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COMMENT

Constitutional Avoidance Step Zero

When construing ambiguous statutes, judges favor interpretations that do not require the court to address a constitutional question—a long-standing practice known as "constitutional avoidance" or the "avoidance canon." Contrary to the common understanding of constitutional avoidance, this Comment argues that employing the canon entails a more complicated process than merely selecting the least constitutionally problematic statutory interpretation. Rather, the avoidance canon first requires judges to engage in a preliminary factual inquiry to determine whether a litigant's claim poses a risk of requiring constitutional adjudication at all. Drawing from the administrative law context, this Comment refers to that analysis as the Step Zero inquiry.[1] For each of three paradigmatic statutory interpretation cases,[2] the Comment describes how the Court employs the avoidance canon only after reaching an initial factual determination of constitutional doubt. Increased awareness of the Step Zero avoidance inquiry may reduce instrumental judicial decisionmaking, force deliberation among the judiciary to determine the appropriate Step Zero threshold, and provide optimal incentives for litigants and Congress. This Comment concludes by recommending additional avenues for scholarly exploration on this topic.

1. This Comment uses the term "Step Zero" in a parallel manner as administrative law scholars refer to the investigation that precedes *Chevron* analysis. *See* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006). After *United States v. Mead Corp.*, 533 U.S. 218 (2001), courts conduct a "Step Zero" investigation as to whether Congress delegated rulemaking authority to agencies before applying *Chevron* analysis. This Comment employs Step Zero as a term of art, implying that courts are currently applying a structurally (but not substantively) similar preliminary investigation before applying the avoidance canon.

2. Gonzales v. Oregon, 546 U.S. 243 (2006); Gregory v. Ashcroft, 501 U.S. 452 (1991); NLRB v. Catholic Bishop of Chi., 440 U.S. 490 (1979).

I. MODERN CONSTITUTIONAL AVOIDANCE AND ITS PROCEDURAL AMBIGUITY

The Supreme Court articulated the modern avoidance canon through its assertion in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council* that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."[3] Although a detailed exposition of the history and recent treatment of the avoidance canon exceeds the scope of this Comment,[4] it is worth noting that scholars have begun to characterize many cases—ostensibly decided without using the avoidance canon—as cases in which the avoidance canon operated as a background norm that influenced the disposition.[5] Because of this shift in scholarly understanding, examining the avoidance canon's Step Zero has far more relevance than for only those cases in which the court explicitly employs that canon of construction.

The Step Zero avoidance inquiry is as old as the canon itself. Indeed, the judicial practice of avoiding constitutional questions pre-dates even judicial review; it was arguably first espoused in the 1800 case *Mossman v. Higginson*.[6] Despite being such a deeply engrained, relatively uncontroversial judicial procedure,[7] this Comment asserts that constitutional avoidance contains a nebulous, previously unexamined threshold inquiry. Although some scholars have hinted at the vagueness of the procedure—Judge Richard Posner has referred to the ambiguity of the avoidance canon as a "judge-made

3. 485 U.S. 568, 575 (1988). Adrian Vermeule also identifies "classical avoidance" as a discrete form of the canon. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1948 (1997). He draws classical avoidance from Justice Holmes's quote in *Blodgett v. Holden*: "[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, [a court's] plain duty is to adopt that which will save the Act." 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

4. For a more detailed discussion of the avoidance canon, see RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE & PROCEDURE § 2.13(g) (4th ed. 2009).

5. *See, e.g.*, Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1561 (2000) (characterizing *Felker v. Turpin*, 518 U.S. 651 (1996), as an avoidance case).

6. 4 U.S. (4 Dall.) 12 (1800); Vermeule, *supra* note 3, at 1948 (arguing that avoidance pre-dates judicial review); *cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (establishing judicial review).

7. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 180-83 (2d ed. 1962).

constitutional 'penumbra'"—no scholar has recognized this fact-intensive examination.[8] Professor Trevor Morrison, for instance, elided the core issue simply by quoting the relevant language from *Edward J. DeBartolo Corp.* as identifying when the canon is "trigger[ed]."[9] The next Part isolates this inquiry and explores three cases.

II. STEP ZERO IN PRACTICE

The three statutory interpretation cases discussed in this Part demonstrate how the Step Zero avoidance investigation exists across jurisprudentially dissimilar cases. For the following reasons, these cases serve as compelling examples for this examination. First, each case may be understood as employing the avoidance canon, even if the authors of each opinion do not explicitly premise their arguments on avoidance principles. Second, each opinion contains an acknowledgment that a factual inquiry precedes application of avoidance: the Step Zero inquiry. Third, the six opinions—each case's majority and accompanying opinions—include a range of six possible threshold levels for the Step Zero process. That is, each opinion identifies a different level of constitutional doubt to trigger use of the avoidance canon.

To begin, *NLRB v. Catholic Bishop of Chicago* presents the only unequivocal example of constitutional avoidance and, accordingly, provides the most succinct and vivid Step Zero exposition. Before construing the statute, the majority examines the practical implications of NLRB's involvement in religiously affiliated schools. The Court concludes that "intrusion into this area *could* run afoul of the Religion Clauses . . . [and] we would be required to decide whether that was constitutionally permissible."[10] After surpassing this Step Zero threshold of potentially requiring a constitutional decision, the Court proceeds to construe the statute in light of the avoidance canon. In contrast, dissenting in *NLRB*, Justice Brennan adheres to the standard of requiring a "serious doubt of constitutionality" before employing avoidance.[11] Such a standard requires a weightier determination—that of serious doubt—as opposed to the majority's view that any interpretation that merely could be problematic triggers the canon.

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

9. Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203 (2006).

10. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499 (1979) (emphasis added).

11. *Id.* at 510 (Brennan, J., dissenting) (quoting Machinists v. Street, 367 U.S. 740, 749 (1961)).

The second case, *Gregory v. Ashcroft*, is a less obvious example of avoidance.[12] Whereas *NLRB* stands as one of the Court's most explicit uses of the avoidance canon,[13] scholars commonly cite *Gregory* as a federalism case.[14] Nonetheless, a strong argument exists to view *Gregory* as an avoidance case because of the constitutional principles that animate the Court's concern about the balance between the national government and state governments. Also, in resolving the case, Justice O'Connor conducts a robust Step Zero investigation before ever examining either the statute's text or congressional intent. After reviewing the exhaustive history of shared powers, the Court concludes that finding the Age Discrimination in Employment Act (ADEA) applicable to Missouri judges "would upset the usual constitutional balance of federal and state powers."[15] Having concluded that a constitutional question exists, the majority proceeds to statutory construction in light of the constitutional issue.

Justice White's concurrence in *Gregory* lends additional support to the theory that a Step Zero inquiry precedes avoidance analyses and profoundly impacts the manner in which the Court interprets statutes. Performing a similarly sequenced investigation as the majority, Justice White concludes, first, that no constitutional difficulty exists and, second, that the Court should interpret the ADEA using ordinary canons of construction.[16] Justice White's Step Zero conclusion that the *Gregory* dispute involved no constitutional question compels him to dispose of the case without the avoidance norms that precipitate the majority's disposition.

Finally, like *Gregory*, scholarly treatments of *Gonzales v. Oregon* have not commonly regarded it as an avoidance case.[17] This Comment asserts, however, that the *Gonzales* opinion's attempt to resolve the case by avoiding constitutional decisionmaking contains a clear exposition of the Step Zero inquiry. Unlike *Gregory*'s open discussion of constitutional issues, *Gonzales* presents a more implicit example of avoidance. To view *Gonzales* as such requires contextualizing it within the Court's assisted suicide jurisprudence. Considering *Gonzales* and its predecessor physician-assisted suicide case,

12. 501 U.S. 452 (1991).

13. *See* Robert W. Scheef, *Temporal Dynamics in Statutory Interpretation: Courts, Congress, and the Canon of Constitutional Avoidance*, 64 U. PITT. L. REV. 529, 542 (2003) (describing *NLRB* as the "high watermark" of avoidance).

14. *See, e.g.*, Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 986 (2007).

15. *Gregory*, 501 U.S. at 460.

16. *Id.* at 474 (White, J., concurring in part and dissenting in part).

17. *See, e.g.*, Ann Graham, *Searching for* Chevron *in Muddy Waters: The Roberts Court and Judicial Review of Agency Regulations*, 60 ADMIN. L. REV. 229, 240-43 (2008).

Washington v. Glucksberg,[18] as a coherent whole, the Step Zero analysis and influence of avoidance norms conform distinctly to the more structured inquiry present in *NLRB* and *Gregory*.

The *Glucksberg* Court conducted a fact-intensive investigation into the constitutional challenges presented by physician-assisted suicide and satisfied the Step Zero avoidance investigation.[19] Foundational in Justice Kennedy's *Gonzales* opinion is the *Glucksberg* Step Zero conclusion that wholesale prohibition of physician-assisted suicide at least implicates constitutional uncertainty.[20] Having proceeded from Step Zero, the majority applies avoidance norms consonant with those present in *NLRB* and *Gregory*. The majority writes without elaboration that "*Glucksberg* . . . makes the . . . delegation [to the Attorney General] all the more suspect."[21] Furthermore, the "earnest and profound debate" among the citizenry cannot alone be significant enough to alter a strong deference norm;[22] rather, the majority awards the Attorney General less deference because to do otherwise would advance upon the frontier of constitutionality prohibited by avoidance. Justice Scalia's *Gonzales* dissent parallels Justice White's concurrence in *Gregory*, creating an additional link within this set of cases. Reaching the conclusion that the case presents no constitutional question, Justice Scalia construes the Controlled Substances Act using the same ordinary canons of construction guiding Justice White's construction of the ADEA in *Gregory*.[23]

Despite their uniform engagement in preliminary constitutional examination, the three cases diverge on the threshold level of constitutional doubt that warrants use of the avoidance canon. The six principal opinions establish a spectrum from highest to lowest level of Step Zero scrutiny. Justice Kennedy establishes the lowest threshold for invoking avoidance norms, as *Gonzales* merely involved an unsettled constitutional issue in the eyes of the public. The *NLRB* majority claims to meet the Step Zero threshold if the facts "could run afoul" of constitutional guarantees.[24] In *Gregory*, Justice O'Connor found the potential interpretation would "upset the usual constitutional balance."[25] Justice Brennan, in his *NLRB* dissent, embraces the standard of

18. 521 U.S. 702 (1997).

19. *See id.* at 722-36.

20. Gonzales v. Oregon, 546 U.S. 243, 267-68 (2006).

21. *Id.* at 267.

22. *Id.* (quoting *Glucksberg*, 521 U.S. at 735) (internal quotation marks omitted).

23. *See id.* at 275 (Scalia, J., dissenting).

24. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 499 (1979).

25. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

"serious doubt of constitutionality."[26] Justice White dissents in *Gregory* and demands a higher standard than merely a "potential constitutional problem."[27] Establishing the highest bar, Justice Scalia, in his *Gonzales* dissent, elects not to apply avoidance because the facts do not "push the outer limits" of constitutional protection.[28] No temporal trend exists in the level of scrutiny: the most recent opinion presents the most polarized standards in majority and dissent.[29]

Although each Justice presents this inquiry in varying degrees of extensiveness, no opinion identifies this process as anything more than background information before the primary task of interpretation. Each ostensibly structures its inquiry by *first* ascertaining whether a plausible reading of the statute exists that avoids the constitutional issue. The use of the avoidance canon is assumed. Although each identifies either textual analysis or construing legislative history as its primary assignment, the Step Zero determination establishes the context for those exercises. It has transpired in advance of this interpretive step. Because this process operates before the purported first step in so many critical cases of statutory interpretation, the next Part discusses the specific benefits of an unambiguous and uniform Step Zero standard.

III. THE IMPORTANCE OF STEP ZERO

Courts should openly acknowledge the Step Zero inquiry and should enunciate an explicit standard for future cases. Such a standard will confer four primary benefits to the legal system: (1) judges will be less likely to adjudicate cases instrumentally through their use of the avoidance canon; (2) litigants will perceive more accurately the consequences of potential litigation; (3) the determination of the appropriate Step Zero level will compel a fruitful deliberative process within the judiciary that may clarify other areas of uncertainty; and (4) having a settled Step Zero threshold will ensure that Congress, when drafting legislation, has more complete knowledge of how courts will interpret statutes.

26. 440 U.S. at 510 (Brennan, J., dissenting) (quoting Machinists v. Street, 367 U.S. 740, 749-50 (1961)).

27. 501 U.S. at 479 (White, J., dissenting) (distinguishing the majority's standard).

28. 546 U.S. at 291 (Scalia, J., dissenting). One might also argue that Justice Scalia sets an even higher standard with his citation to *United States v. Sullivan* for the proposition that "courts shall not distort . . . congressional purpose, not even if the clearly correct purpose . . . leads inevitably to a holding of constitutional invalidity." 332 U.S. 689, 693 (1948).

29. *See Gonzales*, 546 U.S. at 267; *id.* at 291 (Scalia, J., dissenting).

A clear Step Zero inquiry may allay criticisms relating to judicial instrumentalism. If judges must engage with a specified level of constitutional doubt, they will be compelled to enumerate clearly their reasons for applying the avoidance canon in a particular case. Assuming for the purpose of argument that the vast empirical evidence of legal realists has salience,[30] techniques that would reduce unprincipled or political decisionmaking should improve the reliability and predictability of adjudication. This acknowledgement of the "New Legal Realism"[31] may be extended to clarify each stage of judicial decisionmaking, minimizing attitudinal biases.[32] The identification and settling of the Step Zero inquiry, therefore, is a further step in the direction toward neutral decisionmaking.

Moreover, acknowledging the existence of a discrete judicial decision point will provide the appropriate incentives for litigants to make the case more persuasively to courts that the judiciary should or should not engage in constitutional avoidance analysis. Litigants may presently argue that the avoidance inquiry compels a specified result, but insufficient attention is paid to whether that analysis should apply at all. If the court selects a consensus threshold as to the level of constitutional doubt required before the canon should apply, litigants will be able to tailor their arguments toward that standard and will have clearer notice that the canon may not apply in unambiguous circumstances.[33] Because "[l]itigation occurs only when parties either cannot or do not predict what the court will do," this development advances judicial economy and efficient decisionmaking.[34]

An understanding that forces courts to contend with competing constitutional understandings that might require avoidance will initiate a dialogic process within the courts to precipitate the appropriate standard. One can envision conservative judges articulating an exacting standard to defer in greater measure to democratically accountable legislatures, whereas more

30. *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761 (2008); Eric A. Posner, *Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853 (2008).

31. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008).

32. *See generally* Posner, *supra* note 30 (describing efforts to mitigate bias).

33. *See* Neal Devins & Alan Meese, *Judicial Review and Nongeneralizable Cases*, 32 FLA. ST. U. L. REV. 323 (2005); Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007).

34. Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant?: An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31, 34 (2006).

liberal judges might espouse a flexible standard to permit courts to reach outcomes that reflect legislative purpose in cases of statutory ambiguity.[35] This debate, however, does not necessarily result in an outcome along a one-dimensional threshold spectrum from high to low. Courts might consider the manner in which the statute in question had been enacted, whether there had been other indicia of constitutional doubt, or whether it raises constitutional questions arising from multiple clauses of the Constitution.

Finally, courts should adopt a consistent standard for utilizing avoidance to provide ideal incentives for Congress when drafting potentially problematic statutes. An unambiguous threshold for employing the canon will give complete information to legislatures about the likelihood that courts will invalidate a statute because of constitutional doubt.[36] A clear standard will have a deliberation-forcing effect on Congress, as representatives will be more likely to embrace an objective standard as a policy consideration. That is, once the court has delineated a standard for avoidance, legislators will debate this issue explicitly and may avoid enacting problematic statutes.

The ultimate identification of the Step Zero inquiry may have profound effects on litigation involving constitutionally suspect statutes. Courts will be decreasingly likely to decide these claims in an instrumental fashion; litigants will have the optimal incentives for casting their arguments; courts will engage in a reasoned process of common-law-making to select the appropriate threshold; and Congress may be more deliberate in its legislative drafting. Each of these changes signifies a marked improvement from the status quo, advances judicial economy, and promotes reasoned decisionmaking through neutral principles of adjudication. The appropriate threshold to be selected remains a subject that demands significant scholarly attention. The next Part intends to identify the most productive avenues of scholarship through which the academy might attempt to influence courts in making that determination.

IV. CONCLUSION: AVENUES OF EXPLORATION

This Comment has intended to demonstrate the existence of a preliminary factual determination that occurs in advance of employing the avoidance canon. It concludes by outlining a potential research agenda that will assist

35. *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (1998), *with* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 17-18 (2005).

36. *See* Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2, 36-38 (2008).

courts in determining the appropriate threshold to select as the Step Zero avoidance inquiry. At its core, courts must resolve this question by determining a standard above which the avoidance canon will be triggered. Though subjective, courts will ideally select a standard that is sufficiently detailed to alleviate concerns of indeterminacy and judicial manipulation—precisely the concerns that counsel in favor of creating a standard from the current ambiguity.

Scholars should evaluate the bounds of that potential standard by assessing the viability of the polar standards offered by Justice Kennedy and Justice Scalia in *Gonzales*.[37] Concluding decisively that the appropriate standard lies between two poles will signify a strong first step toward developing a coherent discussion of this issue. Specifically, scholars should begin by considering the effect on statutory claims that would arise from adopting Justice Kennedy's implied standard of utilizing the canon in cases of potential constitutional uncertainty. One can envision an exhaustive treatment of statutory claims in which litigants characterize their arguments as being implicated by various areas of unsettled constitutional law subject to "earnest and profound debate."[38] At the other extreme, scholars should assess whether Justice Scalia's standard—when a statute "push[es] the outer limits" of constitutional protection—overly limits the judiciary.[39] His reasoning builds upon two cases, *Solid Waste Agency v. U.S. Army Corps of Engineers*[40] and *United States v. Sullivan*,[41] in which the Court elected not to employ avoidance when construing the Commerce Clause power. Such a standard may unnecessarily constrain courts in engaging with foundational constitutional questions.

If scholars and judges conclude that the range of available options, indeed, lies between those two poles, they should then shift their attention toward assessing whether any of the four other standards enumerated in this Comment offer courts the optimal threshold for achieving the goals outlined in Part III. This Comment urges them to consider whether the selected standard balances the interests of litigant incentives, legislative clarity, and avoidance of unnecessary constitutionalizing of statutory claims. Regardless of the ultimate standard selected, the act of explicitly enumerating any standard at all will go

37. *See* Gonzales v. Oregon, 546 U.S. 243, 267-68 (2006); *id.* at 291 (Scalia, J., dissenting).

38. *Id.* at 267 (internal quotation marks omitted).

39. *Id.* at 291 (Scalia, J., dissenting).

40. 531 U.S. 159, 172 (2001) ("Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

41. 332 U.S. 689, 697-98 (1948).

far toward realizing Justice Brandeis's famous statement that "[i]t is usually more important that a rule of law be settled, than that it be settled right."[42]

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42. Di Santo v. Pennsylvania, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting).