Divesting the Courts: Breaking the Judicial Monopoly on Constitutional Interpretation

Lawrence C. Marshall
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LAWRENCE C. MARSHALL*

"I . . ., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same . . ." Congressional Oath of Office

"The fastest way to empty out the chamber [of Congress] is to get up and say, 'I'd like to talk about the constitutionality of this bill.' Members of Congress believe that's what courts are for."

Judge (and former Member of Congress) Abner M. Mikva

The federal judiciary has changed dramatically in the past decade. In 1980, 60% of sitting federal judges had been appointed by Democratic presidents; by 1990, 60% were Republican appointees. In 1980, the United States Supreme Court had both a core "conservative" block of two (Burger and Rehnquist), and a core "liberal" block of two (Brennan and Marshall); five justices (Stewart, White, Blackmun, Powell, and Stevens) occupied positions at various points in between. In 1990 it appears that the Court has a core conservative block of five (Rehnquist, O'Connor, Scalia, Kennedy & Souter), with one other (White) providing a rather consistent conservative vote. No matter what ultimately happens to Roe v. Wade, it seems fair to say that we now have a Supreme Court that will be extremely reluctant to use the Constitution to shield traditionally powerless groups and individuals from majoritarian decisions, much less to provide these groups and individuals positive entitlements to governmental benefits and protection. The Warren Court's jurisprudence may well have survived Earl Warren's and Warren Burger's tenure; but it most assuredly will not survive William Rehnquist's.

In light of these dramatic changes in the makeup of the judicial...

* Associate Professor, Northwestern University School of Law. Many thanks to Patricia Sindel for her valuable research assistance and support.

1. 5 U.S.C.A. § 3331.

2. Quoted in Greenhouse, What's a Lawmaker to Do About the Constitution, NEW YORK TIMES, Friday, June 3, 1988.

3. These figures were derived from the lists of federal judges printed in 626 F.2d and 898 F.2d, respectively.

branch, it is not surprising that many "progressive" constitutional scholars have begun to focus attention on other branches of government as potential sources of protection. Naturally, the primary focus has not been on the federal executive branch, in light of the rather solid hold the Republican Party—the same party that has transformed the federal judiciary—has on the White House. Rather, there has been a renewed focus on Congress as the branch that might serve as a critical protector of constitutional rights and values. Robin West's article in this Symposium is an example of this trend; after describing the unique, somewhat narrow, way in which judges tend to read the Constitution as a legal, authoritarian instrument, she calls upon Congress to reengage itself in the Constitution and to feel free to read the document as a more value-laden, goal-oriented instrument.

All of this seems to make great sense, politically and otherwise. It is hard to argue with the proposition that Congress ought to be taking its duty to support the Constitution seriously, instead of treating the Constitution as a collection of inspirational quotes to be used with rhetorical flourish or as a shorthand reference to what the Supreme Court is likely to hold on a given issue. The difficulties only begin when one starts thinking about what kind of steps can be taken to induce more congressional attention to constitutional restraints and ideals. For even if all of the legal academics in the country were to agree that Congress ought to

5. See generally West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 678-713 (1990) (discussing strains of progressive constitutionalism with special reference to some recent Supreme Court decisions that have proven quite disappointing to progressive constitutionalists).

6. In the last 22 years, only one Democrat, Jimmy Carter, has occupied the White House, and even he was evicted after one term.


9. There is much to be said in support of West's insight that judges' constitutional interpretation is constrained by their need to treat the Constitution as a legally enforceable set of obligations. I provide some examples of this infra. I question, though, whether the primary example that West uses supports her point. For if the taming of Brown v. Board of Education's vision of substantive equality is a necessary product of the way in which judges view legal issues, what explains Brown in the first place? Did Earl Warren not see the Constitution through judicial lenses? If not, why not? Was it his political background that allowed him to transcend the legal culture that typically defines (and constrains) judges' treatment of constitutional issues? If so, what about the other eight justices, many of whom were classic judicial figures? It seems to me that the erosion of Brown is due to the way that certain judges have viewed the Constitution, not anything about judges' perspectives generally. Under this view, the erosion of Brown's promise has been far more affected by the current Court's judicial and political conservatism, rather than by the limited ways in which judges tend to read constitutional texts.
develop its own role in constitutional interpretation, it seems unlikely that our general pleas for vigorous congressional involvement in the Constitution would influence congressional attitudes.\(^{10}\)

How, then, can the perceived judicial monopoly on constitutional discourse and interpretation be eliminated? In breaking up monopolies, it typically is not enough to give a pep-talk to would-be-competitors persuading them that they ought to assert themselves more forcefully in the market. Rather, it is necessary to focus on the monopolist in order to implement changes that create an environment more conducive to competition. This same reasoning applies to the judicial monopoly on constitutional discourse. In order to help eliminate the monopoly, it is necessary to focus on the courts who now exercise it. Particularly, it is essential to start considering steps that courts can take to help stimulate Congress to take the Constitution more seriously.

In this essay I consider two different contexts in which this goal might be implemented. First, I discuss the traditional canon of interpreting statutes in a manner that avoids constitutional questions (the "avoidance doctrine"). Although this is one of the few existing doctrines explicitly geared toward promoting constitutional dialogue between Congress and the courts, I argue that it is unlikely to accomplish this goal, and carries significant costs that need to be considered. I then turn to the rhetoric and process of judicial review itself, and suggest that the Court has been insensitive to the fact that other branches' independent duties to the Constitution go well beyond their duty to comply with judicial orders interpreting the Constitution. In the course of this discussion, I present the outlines of two proposals as examples of ways in which the Court might go about correcting some of the misperceptions that its approach to Congress and the Constitution has helped create.

I. AVOIDING CONSTITUTIONAL QUESTIONS OR AVOIDING CONGRESS?

Issues of legislative engagement in constitutional issues frequently are discussed when courts invoke the canon of construing statutes to avoid constitutional difficulties. As the Court recently put it: "It has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional

\(^{10}\) I am a little less skeptical about legal scholars' ability to influence the judicial branch. See Marshall, *Intellectual Feasts and Intellectual Responsibility*, 84 Nw. U.L. Rev. 832, 842-50 (1990) (arguing that legal academics can have significant conditioning influence on judicial decisionmaking).
problems, the Court will construe the statute to avoid such problems un-
less such construction is plainly contrary to the intent of Congress.11
In its strong form, this canon allows the courts to ignore the rather plain
language of the statute and other standard indicia of legislative intent in
order to construe the statute in a manner that steers clear of what the
Court considers to be constitutional doubt.12

The Supreme Court claims that the canon "has for so long been
applied . . . that it is beyond debate,"13 and Judge Friendly observed that
questioning this doctrine "is rather like challenging the Holy Writ."14
Indeed, even Karl Llewellyn spared this canon, omitting it from his fa-
mous list of thrusts and parries.15 Nonetheless, in the context of thinking
about Congress' role in constitutional discourse, particularly as part of a
symposium on statutory interpretation, it is worthwhile to consider how
well the canon reflects actual congressional awareness of constitutional
issues and what kind of constitutional culture it helps create within the
halls of Congress.

A. Avoidance as an Effort to Promote Dialogue With Congress

The primary justification provided for the avoidance canon is the
"prudential concern that constitutional issues not be needlessly con-
fronted."16 Because of the basically irrevocable nature of constitutional
decisions—constitutional amendments are virtually impossible in all but
the most politically volatile subject areas—judicial decisions based on the
Constitution are thought to create an extraordinary degree of friction
between the judicial and legislative branches. Statutory interpretation

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). For other recent applications of this rule, see infra note 19.
12. The Supreme Court's recent decision in Rust v. Sullivan, 111 S. Ct. 1759 (1991), may or
may not have signalled a dramatic revision in the Court's approach to the avoidance doctrine. Rust
involved a statutory and constitutional challenge to regulations that barred recipients of federal family
planning funds from talking about abortion with their clients. In refusing to construe the statute
in Rust in a way that would have avoided significant constitutional questions and concerns, the
Court declared that the concerns did not rise to the level of "grave and doubtful constitutional
questions." Id. at 1771. As the dissenters pointed out, however, it surely "avoids reality" to say that
the issues of free speech and abortion rights implicated in Rust were not serious ones. See id. at 1778
(Blackmun, J., with whom Marshall, Stevens & O'Connor, J., join, dissenting); see also id. at 1788
(O'Connor, J., dissenting). It seems likely, though, that the avoidance of the avoidance doctrine in
Rust was driven more by a majority of the Court's zeal to reach the constitutional issues there, rather
than by any general desire to begin cutting back on the avoidance doctrine.
13. Id.
14. H. FRIENDLY, Mr. Justice Frankfurter & The Reading of Statutes in BENCHMARKS 211
(1967). It should be noted that Judge Friendly proceeded to challenge this Holy Writ.
15. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About
How Statutes are to be Construed, 3 VAND. L. REV. 395, 401-406 (1950).
decisions, on the other hand, can be modified by Congress. Many supporters of the avoidance canon have, therefore, justified it as a tool for promoting judicial restraint and for stimulating dialogue between the courts and Congress on constitutional issues.  

This argument would be considerably stronger if there was some evidence that Congress is likely to accept the Court's invitation to engage in constitutional dialogue. But where are the instances of Congress enacting a law adopting interpretation 'a', after the Court specifically has adopted interpretation 'b' to avoid confronting the questionable constitutionality of interpretation 'a'? To do this, Congress would not only have to overcome all of the inertia associated with enacting or amending any piece of legislation, but would also have to be willing to confront the Court by passing a statute about which the Court has already expressed significant constitutional doubts. It is not surprising that no instances of this kind of confrontation come to mind.  

Indeed, it seems quite plausible that the Court promotes more congressional attention to both the constitutional and statutory issues when it actually invalidates a statute based on its most natural construction. For in such cases, the invalidation of the statute (or more likely a provision in the statute) will often leave an unacceptable vacuum in the regulatory scheme. When this happens, Congress may not have the luxury of


18. Some of the literature on this point is discussed in Marshall, Let Congress Do It: The Case for an Absolute Rule of Statutory Stare Decisis, 88 MICH. L. REV. 177, 186-190 (1989).

19. Although I have not conducted a thorough empirical study on the issue, I have looked at a dozen relatively recent cases in which the Supreme Court has invoked the avoidance doctrine. See Public Citizen v. United States Dept. of Justice, 109 S. Ct. 2558 (1989); DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568 (1988); Lowe v. SEC, 472 U.S. 181 (1985); United States v. Security Industrial Bank, 459 U.S. 70 (1982); St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981); United States v. Clark, 445 U.S. 23 (1980); Califano v. Yamasaki, 442 U.S. 682 (1979); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979); Lorillard v. Pons, 434 U.S. 575 (1978); United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971); NLRB v. Fruit & Vegetable Packers & Warehouse Men, 377 U.S. 58 (1964); Machinists v. Street, 367 U.S. 740 (1961). In none of these has Congress reacted by adopting the construction that the Supreme Court rejected. It is possible, I imagine, that Congress could be less intimidated by lower courts' invocation of the avoidance doctrine; for the lower courts' expression of doubt about the statute's potential unconstitutionality might carry less weight. This possibility has to be balanced, however, against the reality that Congress is generally less likely to respond to lower court decisions in the first place.

20. The most striking recent example of this is the Court's decision in Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), striking down the Bankruptcy Code of 1978. For an account of Congress's reaction to the decision, see Countryman, Scrambling To Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process, 22 HARV. J. LEGIS. 1 (1985).
letting the status quo remain, as it does when the Court has taken upon itself to rewrite the statute in a manner that avoids possible constitutional difficulties. By declaring the most natural construction of the statute to be unconstitutional, the Court may well be forcing Congress to confront the subject and to reframe the statute in a manner that incorporates Congress's view of the Constitution, as informed by the Court's decision.21

B. Avoidance as an Exercise in Judicial Restraint

These doubts about whether the avoidance doctrine actually stimulates much meaningful dialogue may not be enough to call the canon into question. But in addition to its lack of proven benefits, there are substantial costs associated with the avoidance doctrine. To begin with, for those who adhere to an agency theory of statutory interpretation, there are significant problems with courts ignoring otherwise dispositive indicia of legislative intent when the Court's interpretation of the Constitution does not actually foreclose the approach that the legislature seems to have chosen. If one believes that the judiciary's role qua statutory interpreter is to implement Congress' constitutionally valid choices whenever they can be discerned,22 then the specter of superconstitutional bending of statutes is quite problematic. As Judge Posner has argued, the doctrine which is supposedly rooted in judicial restraint actually has the effect of enhancing judicial activism in some significant respects. Given the unlikelihood of Congress's overruling a statutory interpretation decision, he explains that:

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

21. If Congress is particularly displeased with the Court's decision it may try to confront the Court by modifying the statute only slightly, with the hope that the Court may either distinguish or overrule its earlier precedent. The best recent example of this phenomenon is the Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777, where Congress confronted the Supreme Court with respect to the Court's decision in Texas v. Johnson, 109 S. Ct. 2533 (1989), which held flag-burning to be constitutionally protected. The Court was not moved. See United States v. Eichman, 110 S. Ct. 2404 (1990) (striking down Flag Protection Act).

22. Although there has been a wealth of academic criticism of this view in recent years, see infra note 35, the Court continues to describe its interpretive task in this way. For a list of cases, see Sunstein, Interpreting Statutes in the Regulatory State, 103 HARV. L. REV. 405, 415-418 (1989). Scholars defending some form of agency theory include: Easterbrook, Statutes' Domain, 50 U. CHI. L. REV. 533 (1983); Maltz, Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach, 63 TUL. L. REV. 1 (1988); and Redish, Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective, 83 NW. U.L. REV. 761 (1989).
do not need that.23

Leaving aside Judge Posner’s editorial comments on whether the courts have interpreted the Constitution too broadly, his arguments about the dangers of creating an area where judges all but strike down statutes that may be unconstitutional are powerful.24 For in these avoidance cases, judges need not even go through the pretext of reasonable constitutional argumentation.25

Moreover, there is a sense in which the exercise in non-interpretive statutory construction gives the judge even more power than she has when conducting judicial review. For a judge considering pure constitutionality has only two basic options: either to uphold or strike down the challenged provision. If a judge opts to strike down the provision, it is left for Congress to consider how, and even if, it should be rehabilitated. By contrast, a judge who invokes the avoidance doctrine actually re-writes the statute, thereby engaging in a relatively creative, arguably legislative, exercise of authority.

Realities aside, though, some might argue that the imagery associated with a constitutional decision is far more damaging to the Court’s political capital because it appears that it is announcing an inflexible, irrevocable rule of constitutional law.26 I do not doubt that the avoidance doctrine is attractive to many judges for this reason. But that does not justify a rule that allows judges to, in effect, strike down legitimate legislative enactments. If courts want to invoke prudential considera-


24. Cass Sunstein’s interesting argument in support of the avoidance doctrine confronts these concerns. He writes:

Because judicial invalidation of statutes is troublesome in a constitutional democracy, courts are properly reluctant to enforce the Constitution with the vigor that might be appropriate for institutions having a better electoral pedigree. Since the Court “under-enforces” the Constitution, certain constitutional norms in fact reach beyond the place where courts have vindicated these norms. It follows that an aggressive judicial role in statutory interpretation, one that removes statutes from the terrain of constitutional doubt, will promote greater conformity with norms that in fact have constitutional status.

Sunstein, Law and Administration After Chevron, 90 COLUM. L. REV. 2071, 2111 (1990). There is certainly much to be said for the proposition that judges underenforce the Constitution. But it is too crude to use this “where there’s smoke, there’s fire” reasoning to justify all extra-constitutional bending of statutes.

25. See Catholic Bishop, 440 U.S. at 500-504 (casually referring to potential first amendment difficulties). Some of the Court’s subsequent religion clause cases seem to suggest that interpreting the NLRA to apply to religious schools may not raise constitutional difficulties after all. See Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303-306 (1985); see generally W. Eskridge & P. Frickey, Legislation: Statutes and the Creation of Public Policy 687 (1988). This scenario raises a series of interesting questions about the vitality of an initial avoidance-driven interpretation of a statute when later developments in constitutional law remove the constitutional concerns that prompted the earlier decision.

26. This form of prudential argument is typically associated with A. BICKEL, supra note 17.
tions to restrain themselves that is one thing; it is quite another to trot out a prudential consideration to justify the kind of activist exercise that invocation of the avoidance doctrine so frequently represents.

C. Avoidance as a Means of Following Legislative Intent

A final justification offered for the avoidance doctrine is the argument that "Congress, like th[e] Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it."27 This argument has the considerable virtue of trying to tie the interpretation back to legislative intent, which is typically considered the linchpin of statutory interpretation. Nonetheless, it is quite difficult to justify the avoidance doctrine by reference to this or any other construction of congressional intent.

1. Specific Intent with Respect to Statute

Unless there is actual evidence that Congress was concerned with some specific constitutional issue, it is unrealistic to assume that Congress gave much consideration to the constitutional ramifications of a statute it enacted.28 It is sheer fiction to assert that Congress must not have wanted to reach a result that is constitutionally questionable, when there is no reason to believe that Congress ever knew that it was treading in a constitutional danger zone.29 But worse than being built on fiction, the assumption that Congress must have wanted to avoid constitutional questions denigrates the notion of serious constitutional discourse by Congress; it creates a sense that Congress can never really be expected to actually talk about and debate constitutionality in a serious manner, and that it can, therefore, be safely assumed that Congress always wants the Court to do what the Court believes is constitutionally purest.

Moreover, even in the relatively rare cases when there is a record of constitutional discourse in Congress this hardly means that Congress opted to be timid in the statute it enacted, or that Congress' view of the constitutional issue was in lockstep with the judiciary's interpretation.

29. This problem is even more acute when judicial decisions have changed the nature of the constitutional issue between the time that Congress enacted the statute and the time the courts are interpreting it. When this happens it is utterly senseless to suggest that the Court is invoking the avoidance doctrine as part of an effort to effectuate the intent of the Congress that enacted the statute.
Indeed, the fact that Congress was conscious of constitutional difficulties, yet opted to enact a statute that seemingly tested the constitutional limitations, tends to confirm that Congress would want its enactment tested for *constitutionality*; not for a determination of whether it raises a *difficult constitutional question*. As Robin West’s article explains, Congress may have a very different way of thinking about constitutional questions than courts do.\(^3\) The principle of judicial supremacy demands that the courts have the ultimate say if Congress’s action is deemed to violate the Court’s view of the Constitution. But unless the Court feels compelled to strike down a statute as unconstitutional, it should not presume that Congress wants it to bend the statute to comport with the justices’ constitutionally-oriented sense of values.

2. General Interpretive Instruction

There is a broader way of thinking about legislative intent, however, that does not depend on Congress having considered the constitutional ramifications of any specific statute. Cass Sunstein, among others, has suggested that one of the justifications for the avoidance canon is that Congress probably prefers that its enactments be validated rather than invalidated.\(^31\) He, therefore, labels the canon as an “implicit interpretive instruction,”\(^32\) which Congress generally wants courts to follow whenever they interpret statutes. There are two significant problems with this argument.

First, it is terribly perilous to try and generalize about what kind of across-the-board interpretive instructions Congress wants the courts to follow. There are, no doubt, some cases in which Congress is willing to have the Court interpret statutes to avoid invalidation on constitutional grounds. However, there are also, no doubt, many other cases in which Congress would prefer there to be no statute in place rather than have the Court adopt a construction that Congress never intended. The relevant factors that distinguish these two sets, both in terms of the nature of the regulatory scheme and the specific pressures that led to the legislation in the first place, are so varied and unknowable that it seems useless to try and make blanket characterizations about what Congress may or may not want the courts to do as a general matter.

Second, even if there were reason to assume that Congress prefers validation to invalidation, this would only justify avoiding a construction

32. *Id.* at 469.
that is actually invalid. But the avoidance doctrine has been taken much further than that—allowing courts to choose a construction not necessarily to save the statute, but to save the court from having to decide on the statute's constitutionality. No congressional preference for validation over invalidation can justify that.

Perhaps, though, another kind of implicit interpretive instruction can be constructed to justify the avoidance doctrine. Perhaps invocation of the avoidance doctrine can be defended as the courts' bringing public values to bear on the interpretive process. For even when a particular construction is not downright unconstitutional, the fact that it is in some tension with a recognized constitutional value might be enough of a reason for a court to loathe interpreting the statute in that way. The Constitution is not an off/on switch, the argument goes, and it can (and should) have a conditioning influence on interpretation even if it does not actually require a statute's invalidation.

The vitality of this argument rests very much on one's view of the proper judicial role in statutory interpretation. If one believes that the courts' preferred role is to play an active and creative part in interpreting statutes in ways that make them more palatable to judges' perception of modern accepted values, then the Constitution (even in its periphery) is a better place than most in which to find such values. But if one believes that the courts have a narrower role in statutory interpretation—one that requires them to discern and apply the intent of those who enacted the legislation—then there is far less room for this kind of value-laden bending of Congress' edicts. The only justification for ignoring Congress' enactments (as best understood by the court) is the Constitution itself (again, as best understood by the court).

Ultimately, then, there are serious questions about the value of the avoidance doctrine, notwithstanding its salutary stated goal of improving the constitutional dialogue between Congress and the courts. This does not mean, however, that the Court should never consider adopting an interpretation of a statute because it creates less tension with constitu-

33. See Posner, supra note 23, at 816 (supporting avoidance canon when alternative is truly unconstitutional construction).
34. See generally Sunstein, supra note 22; Eskridge, Public Values in Statutory Interpretation, 137 U. PA. L. REV. 1007 (1989).
36. See supra note 22.
tional norms. Two scenarios come to mind where such a rule of construction would be quite appropriate.

First, if two competing constructions are truly of relatively equal plausibility then the goal of avoiding a difficult constitutional issue is as good a reason as any, and a better reason than most, for choosing one interpretation over another. Indeed, in these circumstances the decision to choose the interpretation that does not implicate constitutional questions need not even rest on the notion of avoidance, for the values behind the constitutional provision also inform the interpretive process in cases where intent is not clearly discernible.

Ironically, though, the Supreme Court recently refused to apply the avoidance doctrine in just such a scenario. In Rust v. Sullivan, the Court was faced with an attack on Department of Health and Human Services regulations that prohibited any agency receiving federal family planning funds from speaking with a client (even to the extent of answering a direct question from a client) about the possibility of a legal abortion. The attack on the regulations took two forms: first, the plaintiffs argued that the regulations were inconsistent with the federal statute; second, the plaintiffs argued that the regulations were unconstitutional as they abridged rights of free speech as well as abortion rights. The Court began its statutory analysis with words that seems to be laying the groundwork for invocation of the avoidance doctrine: it agreed with "every court to have addressed the issue that the language is ambiguous." But instead of using this ambiguity to invoke the avoidance doctrine, the Court chose to invoke Chevron deference, declaring that when a statute is "ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." There is a real possibility that the Court's ever-expanding reliance on Chevron may serve to displace the avoidance doctrine, even in those cases of real ambiguity where avoidance has a legitimate role to play.

A second scenario where constitutional analysis may be properly

37. See generally Sunstein, Law and Administration After Chevron, 90 Colum. L. Rev. 2071, 2111 (1990) ("Some cases are genuinely in equipoise, and court (or agencies) need tie breakers. It is hard to object to tie breakers that are rooted in constitutionally grounded structural principals."); Eskridge, supra note 34, at 1065-67 (recognizing that "public values" analysis, including policy of avoiding constitutional periphery, should not be invoked to displace clear indications of legislative expectations).
39. 111 S. Ct. at 1767.
41. For a pre-Rust argument against this development, see Sunstein, supra note 37, at 2113.
made part of the process of statutory interpretation is where there is actual evidence, in the statute itself or perhaps through strong indicia of legislative history,\textsuperscript{42} that Congress was concerned about the constitutional issue and wished to steer clear of enacting a statute that raised those kinds of difficulties. For example, in response to an objection that the statute would bar certain constitutionally protected activity, a conference committee may specifically disclaim any intent to regulate that type of conduct. In such a case, of course, a court could avoid the questionable construction without invoking the avoidance doctrine. All it would need to do, assuming the statutory language is sufficiently flexible, is to follow the typical indicia, albeit constitutionally related indicia, of legislative intent.

II. GETTING TO THE ROOTS: THE PROCESS AND RHETORIC OF JUDICIAL REVIEW

Although the use of the avoidance canon does not seem to hold out much hope for stimulating increased congressional attention to constitutional issues, the process and rhetoric of judicial review very well may. For it is judicial review that has helped create the perceived judicial monopoly on constitutional interpretation and application in the first place.

In his classic essay on John Marshall, James Thayer sketched out some of the significant costs of judicial review:

Great and, indeed, inestimable as are the advantages in a popular government of this conservative influence,—the power of the judiciary to disregard unconstitutional legislation,—it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that come from fighting the question out in the ordinary way and correcting their own errors.\textsuperscript{43}

Thayer, of course, used this argument to support his call for judicial restraint, but one need not advocate Thayer's brand of restraint in order to appreciate the force of his insight. For even the most strident supporters of an activist judicial role cannot avoid the realization that judicial re-

\textsuperscript{42} It is, of course, necessary to be wary of such history, though. Judge Mikva writes that: [w]hile constitutional rhetoric occasionally finds its way into the legislative history of a statute and may even convince some members of Congress to act in a certain manner, for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment. If congressional supporters can draw on the Constitution to bolster their case or to create the appearance of a reasonable decision, so much the better.

Mikva, \textit{supra} note 28, at 606.

\textsuperscript{43} J. \textsc{Thayer}, \textit{John Marshall} 106 (1974).
view does not eliminate the need for other branches to grapple with constitutional issues. A variety of prudential, political, and, as West explains, cultural factors prevent the judiciary from fully exhausting the universe of constitutional interpretation; much is necessarily left to the other branches and to the states. Yet, the prevalent model of judicial review has helped create a perception that the courts do take full care of the Constitution. As a result, other bodies are frequently unwilling (or incapable) of addressing constitutional matters even though these other bodies are, in fact, the only ones who can fully consider the implications of the constitutional norm. Perhaps most importantly, the public is not in the habit of demanding that its non-judicial servants articulate and apply visions of the Constitution.

A. Separating Standards of Review from Standards of Conduct

One way to deal with the complacency caused by judicial supremacy would be to eliminate judicial review, or as Thayer argued, limit it to areas in which another branch has acted in a blatantly unconstitutional manner. But it seems safe to say that the courts have come to play much too important a role in our governmental structure to permit these kinds of dramatic changes. Judicial review, in the basic way we are accustomed to thinking about it, is here to stay. The focus, then, must be on the manner in which the Court carries out this function, and the perceptions that it creates in the process. It is at this level that significant changes can be made to help alleviate the impression that the courts are the only credible expositor of constitutional values and that the only constitutional job of the other branches is to obey.

The Supreme Court's decision in Turner v. Safley provides a good example of the phenomenon I am describing. In Turner, the Court was faced with inmates' constitutional challenges to two Missouri prison regulations: one generally barring correspondence between inmates at different institutions, the other generally barring inmates from marrying. Both the district court and the Eighth Circuit Court of Appeals struck down these regulations, holding that the State could not justify either

44. In addition to Professor West's article, see Sager, Fair Measure: The Legal Status of Under-enforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978); Ross, Legislative Enforcement of Equal Protection, 72 MINN. L. REV. 311 (1987).
45. See Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 HARV. L. REV. 17 (1893). For a more recent proposal to this effect, see R. Nagel, CONSTITUTIONAL CULTURES (1989).
47. Id. at 81-82. Both of the regulations allowed prison officials to make exception from the policy on a case-by-case basis.
prohibition under the classic "strict scrutiny" that courts use to evaluate infringements on fundamental constitutional rights, such as free speech and the right to marry. The Supreme Court affirmed in part and reversed in part, invalidating the marriage restrictions but holding that the mail regulations withstood constitutional attack.

The significance of Turner goes well beyond these two regulations, for the Court used the case "to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoners' complaints' and [to] the need to protect constitutional rights."\(^{48}\) After reviewing some of its precedents in the area, the Court announced:

> when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate phenological interests. In our view, such a standard is necessary if "prison administrators . . ., and not the courts, [are] to make the difficult judgments concerning institutional operations." . . . Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."\(^{49}\)

The striking thing about Turner, in my view, is the Court's equation (or confusion) of the standard of judicial review with ultimate questions of constitutionality. The reason that the Court rejected "strict scrutiny," which requires state actors to demonstrate, among other things, that they could not advance their compelling interests without infringing on constitutional rights, was the Court's self-proclaimed institutional incapacity for such review. But the Court's institutional limitations have no relevance to whether prison officials and the state legislatures must, quite aside from their fear of judicial review, only impose such restrictions when they are satisfied that there are no alternatives that will allow them to satisfy their legitimate objectives without sacrificing inmates' constitutional rights. It is one thing to assert that courts are uniquely unsuited to second-guess prison officials' determination that inmates should not receive mail. It is quite another to declare that the Constitution therefore

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48. *Id.* at 85 (emphasis added) (quoting Procunier v. Martinez, 416 U.S. 396, 406 (1974)).
49. *Id.* at 89 (citations omitted).
subjects prison officials to a different standard of conduct.\textsuperscript{50} Nothing in Turner purports to explain why prison officials may treat prisoners' constitutional rights differently than other government actors treat citizens' rights in other contexts.\textsuperscript{51}

The point here is that the Supreme Court's constitutional decisions are widely understood as announcing not only the authoritarian pronouncement of what rules the courts will enforce, but are also understood as declaring the appropriate or ideal standard of constitutional conduct that governmental actors should follow.\textsuperscript{52} This confusion is to some degree probably inevitable, but there are some ways that the Court could help minimize it, without lessening its resolve to afford deference to other branches in these special contexts.

The simplest and most obvious step the courts can take is to carefully distinguish between, on the one hand, its description of how courts will adjudicate constitutional challenges and, on the other hand, the appropriate standard of conduct for government actors. In Turner, for example, the Court might have articulated its holding in this way: "When a

\textsuperscript{50} Of course, a variety of interests might be compelling in the prison context, even though they would not constitute legitimate, much less compelling, interests in a more typical setting. But these differences are adequately reflected in application of the conventional standard and do not require any fundamental alteration of the standard. Cf. Goldman v. Weinberger, 475 U.S. 503, 516 n.2 (1986) (Brennan, J., dissenting) ("any special needs . . . can be accommodated in the compelling interest prong of the test"); id. at 530 (O'Connor, J., dissenting) (standard is "sufficiently flexible to take into account" governmental interests of special importance).

\textsuperscript{51} This same criticism applies to another prisoner-rights case, O'Lone v. Shabazz, 482 U.S. 342 (1987), which the Court decided the week after Turner. In O'Lone, a group of Muslim prison inmates challenged the policies of New Jersey prison officials that precluded them from attending congregational religious services on Friday afternoons. The Supreme Court, again stressing the need for courts "to ensure that courts afford appropriate deference to prison officials" reaffirmed that "prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamentals constitutional rights." Id. at 349. Characteristically, though, the Court used this rationale related to the scope of judicial review to support its conclusion that "the regulations in question do not offend the Free Exercise Clause of the First Amendment to the United States Constitution." Id. at 353 (emphasis added). For other examples of "special contexts" that the Court has recognized in limiting the vigor of judicial review, including the military and the public schools, see Dienes, When The First Amendment Is Not Preferred: The Military and Other Special Contexts, 56 U. CIN. L. REV. 779 (1988).

\textsuperscript{52} The Senate Report accompanying the 1980 amendments to the Military Service Act, 50 U.S.C. App. 451 et seq., displays the kind of confusion I am describing. When Congress reactivated the selective service registration program, it authorized the President to require the registration of males alone. Discussing the constitutional ramifications of this decision, the Senate Report describes some of the Supreme Court's gender discrimination decisions, but then explains:

The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing [with] the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental rights must in some circumstances be modified in light of military needs, and that Congress' judgment as to what is necessary to preserve our national security is entitled to great deference.

prison regulation impinges on inmates' constitutional rights, courts will uphold the regulation as valid if it is reasonably related to legitimate penological interests. Of course, it remains the duty of prison officials to satisfy themselves that infringement of constitutional rights is absolutely necessary to achieve the government's compelling interests."

Recognizing the distinction between rules of judicial decision and rules of primary conduct is not unique. Virtually all would agree, I take it, that a judicial decision invoking the political question doctrine, and thus refusing to pass on the constitutionality of another branch's action, purports to say nothing about the ultimate constitutionality of what the other branch has done. To the contrary, such a decision makes it clear that it is the responsibility of the other branch to enforce the Constitution's provisions. So, too, a judicial decision which invokes the superdeference approach that the Court has developed in prison and other special context cases ought not be treated as having passed on the ultimate constitutionality of what the other branch has done. It is up to the Court to make this distinction clear. Only the most positivist vision of what a legal obligation means would equate the dictates of the Constitution with the scope of the judiciary's willingness to enforce it.

I am confident that many readers are by now accusing me of being incredibly naive for thinking that governmental actors are going to be affected by this kind of precatory dictum. If my claim was that all actors would suddenly change their way of thinking about their duties, I would plead guilty to naivete. But I think it unduly cynical to assume that no governmental actors care about what the Constitution expects from them, quite aside from whether a court will invalidate their action. These legislators take an oath in support of the Constitution very similar to the oath that judges take. To be sure, they are subject to different pressures than judges are; their lack of life tenure makes us far more suspicious about whether elected officials will always be faithful to their oaths to put the Constitution ahead of political expediency. Hence, the

53. Indeed, this is the critical difference between a decision on the merits which upholds another branch's action using a highly deferential mode of review and a decision invoking the political question doctrine. When the political question doctrine is invoked, there is less reason to fear that the Court's action will be taken as legitimizing the governmental action. See infra note 80.

54. Describing some of the instances, including political question doctrine cases, where the courts refuse to hear claims that the Constitution has been violated, Justice Scalia recently wrote: In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive branch take the same oath to uphold the Constitution that we do, and sometimes they are left to perform that oath unreviewed, as we always are.


55. Cf. T. Tyler, Why People Obey the Law 178 (1990) ("key implication" of study is that "[p]eople obey the law because they believe that it is proper to do so").
need for judicial review. But I am not talking about a substitute for judicial review; I am talking about a supplement. Once it is assumed that judges are going to engage in less than full-scale judicial review, there is a lot to be gained by pressuring and imploring other officials to scrutinize their own action.

Moreover, it is not only public officials whose views of the Constitution are shaped by judicial opinions. If it can be made clear that legislators and public officials have a duty independently to apply their perception of the Constitution, then public scrutiny and pressure on these officials’ constitutional decisionmaking should increase. Of course, the Constitution is not designed to be shaped by the views of the electorate; an independent judiciary armed with judicial review remains indispensable. But, again, I am offering a supplement to review by an independent judiciary—not a substitute.

B. Deferring Only When Deference Is Due

A more dramatic method of stimulating other branches’ attention and accountability to the Constitution would be for the Court to restrict its review of other branches’ constitutional decisions to an on the record review. In the event that the record (the legislative or decisional record—not the post-hoc litigation record) does not provide a basis for concluding that the constitutional ramifications of the decision were considered, then no deference ought to be afforded, and the Court should feel quite free to find the statute unconstitutional. For the greatest part of the “countermajoritarian” tension of judicial review stems from the courts substituting their own judgment for elected officials’ judgment of whether some public need justifies interference with a citizen’s constitutional interests. When those elected officials have not exercised any independent judgment, this tension is mitigated, if not eliminated.

To see how this might work, consider the facts, and some hypothetical variations on the facts, of Goldman v. Weinberger.56 In Goldman, the Supreme Court upheld an Air Force regulation that prohibited an Orthodox Jewish Captain from wearing his yarmulke or any other head covering while indoors. Using language and reasoning very similar to what it later used in Turner, the Court explained that “when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of

56. 475 U.S. 503 (1986). I did some work on the Goldman case while serving as a summer associate at Miller, Cassidy, LaRocca & Lewin, which represented Simcha Goldman. None of the views expressed here necessarily reflect the views of that firm.
military authorities concerning the relative importance of a particular military interest.” 57 But what “professional judgment” was the Court deferring to? The Court cited absolutely no evidence that the military officials had ever considered the fact that the general restriction on wearing headgear indoors (designed to facilitate the identification of military police who are required to wear their headgear indoors) infringed on some soldiers’ constitutional interests. Certainly, the Court cited no evidence that the military had ever balanced its interests against Goldman’s constitutional interests.

Blind deference is senseless, as the following hypothetical should illustrate. Imagine that Congress enacted a bill prohibiting all military personnel from wearing any visible religious garb. Imagine further that during the debate on the bill a number of Senators raised free exercise concerns about requiring Orthodox Jews to remove their head coverings. In response to these concerns, one Senator explained: “I do not think that any member of any religious order to be true to his faith or true to his God or true to his beliefs has to outwardly wear headgear during duty hours.” 58 Imagine that after this representation, the measure then passed by a 55-45 vote. However, fifteen of the Senators voting in the majority explicitly stated on the record that they do not believe the need for uniformity justifies infringements on free exercise interests of service members, and have supported the bill only because they have been convinced that no one’s religious freedom is being infringed.

Obviously, it would be absurd in this hypothetical for the Court to defer to Congress’s determination that military interests outweigh the constitutional interests at stake. For in this hypothetical Congress quite clearly made no such determination. To the contrary, it appears that a majority of the Senate considered the program insufficiently important to justify infringement on any constitutional interests, but were acting under a mistaken belief that no religious interests were at stake. Were the Court ever faced with a hypothetical as extreme as this it might well have to retreat from the superdeference approach it has articulated. But why should it take so extreme an example to convince the Court that

57. Id. at 507. As in Turner, the Court used this reasoning to make a broad declaration not only about judicial review, but about the dictates of the First Amendment as well. See id. at 510 (“The First Amendment therefore does not prohibit [the no-head-covering rules] from being applied to petitioner.”). Yet, it was clear that the Court was not engaging in any real appraisal of the policy’s constitutionality. See Goldman, 475 U.S. at 515 (Brennan, J., dissenting) (accusing the Court of adopting “a subrational-basis-standard” of review); see also Dienes, supra note 51, at 808 (“Goldman presents a patent example of extreme deference bordering on non-justiciability”).

58. Although the scenario I have created is hypothetical, the quote is not. It was uttered by Representative Hartnett of South Carolina in the course of debate on the issue. 130 Cong. Rec. H4838 (daily ed. May 24, 1984).
deference is frequently inappropriate? For this same absence of constitutional judgment often presents itself when there is no record that the government’s interests have been balanced against individuals’ constitutional interests.

My hypothetical is perhaps unnecessary, given some of the facts underlying Goldman itself. During the 1981 trial on Goldman’s claim, the Air Force designated Major General William Usher, Director of Personnel Plans at Air Force Headquarters in Washington, D.C., to be its spokesperson in defense of its position. During cross-examination about whether the military could accommodate Goldman’s religious practice, Usher testified as follows:

Q. All right. But you will agree with me, though, that it is possible to consider a subsidiary question of whether a religious exemption would interfere with military discipline? That would be considered as a separate question—would you agree with that?
A. Again, I will not agree with the question as stated because I say that our position is that we do not make any exception on religious grounds. Of course, we do not distinguish between religious and other grounds.
Q. You do not distinguish between religious and nonreligious grounds?
A. That is correct.
Q. All right. And in that regard, in terms of your own function or any functions that you work on within the Air Force, have you considered the impact of the First Amendment to the United States Constitution in any way, the provision which requires that the United States guarantee the free exercise of religion?
A. Here, of course, we do not believe that our uniformed standards, in fact, abridge those rights in any way. People are still free to practice their religion as they see fit. And I think, in fact, to get ahead of your point, I think there is a considerable expert opinion that says that, in fact, it is not necessary to wear the Yarmulke to practice Orthodox Judaism during the time of employment.59

No matter how narrowly the Supreme Court may interpret the free exercise clause today,60 it seems clear that this misperception about the dictates of Goldman’s religious practice pervasively distorted any sense of constitutional balancing.61 Because the military thought that no free ex-

59. Goldman, Joint Appendix (available on LEXIS).
60. The Court appears to have announced dramatic changes in its free exercise jurisprudence. See Employment Division, Dep’t of Human Resources of Oregon v. Smith, 110 S. Ct. 1595 (1990) (free exercise clause does not require state to make religious exceptions from generally valid criminal laws). Appallingly, two of the cases that the Court relied upon in support of its narrowing construction of the clause were Goldman and O’Lone (see Smith, 110 S. Ct. at 1603), cases which, on their own terms, had very little to say about what the free exercise clause means. See supra note 51 (discussing O’Lone). Congress may yet have the last word. See A Bill to Protect the Free Exercise of Religion, H.R. 5377 (101st Cong. 1990).
61. Although some Orthodox Jews believe that a man may uncover his head when it is neces-
ercise interests were at stake, they obviously engaged in no balancing of those interests against its own. Yet the Court deferred to the military’s constitutional “judgment.”

If this was all there was to the record of military judgment in *Goldman* the decision would have been a sham. And because the opinion was written without any reference to another branch’s constitutional deliberation, it appears to create a rule of superdeference even when there is no evidence that the constitutional issue was considered by another branch. Ironically, though, there was a more responsible way for the Court to defer to the military’s judgment in *Goldman*.

After the Court of Appeals for the District of Columbia Circuit had rejected Captain Goldman’s free exercise claim, and before the Supreme Court had granted certiorari, Congress had appended to the Department of Defense Authorization Bill a provision requiring the Secretary of Defense to establish a study group to “examine ways to minimize the potential conflict between the interests of the armed forces in abiding their religious tenets and the military interest in maintaining discipline.”

Pursuant to this legislation, the Secretary formed the Joint Service Study Group on Religious Practice, which was to receive comments from the interested public and otherwise “address the issues of compliance with and modifications of uniform regulations, dietary restrictions, sabbath observance, and facial and body hair length practices.” Critically, the study group was charged with the task of “articulat[ing] an approach to these sensitive issues that will maximize morale and discipline as well as the opportunity for exercise of freely held religious beliefs by members of the Armed Forces.”

After surveying religious practices and conducting interviews, including hearing constitutional analysis from Professors Philip Kurland and Leo Pfeffer, the Study Group issued its findings. With regard to exceptions from the uniform regulations the Study Group found that

sary to his livelihood, others strongly believe that the head must be covered at all times. In any event, there has never been any questioning that Simcha Goldman’s bona fide religious convictions required that he keep his head covered during employment. See *Goldman v. Secretary of Defense*, 29 Empl. Prac. Dec. ¶ 32,753, 25,539 (D.D.C. 1982) (finding that “pursuant to tradition and practice of his Orthodox Jewish faith, Goldman has worn a . . . yarmulke since he was a child”); *id.* at 25,540 (holding that “[t]he wearing of a yarmulke by a Jewish male is a practice which falls within the ambit of the free exercise clause”).


63. The group consisted of six generals, three admirals, three chief chaplains, the Navy Judge Advocate General, and five line officers. Joint Study Group on Religious Practice, *Joint Service Study on Religious Matters* at iii (1985) [hereinafter *Joint Service Study*].


"[e]xcept where permitted in sharply limited and clearly defined circumstances, visible or otherwise apparent exceptions to military uniform and appearance standards have a significant adverse impact on cohesion, discipline and military effectiveness" and that "[c]reation of a mandatory standard for accommodation of personal religious practices in the Armed Forces runs a grave risk of undermining esprit de corps, military discipline, and the military justice system." 66 Balancing these problems against the religious interests of service members, the Study Group recommended that service members should be permitted to wear non-visible items of religious apparel with the prescribed uniform and that visible items of religious apparel should be permitted in the relative privacy of a soldier’s living quarters. 67

Based on the Study Group’s findings and recommendations, the Department of Defense (DoD) issued a directive for all military departments allowing commanders, in their discretion, to make limited exceptions from the uniform regulations for religious reasons. The directive declared that the Department “places a high value on the rights of service members of the Armed Forces to observe the tenets of their respective religions. It is DoD policy that requests for accommodation of religious practices should be approved by commanders when accommodation will not have an adverse impact on military readiness, unit cohesion, standards, or discipline.” 68 The directive went on to suggest that the “[m]ilitary departments should designate living spaces in which religious articles may be worn with the uniform when wear will not affect adversely unit cohesion.” 69

It is troubling that the Court in Goldman did not ground its deference on this detailed study of military needs as they relate to free exercise of religion. If deference was appropriate, it was only appropriate because the military, under an express delegation from Congress, had considered the constitutional issue before the Court. Yet, nothing in Goldman limits its super-deferential approach to cases where the military has conducted this kind of analysis. Had the Court announced a narrow holding that it would defer to the military’s decisions only when there was evidence that the military had considered the constitutional issue, then the effect would have been to adopt a form of on-the-record judicial review of other branches’ decisions affecting fundamental constitutional interests. 70

66. Joint Service Study, supra note 63, at xi-xii.
69. Id.
70. A similar observation can be made with regard to Rostker v. Goldberg, 453 U.S. 57 (1981),
In applying this form of on-the-record review, a court would apply its typical, aggressive form of judicial scrutiny unless it were convinced that the other branch of government had considered the balance between its needs and the constitutional interests of those affected by the challenged policy. In many cases, this would mean that the reviewing court would invalidate the policy in question. Unlike most constitutional decisions, however, the invalidation of the regulation would not be irrevocable. It would, in effect, constitute a remand to Congress for its assessment of whether the policy justified the infringement of Captain Goldman's rights under the conventional constitutional standard. In the course of its decision the Court could clarify what Congress's task would be if it chose to consider the issue on its own. The decision would explain that although the Court would give great deference to Congress' ultimate decision, it would only do so if Congress had in fact made a decision taking account of the constitutional ramifications of its decision.

Courts frequently engage in this kind of process-based "hard look" in reviewing decisions of administrative agencies, requiring that the agency offer a detailed explanation for its decision including consideration of the "fully relevant information concerning the effects of the various alternatives and the relevant considerations and interests involved in choosing them."71 Surely, just as hard a look is appropriate when fundamental constitutional interests are at stake.

By requiring actual congressional consideration of the constitutionality of a policy, the Court could improve both the legislative and adjudicative processes. Legislators would necessarily become more conscious of the Constitution, because they would be forced to grapple with constitutional issues, instead of engaging in the routine constitutional buck-passing that is currently so common. By the same token, there would be an increased degree of accountability on the part of legislators, who would have to defend their public records on constitutional issues. As for the benefits to the courts, judges would be able to review legislators' in which the Court upheld the male-only selective service registration program. In adopting that policy Congress had held hearings on the statute's constitutionality, and the Senate Report contains an explicit finding that the program was constitutional. See S. Rep. No. 96-826, at 161 (1980). No matter what one thinks of Rostker and the deference the Court afforded to Congress there, or the quality of Congress' deliberation in that case, see supra note 52, the fact that Congress at least had considered the issue provided some sensible rationale for talking about deference. Yet there is precious little in the Court's broad opinion referring to this consideration of the constitutional issue, much less tying deference into the presence of such deliberation.

constitutional decisions with a more complete understanding of the constitutional vision that led the legislature to conclude that their action was within their constitutional authority.

The aftermath of Goldman is again instructive on the importance of involving Congress in the decisional process. Although the Study Group that Congress commissioned in 1984 decided against creating any broad exceptions to the uniform regulations, Congress continued to remain engaged in the issue. After a number of unsuccessful tries in earlier years, in 1988 Congress finally passed, and President Reagan signed into law, a statute generally protecting the right of a member of the armed forces to "wear an item of religious apparel while wearing the uniform of the member's armed force." The secretary of the service involved may prohibit the wearing of an item only if it "would interfere with the performance of the member's military duties" or if, pursuant to regulations, the secretary determines that the item of "apparel is not neat or conservative." Congress's ultimate disposition of the yarmulke issue is a prime example of how Congress can (and sometimes will) implement a vision of the Constitution that goes beyond the dictates of the Court's decisions.

It is, of course, impossible to tell whether the statute that was passed would have also been passed had Congress never been involved in the yarmulke issue prior to the Supreme Court's decision. There were unusual elements in Goldman that made congressional involvement more likely than in many cases. Among these were the efforts of Congressman Steven Solarz, whose district in Brooklyn includes the largest block of Orthodox Jews outside of Israel. Another prime supporter on the Senate side was Frank Lautenburg of New Jersey, who later actually included a yarmulke in a fund raising mailing sent around the country, together with a message decrying the military's position that "observant Jews who want to serve their country must leave their Yarmulkes at home." In sum, there were substantial political incentives and pressures associated with this particular issue. But even if it is difficult to conclude that Congress's pre-decisional involvement was critical to Congress' ultimate disposition of the Goldman issue, it does seem fair to say that a judicially imposed requirement that Congress engage itself in the constitutional

72. See supra notes 62-69 and accompanying text.
75. 10 U.S.C. § 774(b).
76. Fund raising letter from Frank Lautenburg (on file with author).
process will make a difference in some cases. This is particularly true where the political power of the burdened group is not otherwise strong enough to get their issue moved to the top of the congressional agenda.

I have focused here on special context cases, such as those involving the military and prisons. But the general point applies to almost all constitutional cases in which some degree of deference plays a part in the Court's decisionmaking, as it almost always does. There is often no basis for believing that the other branch has ever given any consideration to the constitutional ramifications of its decision. Indeed, in many cases, the legislature and executive enact a law knowing that it might well be unconstitutional, explicitly leaving that issue for the courts to decide. It seems obvious that no deference is appropriate in such cases, and that some form of on-the-record review is necessary to ensure that none is afforded.

I recognize that this kind of on-the-record review would not necessarily guarantee that Congress would fully engage itself in thinking about the constitutional ramifications of its decisions; the Court's deferential approach might induce Congress to simply go through the motions of constitutional deliberation. But it does not seem far-fetched to believe

77. Justice Frankfurter's oft-quoted statement remains the classic: "[T]he relevant considerations must be fairly . . . weighed with due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the constitution and who have the responsibility for carrying on government." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 164 (1951) (concurring opinion). The presumption of constitutionality can have significant practical consequences. Chief Justice Rehnquist, for example, has a longstanding policy of granting stays of judgments where lower courts have declared acts of Congress unconstitutional. See Bowen v. Kendrick, 483 U.S. 1304 (1987) (in chambers); Marshall v. Barlow, Inc., 429 U.S. 1347 (1977) (in chambers).


79. See Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175, 181 (1986) ("when courts do adjudicate constitutional matters, they often defer to the judgments of fact, value, and law supposedly made by the body whose decision is under review. If the legislature itself has not considered the constitutional issue at stake, they may fall between two stools."); Comment, The Religion Clauses and Compelled Religious Divorces: A Study in Marital and Constitutional Separations, 80 NW. U.L. REV. 204, 212 n.144 (1985) ("Amidst such reciprocal deference it is quite possible that no branch ever takes the opportunity to meaningfully apply the dictates of the Constitution.")

80. If the remand option is deemed unworkable, or unlikely to stimulate real congressional attention to the Constitution, then perhaps the Court ought to declare that the military and prison policies, such as those challenged in Goldman and Turner, are beyond the purview of judicial review altogether. For the effect of the judicial review implemented in these cases was to legitimize the policy, even though the Court did no more than rubber-stamp the military's decision. See Goldman, 475 U.S. at 509 (refusing to consider testimony of expert witnesses because "[t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment"). Under these circumstances, a strong argument can be made that invoking the political question doctrine accomplishes the same result of upholding the governmental policy without providing the extra element of judicial legitimization. See Korematsu v. United States, 323 U.S. 214, 245 (1945) (Jackson, J., dissenting) ("But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be
that these remands would result in more than perfunctory approval of Congress's earlier decision, especially in light of the kind of high visibility events these remands would likely become. On the long term, moreover, once it is known that the courts remand cases to Congress for constitutional deliberation, Congress would no doubt begin to routinely consider and deliberate constitutional issues when it enacts legislation. No one knows just how serious this consideration is apt to be; much would depend on what the public came to expect of its legislators in this regard. No matter what happens though, an important first step will have been taken. The courts will have begun to change the prevalent cultural perception that constitutional interpretation is reserved for the judiciary.\(^{81}\)

### III. Conclusion

Once it is recognized that Congress has an important role to play in constitutional discourse, it is imperative to begin thinking about how Congress can best be stimulated to engage itself in the Constitution. One logical place to begin is with the judiciary, which is so widely perceived as holding a monopoly on anything and everything that relates to the Constitution. Encouraging Congress to take the Constitution more seriously may well mean that these branches will find messages in the Constitution that the Court is unwilling or institutionally unable to find. And it is possible that some of these messages will convince Congress to extend (its brand of) constitutional protections to some groups and activities that the Court has refused to protect. But unless today's Court is dedicated to the principles of political conservatism—as opposed to judicial conservatism—the possibility of Congress acting this way should prove to be a welcome exercise in the self-government that the Court is so fond of extolling.

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\(^{81}\) I have used two examples of deferential review here. Obviously, the need for stimulating congressional attention to the Constitution is even more acute in those areas where, given the current rules of justiciability, courts cannot review the constitutionality of enactments under any standard, deferential or otherwise. See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 489 (1982) (denying taxpayer group standing to bring establishment clause challenge to government's gift of property to religious institution, and declaring that "the assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing")

\(^{81}\) A. BICKEL, supra note 17, at 184 (one justification for political question doctrine is "the anxiety, not so much that the judicial judgment will be ignored, as that it perhaps should but will not be").