve it of this difficulty") (emphasis added); *Clare v. State*, 68 Ind. 17, 25 (1879) (observing that a literal construction "might perhaps" make the statute unconstitutional while a liberal construction "would remove all doubts").

suffice to require a different interpretation.⁷⁴ With hindsight, these ambiguous statements may have presaged the announcement of the doubts canon in *Delaware & Hudson*, but the balance of the nineteenth century cases left little doubt that the unconstitutionality canon remained securely in place.

II. THE CHOICE OF CANONS IN *DELAWARE & HUDSON*

The differences between the unconstitutionality canon and the doubts canon can be illustrated by considering how each canon operated in *Delaware & Hudson* itself. Congress enacted the Hepburn Act in 1906. Section one of the Act—the Commodities Clause—provided:

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.⁷⁵

The Commodities Clause responded to the existing situation in which a handful of Pennsylvania railroads shipped most of the anthracite coal produced and used in the United States. Consistent with Pennsylvania state policy, these railroads owned an interest in the coal that

⁷⁴ See *Knights Templars*, 187 U.S. at 205 (stating the unconstitutionality canon but declining to decide the constitutional question); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448 (1830) (stating the unconstitutionality canon but reading a statute governing federal court proceedings in Louisiana to avoid "the most serious doubts" about the statute's constitutionality); *People v. Frisbie*, 26 Cal. 135, 139 (1864) (opining that the statute would be "difficult, if not impossible" to sustain under one interpretation); *Commonwealth v. Downes*, 40 Mass. 227, 229-32 (1836) (refusing to interpret a federal statute to authorize the enlistment of minors in the military without the consent of their parents because Congress had not clearly stated such an intention in the statute); *Atlantic City Water-Works Co. v. Consumers' Water Co.*, 15 A. 581, 586 (N.J. Ch. 1888) (indicating that the constitutionality of a statute would be in doubt under one interpretation, but earlier stating that the constitutional conclusion "would seem to be so clear as to be beyond all dispute"); *Palms v. Shawano Co.*, 21 N.W. 77, 80 (Wis. 1884) (deciding to avoid an interpretation that "might" be unconstitutional); cf. *In re Abbey Press*, 134 F. 51, 55 (2d Cir. 1904) (describing argument of counsel that a provision in a bankruptcy statute is "unconstitutional, or at least so inconsistent with the fundamental law that no doubtful language should be construed to include such [constitutionally problematic] authority").

⁷⁵ Hepburn Act, ch. 3591, § 1, 34 Stat. 584 (1906).

they shipped, so that other railroads were unable to compete for the business of transporting the vast amount of coal mined in Pennsylvania.⁷⁶ For example, the Delaware and Hudson Company mined coal from its own lands and owned the stock of several coal companies, so that "much the greater part of the coal shipped over the railroad [was] the product of its own mines."⁷⁷ Congress sought to abolish simultaneous ownership of coal and the means of transporting coal by enacting the Commodities Clause.

The Pennsylvania railroads, of course, objected. Some of them structured their ownership interests so that they would fall outside the Commodities Clause; other railroads "fully expected the clause to be declared unconstitutional, and took no steps to dispose of their holdings."⁷⁸ Thus, when Attorney General Bonaparte sued the railroads to obtain compliance with the Clause, the railroads argued that the Clause exceeded the congressional commerce clause power and that it violated due process. The circuit court agreed in a 2-1 decision.⁷⁹

On appeal, the Supreme Court identified a series of "grave constitutional questions" raised by the government's interpretation of the statute as banning all railroad ownership of coal that they ship.⁸⁰

76 See *United States v. Delaware & Hudson Co.*, 164 F. 215, 224 (C.C.E.D. Pa. 1908) (recounting the events that led to the enactment of the Commodities Clause). For other accounts of the history of the Commodities Clause, see FRANK HAIGH DIXON, *RAILROADS AND GOVERNMENT: THEIR RELATIONS IN THE UNITED STATES, 1910-1921*, at 55 (1922); ROBERT B. HIGHSAW, *EDWARD DOUGLASS WHITE: DEFENDER OF THE CONSERVATIVE FAITH* 105 (1981); ELIOT JONES, *THE ANTHRACITE COAL COMBINATION IN THE UNITED STATES 187-93* (1914). The best description of the development of the Pennsylvania coal mining industry and its relationship to the railroads is contained in JONES, *supra*, at 3-179, and in *United States v. Reading Co.*, 226 F. 229, 232-39 (E.D. Pa. 1915).

77 JONES, *supra* note 76, at 129.

78 GABRIEL KOLKO, *RAILROADS AND REGULATION: 1877-1916*, at 163 (1965); *accord* JONES, *supra* note 76, at 195 (noting that "practically no effort was made by the principal coal roads to comply with the law" because of their heavy mortgage debt on coal lands and "because it was believed that the commodity clause would be held by the courts to be unconstitutional"). Indeed, the Justice Department agreed not to prosecute railroads for violating the Commodities Clause pending a judicial determination of its constitutionality, provided that the railroads agreed to abide by that decision. See *id.* at 196 (citing 42 CONG. REC. 5331 (1908), and 42 CONG. REC. 5533 (1908)).

79 See *Delaware & Hudson*, 164 F. at 226-49 (Gray, J.); *id.* at 249-51 (Dallas, J., concurring) (concluding that the statute "is incompatible with free government"). But see *id.* at 251-59 (Buffington, J., dissenting) (defending the constitutionality of the statute).

80 *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 406 (1909). The Court described the government's interpretation of the statute as

prohibit[ing] railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been man-

These questions included whether the Commerce Clause authorizes Congress to regulate an article that might become involved in interstate commerce, whether the Commerce Clause authorizes Congress to prohibit a railroad from shipping an article that it has previously owned, whether traditional state power to authorize a corporation to produce and ship a commodity was displaced by the Commerce Clause, and whether past congressional approval of such practices affected their constitutionality.⁸¹ Instead of deciding any of those questions, the Court announced the doubts canon and interpreted the Commodities Clause in a more narrow fashion that avoided those constitutional objections. But constitutional concerns were not the only basis for the Court's approach. The Court suggested that a literal reading of the statute produced internal inconsistencies that required the Court to harmonize the provisions.⁸² Additionally, the Court interpreted the direct or indirect interests in an article, that were prohibited by the Commodities Clause, as not encompassing railroad ownership of a coal company's stock.⁸³ Thus, the Commodities Clause escaped the Court meaning that railroads were prohibited from shipping coal that (1) the railroad had produced and had not in good faith sold before transportation, (2) the railroad owned in whole or in part, or (3) the railroad had some legal or equitable interest in other than stock.⁸⁴

ufactured, mined or produced by them or under their authority, or which they own or may have owned in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a railroad company in interstate commerce of a commodity which has been manufactured, mined or produced by a corporation, in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership.

Id. at 404; *see also id.* at 405 (quoting the government as arguing that "[t]his is undoubtedly a searching and radical law, and was meant to be so").

81 *Id.* at 406-07.

82 *Id.* at 408-12.

83 *Id.* at 413-14. The Court defended this reading as consistent with the Senate's refusal to amend the Commodities Clause to specifically prohibit railroad ownership of coal company stock. *Id.* at 414 (citing 40 CONG. REC. 7012-14 (1906)).

84 *Id.* at 415. In the Court's words, the Commodities Clause prohibited

a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined or produced by a carrier or under its authority, and at the time of transportation the carrier has not in good faith before the act of transportation dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported in whole or in part; (c) When the carrier at the time of transportation has an interest, direct or indi-

This debut of the doubts canon proved to be less than auspicious. Justice Harlan dissented from the Court's opinion because he feared that it would allow railroads to arrange their affairs in a way that avoided the congressional intent to distinguish railroads from the coal that they shipped.⁸⁵ The railroads quickly fulfilled Justice Harlan's prediction. The Delaware, Lackawanna, and Western Railroad established a separate coal company to which the railroad sold its coal at the mouth of the mine. The Lehigh Valley Railroad organized a similar company that bought the coal from the railroad and then contracted with the railroad for its shipment. The Reading Railway maintained its existing structure as part of a corporation that owned both the railroad and the coal company.⁸⁶ The lower courts interpreted *Delaware & Hudson* as permitting these new arrangements even though they threatened to defeat the original congressional purpose in enacting the Commodities Clause.⁸⁷ The Supreme Court, however, reversed each decision and held that the corporate structures violated the Commodities Clause.⁸⁸ The Court's opinions treated the Commodities Clause much differently than had *Delaware & Hudson*. In *United States v. Delaware, Lackawanna and Western Railroad Co.*,⁸⁹ the

rect, in a legal or equitable sense in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced or owned, etc., by a *bona fide* corporation in which the railroad company is a stockholder.

Id.

85 *Id.* at 419 (Harlan, J., dissenting); see also DIXON, *supra* note 76, at 55 (asserting that "[n]o more helpful guidance could have been offered by expert counsel to those companies that were seeking a way around the law").

86 The post-*Delaware & Hudson* activities are described in ROBERT J. CASEY & W.A.S. DOUGLAS, *THE LACKAWANNA STORY* 145-47 (1951); DIXON, *supra* note 76, at 56-58; JONES, *supra* note 76, at 201-12; Note, *Interpretation of the Commodities Clause of the Act of Congress Regulating Railroads*, 69 U. PA. L. REV. 66, 67-70 (1920).

87 See *United States v. Reading Co.*, 226 F. 229, 276 (E.D. Pa. 1915) (concluding that "the plan now assailed by the government cannot be successfully attacked for lack of good faith; we regard it as an honest attempt to cope with a perplexing financial situation . . . and an attempt to solve difficult legal problems with scrupulous regard for the law"); *United States v. Lehigh Valley R.R. Co.*, 225 F. 399 (S.D.N.Y. 1914); *United States v. Delaware, Lackawanna & W. R.R. Co.*, 213 F. 240, 260 (D.N.J. 1914) (observing that "the transactions between the [railroad and coal] companies began and have been carried on in good faith, in obedience to the decisions of the Supreme Court and in reliance thereon"); see also *Ketchum v. Denver & Rio Grande R.R. Co.*, 248 F. 106 (8th Cir. 1917) (holding that a private party lacked standing to raise a Commodities Clause claim).

88 See *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Delaware, Lackawanna & W. R.R. Co.*, 238 U.S. 516 (1915); *United States v. Lehigh Valley R.R. Co.*, 220 U.S. 257 (1910).

89 238 U.S. 516 (1914).

Court explained that while the corporate relationships did not actually constitute a monopoly, the monopolistic tendencies of those relationships were "opposed to that policy of the law, which was the underlying reason for the adoption of the Commodities Clause."⁹⁰ Then in *United States v. Reading Co.*,⁹¹ the Court emphasized that the corporate structure was within the evil to be remedied by Congress when it enacted the Commodities Clause and decided that the railroad exercised the requisite authority over the coal "without splitting hairs as to where the naked title to the coal would be when in transit."⁹² The remedial approach followed in these cases is a far cry from the narrow interpretation announced in *Delaware & Hudson*. Indeed, eleven years after the Court decided *Delaware & Hudson*, the Commodities Clause regained the meaning that the government had originally advanced.⁹³

And it did so without revisiting the constitutional questions left undecided in *Delaware & Hudson*. The attorney representing the railroad in the first case decided after *Delaware & Hudson* argued that a broader reading of the Commodities Clause would raise the Commerce Clause and due process questions,⁹⁴ but the Court refused to consider those constitutional questions in that case or any of the ensuing cases. By 1920, the Court had adopted the original meaning of the Commodities Clause without ever explaining why the serious constitutional questions raised by that meaning somehow disappeared.

90 *Id.* at 533; see also *Tap Line Cases*, 234 U.S. 1, 27 (1914) (explaining that the purpose of the Commodities Clause was "to divorce transportation from production and manufacture and to make transportation a business of an by itself unallied with the manufacture and production in which a carrier was itself interested").

91 253 U.S. 26 (1920).

92 *Id.* at 60-61. Chief Justice White, the author of *Delaware & Hudson*, would have upheld the corporate structure for the reasons stated in the district court's opinion. *Id.* at 64-65 (White, C.J., joined by Holmes & Van Devanter, JJ., dissenting).

93 As one contemporary observer wrote: "In the Reading Company case the Supreme Court has clearly departed from its position taken in the Delaware and Hudson case and the basis of its decision is the underlying policy of the clause." Note, *supra* note 86, at 69-70.

94 In *United States v. Lehigh Valley R.R. Co.*, John G. Johnson, counsel for the railroad, argued:

The relationship which the Government now seeks to have declared so lacking in good faith as to render the existence of the coal company a mere fiction, forms the basis of the very rights from which arose the grave and doubtful constitutional questions which this court found it unnecessary to decide.

220 U.S. 257, 262 (1910); cf. JONES, *supra* note 76, at 198 n.5 (writing—in 1914—that the constitutional questions left undecided in *Delaware & Hudson* "presumably will come up again before the Supreme Court for final determination").

The invocation of the doubts canon in *Delaware & Hudson* also resulted in an interpretation of the statute that remained subject to constitutional challenge. Once the Court adopted its construction of the Commodities Clause, it then spent three pages explaining why the Commerce Clause and due process objections to that construction were unavailing. Those constitutional arguments troubled the Court far less than the constitutional questions posed by the government's broader understanding of the statute, but the complete invalidation of the provision by the lower court shows that the Court's interpretation of the statute failed to achieve its stated goal of avoiding "grave and doubtful" constitutional questions.

By contrast, if the Court had employed the unconstitutionality canon in *Delaware & Hudson*, then it would have resolved the constitutional issues at an earlier date and avoided several years of futile railroad efforts to restructure their corporate relations in an effort to comply with *Delaware & Hudson*. If the Court had decided that the government's reading of the Commodities Clause was constitutional, then the Court would have adopted an interpretation that effectuated congressional intent, too. The only danger created by the unconstitutionality canon is that it could have provoked the Court to follow the lower court's lead in holding the government's interpretation of the Commodities Clause unconstitutional. Had it done so, then the unconstitutionality canon would have allowed the Court to adopt the narrower interpretation of the clause—the interpretation that the Court actually announced in *Delaware & Hudson* because of the doubts canon—so that the law would have survived, albeit in a truncated form.

It is impossible to say in 1997 how the Court would have decided the constitutionality of the Commodities Clause in 1909. The Court's invalidation of broad economic legislation as contrary to the Due Process Clause had already reached its zenith by that date,⁹⁵ and there was some indication of a greater willingness to uphold such statutes.⁹⁶ On the other hand, the Court continued to strike down federal economic legislation during the years that the Court revived the original understanding of the Commodities Clause.⁹⁷ We can only speculate

95 See *Lochner v. New York*, 198 U.S. 45 (1905).

96 See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon statute regulating the number of hours that women were allowed to work). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 378 & n.26 (5th ed. 1995) (noting that between 1900 and 1910 the Supreme Court usually sustained federal statutes expanding the power of the ICC).

97 See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down a federal child labor statute as beyond the congressional commerce clause power).

about how the Court would have resolved the constitutional issues raised in *Delaware & Hudson* if the Court had been forced to decide them. But this much is certain: the unconstitutionality canon would have required the Court to actually decide the constitutionality of the government's reading of the Commodities Clause before rejecting that reading in favor of the less obvious reading that the Court in fact adopted. Instead, the Court used the doubts canon to cast aside the best reading of the statute, only to later return to that reading without ever answering the constitutional questions.

III. CONCLUSION

Delaware & Hudson was wrong to insist that the doubts canon is the only tool available to a court confronted with an ambiguous statute and a constitutional problem. The unconstitutionality canon presented a viable alternative throughout the nineteenth century. That does not mean, however, that those were the good old days. The unconstitutionality canon smacks of an advisory opinion by answering a constitutional question only so that the constitutional holding can be avoided and it demands a resolution of constitutional questions that the courts may be just as happy to leave unresolved. These concerns may justify the modern focus on the doubts canon instead of the unconstitutionality canon. But now that Professor Schauer has questioned the doubts canon, any helpful alternative may find a receptive audience. Or maybe there is a way to reconfigure both canons into an integrated whole. These are difficult questions that I leave for another day. Meanwhile, Justice White's claim that the historic statement of the unconstitutionality canon "plainly must mean" the doubts canon instead can no longer survive. If we are going to heed Schauer's advice to reexamine *Ashwander*, we should probably reexamine *Delaware & Hudson*, too.