Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?

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NOTE

JUDICIAL REVIEW AND SOLDIERS' RIGHTS: IS THE PRINCIPLE OF DEFERENCE A STANDARD OF REVIEW?

INTRODUCTION

Since 1974, members of the armed forces have called upon the Supreme Court to decide whether various military regulations violate their constitutionally protected rights. Although expressed in various forms, the Supreme Court's fundamental response to these constitutional challenges is generally referred to as the "principle of deference." As articulated by the Court, the principle of deference is a circumscribed form of judicial review in which the balance reached by the political branches of government regarding military necessity and servicemembers' rights is afforded a heightened degree of respect. At its core, the Court's deference is motivated by its be-


2. The Supreme Court has applied the same degree of deference regardless of whether the constitutional challenge was to a congressional statute or an armed forces regulation. Compare Rostker v. Goldberg, 453 U.S. 57 (1981) (upholding a congressional statute that exempted females from registering for the draft) with Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding an air force dress regulation). One commentator has argued for heightened deference when congressional rather than armed forces regulations are challenged. See Hirschhorn, The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C.L. REV. 177, 247-48 (1984).


4. See, e.g., Goldberg, 453 U.S. at 70 (stating that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.").

5. But see infra notes 102-52 and accompanying text (questioning whether the principle of deference is in fact a standard of review).


465

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lie that the sensitive weighing of competing military interests is constitutionally and functionally more amenable to political, rather than judicial, resolution.

Whether labeled the “separate community” doctrine, the doctrine of “military necessity,” or the principle of deference, the effect of the Court’s military jurisprudence for members of the armed forces asserting constitutional violations is the same—the likelihood of success on the merits, given the significantly limited form of “review,” is quite remote. Indeed, through the 1987 term, the Supreme Court has upheld every challenged regulation.

In each of these cases, the Court has routinely asserted that individuals do not lose the protections of the Bill of Rights upon entry

adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated.

7. See infra notes 61–63 and accompanying text (discussing the constitutional basis for the principle of deference).

8. See infra notes 64–74 and accompanying text (discussing the pragmatic considerations that have been expressed in support of the principle of deference).

9. In Chappell v. Wallace, 462 U.S. 296 (1983), then-Chief Justice Burger noted that “the military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.” Id. at 301 (quoting Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (Jackson, J.).

10. See Hirshhorn, supra note 2, at 178.


12. See Solorio v. United States, 107 S. Ct. 2924, 2931 (1987). This Note employs the term “principle of deference” since it is believed that this phrase most accurately describes the Supreme Court’s method for reviewing constitutional claims of members of the armed forces.

13. See Goldman v. Weinberger, 475 U.S. 503 (1986) (holding that an Air Force regulation that had the effect of preventing plaintiff from wearing a yarmulke while on duty did not violate the first amendment); Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that a congressional statute requiring males, but not females, to register for the draft did not violate plaintiff’s right to equal protection of the laws); Brown v. Glines, 444 U.S. 344 (1980) (holding that an Air Force regulation requiring the prior approval of commanding officers before soldiers could distribute petitions on an Air Force base did not violate the first amendment); Middendorf v. Henry, 425 U.S. 25 (1976) (holding that a congressional statute permitting a summary court martial to try servicemen without the assistance of counsel did not violate the sixth amendment); Schlesinger v. Ballard, 419 U.S. 498 (1975) (concluding that a congressional statute subjecting males, but not females, to mandatory discharge for failing to be promoted for a second time did not violate plaintiff’s right to equal protection of the laws); Parker v. Levy, 417 U.S. 733 (1974) (holding that a congressional statute which had the effect of prohibiting petitioner from making statements criticizing the American role in Vietnam did not violate the first amendment).
into the armed forces. Nonetheless, the scope of those protections, the Court reasons, is narrower, because of the military's "fundamental necessity for obedience, and the consequent necessity for imposition of discipline . . . ." The Court has failed, however, to translate this principle of deference into a consistent standard of review that clearly and precisely delineates what servicemembers must prove to establish a viable constitutional claim. The absence of such a standard of review, in addition to the Court's unwillingness to invalidate any of the challenged regulations, raises a significant question as to whether a majority of the Supreme Court has tacitly concluded that servicemembers lose the protections of the Bill of Rights for the duration of their military service.

Several commentators, while not expressly addressing this issue, have suggested that the Court's deferential approach in these cases reflects a general insensitivity to civil liberties and constitutes an unjustifiable abdication of the judicial function. This Note argues, by

14. See, e.g., Goldman, 475 U.S. at 507; Goldberg, 453 U.S. at 66; Glines, 444 U.S. at 354; Henry, 425 U.S. at 44, 48; Ballard, 419 U.S. at 507; Levy, 417 U.S. at 758; cf. Parker v. Levy, 417 U.S. 733, 758 (1974) (stating that “[w]hile the members of the military are not excluded from the protection[s] granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”).

15. Levy, 417 U.S. at 758.

16. The need for clarity in articulating a standard of review is fundamental to the development of a rational and principled body of constitutional law. Without the expression of a discernible standard, there is nothing to prevent individual judges from deciding constitutional questions on wholly arbitrary and subjective bases. As Justice Douglas once observed, "One who need not explain the reasons for his actions can operate beyond the law." Spady v. Mount Vernon Hous. Auth., 419 U.S. 983, 985 (1974) (Douglas, J., dissenting).

This is not to suggest that the expression of a standard of review necessarily guarantees the principled development of law. Certainly, mere words can be shaped and manipulated to achieve arbitrary results. As Justice Stevens has noted, how a court expresses a standard of review is less important than "the actual showing that the court demands of the State in order to uphold the regulation." Turner v. Safley, 107 S. Ct. 2254, 2267 (1987) (Stevens, J., dissenting). Nonetheless, a decipherable intellectual framework for judicial analysis is an essential starting point for the creation of a rational system of constitutional law.

17. See infra notes 153-59 and accompanying text.

contrast, that the fundamental inadequacy of the Court's military jurisprudence is not necessarily its deferential perspective; rather, in its failure to provide any meaningful guidance to servicemembers, the lower federal courts, and the bar,\(^9\) the Supreme Court has failed to substantiate its basic assumption that members of the armed forces are protected by the Bill of Rights.\(^2\)

I. THE CONSTITUTION, THE MILITARY, AND SOLDIERS' RIGHTS

A. The Standing Army in Early American Society

Since the early colonial period in American history, the military establishment has occupied an often controversial position within our legal environment.\(^2\) Perhaps no other values were as deeply embedded in the core of early American society as the inherent suspicion of, and the profound hatred for, the peacetime standing army.\(^2\) This deep-seated distrust of the military was essentially a product of the commonly held perception that a standing army could not be restrained by the limits of the legal system and would thus be likely to abuse its authority with impunity, to the detriment of the local populace.\(^2\)

prem Court's majority decision in Goldman because it "creates a single inescapable conclusion: the standard to be applied to individual rights challenges in the military context will henceforth be one of absolute deference."); see also Goldman v. Weinberger, 475 U.S. 503, 515 (1986) (Brennan, J., dissenting) (commenting that “[t]oday the Court eschews its constitutionally mandated role.”); Rostker v. Goldberg, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting) (arguing that “the Court substitutes hollow shibboleths about 'deference to legislative decisions' for constitutional analysis.”).  
19. See infra notes 102-52 and accompanying text.  
20. See supra note 14 and accompanying text.  
22. R. Kohn, supra note 21, at 2-6. This view of the military establishment was not unique to early Americans, but was essentially a product of a rich body of seventeenth century British political thought, which had provided the intellectual foundation for the parliamentary revolution in 1689. See L. Schwoerer, "No Standing Armies!": The Antiarmy Ideology in Seventeenth-Century England 188-201 (1974).  
23. The speech delivered by Dr. Joseph Warren on March 5, 1772, at a ceremony commemorating the Boston Massacre is representative of early American views on the military: 

The ruinous consequences of standing armies to free communities may be seen in
Closely linked to the colonists' hatred of the standing army was the early American faith in the virtues of the local militia. This trust was due, in part, to the influence of British political thought, and in part, to the practical limitations that a sparse population imposed on the size and structure of a military unit. Since a militia was comprised of civilians rather than professional soldiers, some early Americans argued that the members of this "fighting force" would act vigilantly to protect the rights of their fellow civilians. As the American Revolution approached, the clear symbolism between the liberty-enhancing militia and the liberty-infringing standing army became one of the many rallying cries for separation from Great Britain.

This same debate between the evils of the standing army and the virtues of the local militia that exemplified the broader political struggle with Great Britain continued after Independence as a microcosm of the more basic tension between competing visions of how to build the nation. In the early years of the Republic, the bias
against the standing army, and the general aversion towards a strong central government, were too entrenched to permit anything approaching a national military establishment.\(^3\) Instead, Congress, under the Articles of Confederation, created a small piecemeal force that proved incapable of meeting the new nation's military needs.\(^3\) Shay's Rebellion in 1787, in which a group of disgruntled Massachusetts farmers forcefully prevented farm foreclosures by the local courts, highlighted the "military impotence" of the Confederation and the general inadequacy of the Articles of Confederation to provide even the rudiments of national cohesion.\(^3\)

The Framers of the Constitution bore the responsibility of reconciling the tension between the need for a national military force that could maintain internal order and prevent foreign domination and the long tradition of bitter opposition to the peacetime standing army.\(^3\) They accomplished this by granting Congress clear authority to create and maintain a peacetime military force,\(^3\)\(^4\) wresting primary control of the military from the executive branch and placing it in the hands of the national legislature,\(^3\) limiting military appro-

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SOLDIERS’ RIGHTS

Appointments to two year periods,\(^{36}\) and nationalizing the state militias.\(^{37}\) In this manner, the Framers enabled the American military establishment to bridge the gap from an instrument of autocracy to a carefully restrained tool of a sovereign democratic nation.\(^{38}\)

B. Constitutional Ambiguities

The Constitution expressly provides that within our structure of government it is the legislature that governs and regulates the military, thereby preventing the military from forcibly dominating civilian government.\(^{39}\) What the Constitution does not make clear, however, is the extent to which the Bill of Rights restricts Congress when it exercises its regulatory authority over the armed forces. To this question neither the Constitution nor other historical evidence provides adequate guidance.\(^{40}\) The dearth of constitutional or histori-

the Constitution is not without military power. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW 230-38 (2d ed. 1988) (discussing the scope of presidential power as commander-in-chief). Indeed, Article II, § 2, states that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States . . . .” U.S. CONST. art. II, § 2. According to Alexander Hamilton, the president’s authority as commander-in-chief:

would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces as first General and admiral of the Confederacy; while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies,—all of which, by the Constitution under consideration, would appertain to the legislature.

The Federalist No. 69, at 430-31 (A. Hamilton) (H.C. Lodge ed. 1902) (emphasis in original). Notwithstanding this limited conception of presidential military authority, “[o]ur military history . . . is replete with instances of executively ordained uses of military force abroad in the absence of prior congressional approval.” L. Tribe, supra, § 4-7, at 231.

36. U.S. Const. art I, § 8, cl. 12; see The Federalist No. 26 (A. Hamilton).
38. See R. Kohn, supra note 21, at 86.
39. See U.S. Const. art. I, § 8, cl. 14. As one commentator noted:

Theoretically there was—and is—no way the military can take over the government without destroying the ability of that government to function. The government cannot be taken over, only replaced, and all legitimate instruments of authority rendered inoperative. As long as the Constitution exists, and is accepted, and any of the institutions through which it works—Congress, the courts, and the executive—function normally, no army can take over the United States.

R Kohn, supra note 21, at 81 (emphasis added). But cf. id. (observing that “neither the Constitution nor its authors provided adequate answers” to such questions as whether, in the absence of normal operations of government, the military could “infiltrate the process by which public policy was made, or . . . openly negotiate its willingness to protect the nation[,]”).

40. But see Weiner, Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv. L. Rev. 266, 301-02 (1958) (concluding that while the Framers did not originally intend to extend Bill of Rights protections to members of the armed forces, this same conclusion is not necessarily warranted in modern society).
cal insight into this problem is not surprising given that the Framers were more concerned with justifying the very existence of a national military force to an anti-militaristic society than with the rights of soldiers. Thus, it is unlikely that the Framers ever considered whether members of the armed forces are protected by the Bill of Rights.

Article I, section 8 of the Constitution provides, *inter alia,* that “*t*he Congress shall have power . . . *t*o raise and support armies . . . *a*nd *t*o make rules for the government and regulation of the land and naval forces . . .” Alexander Hamilton, writing in *Federalist* No. 23, apparently envisioned no restrictions on the legislative military authority:

> These powers ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. . . .

> . . . [I]t must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to its efficacy—that is, in any matter essential to the *formation, direction, or support* of the National Forces.

While the Supreme Court has never interpreted this power to be boundless, it has on numerous occasions acknowledged the broad

41. *See supra* notes 21-38 and accompanying text (discussing perceptions of the military in early American society); *see also* 2 *The Records of the Federal Convention of 1787,* at 329 (M. Farrand ed. 1911) (noting that Elbridge Gerry, delegate from Massachusetts, “thought an army dangerous in time of peace [and] could never consent to a power to keep up an indefinite number [and] proposed that there shall not be kept up in time of peace more than [two or three] thousand troops.”).

42. U.S. CONST. art I, § 8, clss. 12, 14.


44. *See, e.g.,* McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960) (holding that courts martial lack jurisdiction over civilian military employees in non-capital cases); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (holding that courts martial may not try dependents of members of the armed forces located in foreign countries in non-capital cases); Reid v. Covert, 354 U.S. 1 (1957) (holding that courts martial in peacetime lack jurisdiction over dependents of members of the armed forces located in foreign countries in capital cases); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (holding that courts martial may not try discharged veterans for alleged crimes committed during active service); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that courts martial may not try civilians where civil courts are open and their process unobstructed by foreign invasion or civil insurrection).
scope of this power by characterizing it as plenary.\textsuperscript{45} In \textit{Chappell v. Wallace},\textsuperscript{46} for example, the Supreme Court stated, "It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the Courts have acted in conformity with that view."\textsuperscript{47} The difficulty with the Court's characterization, however, is that it suggests that it is Congress, rather than the judiciary, that has the ultimate word on the extent of servicemembers' constitutional rights. Such an interpretation, however, is not only contrary to the Court's basic assumption that soldiers retain Bill of Rights protections,\textsuperscript{48} it is also inconsistent with the doctrine of judicial review.\textsuperscript{49}

\textsuperscript{45} See, \textit{e.g.}, Gilligan v. Morgan, 413 U.S. 1, 4 (1973) (stating that "[i]t would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process."); Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) (concluding that "judges are not given the task of running the Army" and that "[t]he responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.").

\textsuperscript{46} 462 U.S. 296 (1983).

\textsuperscript{47} \textit{Id.} at 301. On the other hand, the only indication in the text of the Bill of Rights that would suggest that the rights of soldiers may not be coextensive with the rights of civilians is contained in the fifth amendment, which excepts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger," from the prosecutorial requirement of indictment by grand jury. U.S. Const. amend. V. The remaining amendments, however, contain no further exceptions and thus \textit{seemingly} apply in full force to servicemembers.

\textsuperscript{48} \textit{See supra} note 14 and accompanying text.

\textsuperscript{49} The principle of judicial review is deeply engrained in American jurisprudence despite scholarly debate over its theoretical justifications. See, \textit{e.g.}, P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, \textit{The Federal Courts and the Federal System} 82 (2d ed. 1973) (questioning the appropriateness of judicial review by asking "why should [the Court] not, in all cases . . . accept the determination of Congress and the President . . . that a statute is duly authorized by the Constitution?"); A. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 12 (1962) (arguing that the principle of judicial review can only be "supposed" and that the "phraseology of the Constitution" itself neither supports nor disavows it"); L. Hand, \textit{The Bill of Rights: The Oliver Wendell Holmes Lectures}, 1958, at 10-11 (1958) (stating that "[t]here was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress. . . . [but] there were other reasons, not only proper but essential, for inferring such a power in the Constitution . . . ."); L. Tribe, \textit{supra} note 35, \S 3-2, at 25 (noting that "[t]he premise of a written Constitution would not be disavowed, and legislative power would not necessarily be unbounded, if Congress itself judged the constitutionality of its enactments."). Since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), litigants have relied upon the federal courts, and ultimately the Supreme Court, to delineate the outer boundaries of permissible governmental conduct, so as to preserve both the fundamental structure of government erected by the Framers and those personal liberties embodied in the Bill of Rights.
Consequently, an unresolved, and perhaps unresolvable, tension exists between the seemingly "plenary" congressional power to regulate the armed forces and the extent to which the Bill of Rights acts to limit that power. The remainder of this Note examines the Supreme Court's attempted reconciliation of this tension and argues that the Court has failed to articulate and apply a clear standard of review which incorporates the principle of deference while maintaining some room for the judicial protection of servicemembers' rights.

II. DEFERENCE IN PERSPECTIVE

A. Theoretical Bases for Deference

The Supreme Court has never claimed that military rules and regulations enacted by either Congress or one of the armed services are immune from judicial scrutiny. In fact, the Court has been quite sensitive to the charge that the principle of deference is merely a euphemism for the abdication of the judicial role. Similarly, the Court has not attempted to evade the necessity of addressing the constitutional issues presented by invoking the political question doctrine. Nor has the Court ever purported to argue that Bill of

50. See infra notes 52-74 and accompanying text.
51. See infra notes 102-59 and accompanying text.
52. See, e.g., Chappell v. Wallace, 462 U.S. 296, 304-05 (1983) (stating that “[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.”); Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (commenting that “Congress is [not] free to disregard the Constitution when it acts in the area of military affairs.”); cf. Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (noting that while the Court will review constitutional claims of servicemembers, it “must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.”); Brown v. Glines, 444 U.S. 348, 357 (1980) (reviewing Glines’ constitutional challenge but concluding that “the military must possess substantial discretion over its internal discipline.”).
53. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (stating that “[w]e of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.”). But see Brown v. Glines, 444 U.S. 348, 370 (1980) (Brennan, J., dissenting) (contending that the majority had “abdicate[d] its responsibility to safeguard free expression when it reflexively bow[ed] before the shibboleth of military necessity.”); cf. Note, Deference or Abdication?, supra note 18, at 557 (arguing that the Court in Goldman “implicitly abdicated its role as arbiter of the Constitution for future cases arising in the military context.”).
54. See generally Baker v. Carr, 369 U.S. 186, 208-37 (1962) (discussing the political question doctrine). Although the underlying rationale for the political question doctrine has been subjected to varying interpretations, see, e.g., Bickel, The Supreme Court, 1960 Term—Forward: The Passive Virtues, 75 Harv. L. Rev. 40, 74-79 (1961); Champlin & Schwarz, Political Question Doctrine and Allocation of the Foreign Affairs Power, 13 Hof-
Rights protections are wholly inapplicable to members of the armed forces.58

On the contrary, the Court has justified its "healthy deference to legislative and executive judgments in the area of military affairs"58 on the following bases: first, the constitutional doctrine of separation of powers mandates such deference;59 second, the unique nature of the military establishment within our governmental structure requires a narrow judicial role;60 third, the inherent inability of the judicial system to competently scrutinize the competing military interests renders full scale judicial review inappropriate;61 and finally, the potential costs of an erroneous judicial balance necessitate strict judicial deference.60

1. Constitutional Deference.—The text of Article I, section 8 grants to Congress the broad authority to create rules and regulations for the military without any apparent limitation.61 As a majority of the Court construes the doctrine of separation of powers, Congress' "plenary" power in this context is inferentially a constraint on

58. See supra note 14 and accompanying text.
57. See infra notes 61-63 and accompanying text.
58. See infra notes 64-67 and accompanying text.
59. See infra notes 68-70 and accompanying text.
60. See infra notes 71-74 and accompanying text.
the exercise of judicial power. Thus, even though the limited judicial role is not made explicit in the text of the Constitution, a majority of the Court contends that an over-intrusive judicial role in this context would constitute an unjustified encroachment upon an inherently legislative function.

2. Separate Community.— Prior to the 1981 case of Rostker v. Goldberg, the constitutional dimensions of the principle of deference were always lurking on the periphery of the Court’s analysis but never expressly articulated as such. Instead, the principle of deference was invoked essentially as a response to the perceived uniqueness of the armed forces within our governmental structure. In Parker v. Levy, Justice Rehnquist expressed the often quoted functional justification for judicial deference:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.”

The legal consequence of the military’s unique mission is that governmental action which might otherwise infringe upon a constitutionally protected interest if undertaken in a civilian context may be deemed constitutional in the military context because “there is simply not the same autonomy as there is in the larger civilian community.” Consequently, the narrower form of judicial review invoked when servicemembers assert constitutional claims is a function of the narrower rights generally afforded to members of the military.

3. Limits of the Judicial Process.— The third rationale for deference, as articulated by the Court, is that the judiciary lacks competence to deal effectively with the complex military and national defense issues raised by these cases. In a speech given at the New

63. See Rostker v. Goldberg, 453 U.S. 57, 58 (1981) (stating that “[i]n deciding the question before us we must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.”).
64. 453 U.S. 57 (1981).
66. Id. at 743 (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).
67. Id. at 751.
68. See, e.g., Gilligan v. Morgan, 413 U.S. 1, 10 (1973). The Court in Gilligan noted:
York Law Center in 1962, then-Chief Justice Earl Warren captured the essence of this incapacity aspect of the principle of deference when he stated that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal." As a consequence, the scope of review, the Court argues, must be narrowed to reflect this inability of the judiciary to master the complexities of military adjudication.

4. Cost of Judicial Error.—Finally, one commentator has argued that the fundamental incompetence of the judiciary in this field stems not from a lack of expertise but from the costs of judicial error. He argues that unlike other areas of the law in which the judiciary is called upon to exercise its judicial review function, an erroneous judicial invalidation of a challenged military regulation may have catastrophic consequences for national defense. The judiciary’s interference on the side of the servicemember may at some level so hinder military effectiveness that “[a]t the worst, it permits the imposition of the will of another state on the United States.” From this perspective, the principle of deference acts as a safeguard against potentially injurious judicial intermeddling.

B. Deference Challenged

From the first articulation of the principle of deference in *Parker v. Levy,* to its most recent exposition in *Goldman v. Weinberger,* the doctrine has been vehemently criticized by members of the Court and commentators as both a denigration of Bill of Rights and a denial of the role of the courts in overseeing military actions. It is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Id. (emphasis in original).

72. Id.
73. Id. at 238.
74. See id.
76. 475 U.S. 503 (1986).
77. See, e.g., id. at 513-14 (Brennan, J., dissenting) (arguing that the majority’s deference to unsubstantiated assertions of military necessity was an unconstitutional abdication of the Court’s judicial function as “protector of individual liberties”); id. at 525 (Blackmun, J.,
Rights values and an unjustifiable relinquishment of the judicial function. The focus of this opposition has been the underlying theories posited for the principle of deference, which critics challenge as conceptually weak and unpersuasive.

First, critics have challenged the Court's core premise that deference is mandated by the constitutional doctrine of separation of powers. Indeed, critics argue that the principle of deference undermines, rather than advances, the theory of separation of powers. Since Marbury v. Madison, it has been the function of the judiciary and not the political branches to delimit the bounds of permissible governmental conduct and the scope of constitutionally protected rights. The principle of deference, however, is diametrically opposed to this tradition. As a consequence, critics argue that the principle of deference does not reflect a heightened respect for the political branches of government, but rather, a clear abdication of the traditional judicial function.

Moreover, while critics acknowledge that it is Congress that has taken the initiative during this century in moving the military closer...
to civilian legal standards, they argue that this alone is not an adequate justification for relinquishing the judicial review function. Since the political branches must necessarily accommodate majority interests, subtler forms of constitutional deprivations affecting minority interests are likely to be glossed over. For this reason, it was decided long ago that the judiciary should be the final arbiter of the constitutionality of governmental conduct.

Finally, critics contend that if the separation of powers rationale for deference is taken literally, then the Court should invoke the political question doctrine and clearly state that there is no judicial role in this context. The Court, however, has not gone this far. Consequently, the illogical nature of the separation of powers justification for deference is revealed by the Court's unwillingness to adhere to the implications of its own reasoning.

Critics have also taken issue with the separate community argument for deference. Some critics argue that the narrower form of judicial inquiry undertaken when servicemembers assert constitutional claims is inappropriate because it is founded on outdated no-


88. See Zillman & Imwinkelried, supra note 87, at 401; cf. Goldman, 475 U.S. at 523 (Brennan, J., dissenting) (stating that "[o]ur Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary.").

89. See Goldman, 475 U.S. at 523-24 (Brennan, J., dissenting). According to Justice Brennan:

"The concept of military necessity is seductively broad," and military decisionmakers themselves are as likely to succumb to its allure as are the courts and the general public. Definitions of necessity are influenced by decisionmakers' experiences and values. As a consequence, in pluralistic societies such as ours, institutions dominated by a majority are inevitably, if inadvertently, insensitive to the needs and values of minorities when these needs and values differ from those of the majority. The military, with its strong ethic of conformity and unquestioning obedience, may be particularly impervious to minority needs and values.

Id. (citation omitted) (quoting Brown v. Glines, 444 U.S. 348, 369 (1980)).

90. See id. at 524.

91. See Note, First Amendment Rights, supra note 18, at 857; cf. Dienes, supra note 18, at 819-20 (commenting that "[t]he deference to other government actors exhibited by the Supreme Court in the military cases, and the Court's language denigrating the judicial capacity to properly decide issues involving the relation of the military command to its personnel . . . often reflect . . . de facto non-justiciability.").

92. But see infra notes 153-59 (suggesting that the Court may have tacitly concluded that there is in fact no judicial role in the military context).

93. See supra notes 64-67 and accompanying text (setting forth the separate community argument).
tions of the military establishment that no longer comport with reality. Others, such as Justice O'Connor, argue that even assuming that the majority's view of the military is correct, this still begs the essential question of what standard of review should be employed—that the military is different than civilian society should not in itself lead to the inexorable conclusion that the Court should afford any more deference to the political branches' judgments regarding military needs than that granted in other non-military contexts.

The argument that the judiciary lacks the competence to adequately balance the needs of military necessity and the rights of servicemembers has not garnered much scholarly support. Indeed, one commentator who supports the principle of deference in theory acknowledges the weakness of this rationale. The federal courts are called upon daily to review intricate and complex controversies. Often, the extent of the court's technical knowledge is no greater than that which can be obtained from information provided by the litigants. Therefore, exactly why the federal courts should be any less competent in the military context is not readily apparent, and

94. See, e.g., Zillman & Imwinkelried, supra note 87, at 400. The authors observed: The "society apart" was a valid description of the small, 19th century regular Army fighting Indians on the frontier. The description was still largely valid when forces stood garrison or shipboard duty in the 1930's. But by 1974 the military had become a multimillion-person employer involved in almost every aspect of American life. . . .

Besides growing in size, the modern military shows increasing signs of "creeping civilianism." Officer Training Programs stress graduate civilian education, foreign affairs study, and managerial technique. Id. (footnotes omitted). But see, e.g., Hirschhorn, supra note 2, at 218-29 (arguing that the "separate community" remains an apt description of the modern American military community). Certainly, the available statistics seem to belie the notion that our modern military is a "separate community." As of 1986, approximately 2.2 million Americans served on active duty in the United States and abroad. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988, at 323 (108th ed. 1987). Of those 2.2 million, about 84% have or are employed in occupations unrelated to combat duty. See M. BINKIN, MILITARY TECHNOLOGY AND DEFENSE MANPOWER 6 (1986).

95. See Goldman v. Weinberger, 475 U.S. 503, 531 (1986) (O'Connor, J., dissenting); see also Dienes, supra note 18, at 826 (arguing that "acceptance of vital, compelling interests that are often implicated by military regulations does not justify alteration of the standard of review.").

96. See supra notes 68-70 and accompanying text.

97. See, e.g., Dienes, supra note 18, at 820 n.163, 822; Hirschhorn, supra note 2, at 239.

98. See Hirschhorn, supra note 2, at 239 (stating that "there is no basis to conclude that judges are distinctly less able to comprehend the technical aspects of military discipline than any other complex scientific or economic issue with which they are presented.").

99. See MANUAL FOR COMPLEX LITIGATION § 33 (2d ed. 1985) (discussing judicial strategies for the management of complex cases such as antitrust, securities, and employment litigation).
the Supreme Court has not attempted to explain its reasoning further.

Finally, while there has been little commentary on the argument that the judiciary's alleged incompetence in handling military litigation stems from the grave dangers of judicial error rather than from inexpertise, that position may be greatly overstated. In theory, a series of judicial decisions adverse to the balance reached by the political branches may to some extent reduce the effectiveness of a fighting force. Such an effect, however, is clearly speculative. In fact, the commentator who has advanced this theory has acknowledged that even the professional judgments of military experts regarding "effects of changes in doctrine, discipline, and equipment" are often "grossly wrong." Moreover, in light of the infinite number of factors that combine to make an effective military force, it is difficult to imagine that judicial invalidation of regulations similar to those which the Court has upheld will be seriously cited by future historians as a primary or even collateral cause of an American military defeat.

III. IS THE PRINCIPLE OF DEFERENCE A STANDARD OF REVIEW?

Regardless of whether one deems there to be either constitutional, historical, or logical support for the principle of deference, the most comprehensive examinations of what the proper standard of review should be are those of James M. Hirschhorn, Hirschhorn, supra note 2, and C. Thomas Dienes, Dienes, supra note 18. According to Hirschhorn, "the courts should not find military departures from civilian standards of individual rights within the armed forces to be unconstitutional unless manifestly irrational in terms of successful military performance." Hirschhorn, supra note 2, at 246. In assessing rationality, Hirschhorn contends that the proper scope of judicial inquiry depends on whether the challenged military rule has been enacted by Congress or by one of the branches of the armed services. Id. With respect to challenges to congressional enactments, Hirschhorn reasons that given the particular competence of Congress and the corresponding incompetence of the judiciary to reach a proper constitutional balance, the judicial role must be very narrow. Id. at 241-51. Thus, Hirschhorn argues that:

100. See supra notes 71-74 and accompanying text (setting forth this argument).
101. Hirschhorn, supra note 2, at 240.
102. Whether one ultimately believes that a deferential approach to military adjudication is justified is inextricably linked to one's views of the proper relationship between the judiciary and the political branches of government. It is not the purpose of this Note to argue that one position is inherently superior to the other. The limited purpose of this Note is to argue for clarity, precision, and consistency in judicial analysis, which, it is argued, is noticeably absent in the Court's principle of deference cases.
if one is to accept the Supreme Court's initial premises to be more than mere perfunctory assertions, then the Court must translate its deferential principles into some guiding standard of review so that lower federal courts can rationally assess whether a military regulation infringes upon a servicemember's constitutional rights. Unfortunately, the Supreme Court has provided little helpful insight into the appropriate judicial methodology for distinguishing a constitutional from an unconstitutional military regulation. As a result, lower federal courts, as well as servicemembers contemplating litigation, are confronted with the futile task of sifting through the Court's eloquent assertions regarding the need for heightened deference to discern the seeds of a guiding standard of review.

At most, all that can be gleaned from the various principle of deference cases is that the Court's constitutional review of military regulations "is far more deferential than constitutional review of

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Id. at 248. Accordingly, under this construction, the judiciary's only role would be to ensure that the political process which enacted the regulation was functioning properly.

With respect to regulations promulgated by one of the branches of the armed forces, Hirschhorn leaves more room for judicial review because in his opinion "the armed forces are not necessarily rational self-critics." Id. at 247. Consequently, the reviewing court:

should insist on an explanation, in the light of the criticisms raised by the serviceman, of the need served and how the practice relates to it. The burden of persuasion would remain on the serviceman, but the armed forces would have to provide a rational articulation of the usefulness of the practice.

Id.

Professor Dienes rejects Hirschhorn's rationality approach. Dienes argues that "[r]ationality review has become essentially no judicial scrutiny at all: the test today is largely outcome deterministic, with the first amendment challenge being rejected." Dienes, supra note 18, at 833. Instead, Dienes argues for, at least in the first amendment context, "a methodology of weighted judicial interest-balancing with a preference or presumption in favor of first amendment expression." Id. at 785. Dienes further argues that "[o]nly such adherence to a system of weighted interest balancing . . . can properly respect first amendment values burdened by government regulation and at the same time allow government to protect its vital interests by means of narrowly drawn regulations." Id.

Thus, Dienes adopts the position articulated by Justice O'Connor in her dissenting opinion in Goldman v. Weinberger, 475 U.S. 503, 528-33 (1986), namely, that "the test that one can glean from this Court's decisions in the civilian context is sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending." Dienes, supra note 18, at 826-27 (quoting Goldman, 475 U.S. at 530-31 (O'Connor, J., dissenting)); see supra note 95 and accompanying text (discussing Justice O'Connor's dissenting opinion in Goldman).

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103. See supra note 14 and accompanying text (observing that the Supreme Court consistently asserts that individuals do not lose the protections of the Bill of Rights upon entry into the armed forces).

104. See infra notes 146-52 and accompanying text (discussing the confusion in the lower courts resulting from the Supreme Court's failure to articulate a specific standard of review).
similar laws or regulations designed for civilian society." As a brief survey of the major principle of deference cases reveals, however, the Court refuses to delineate exactly how much more deferential that standard of review is.

In *Parker v. Levy*, Army captain Howard Levy was convicted by a general court martial for, *inter alia*, "conduct unbecoming an officer and a gentleman," and engaging in behavior "to the prejudice of good order and discipline in the armed forces." Subsequently, Levy was sentenced to "dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor." The conduct that formed the basis of Levy's conviction was a series of public statements in which Levy assailed the American role in Vietnam and urged black soldiers that "they should refuse to go to Vietnam and if sent should refuse to fight."

On appeal to the Supreme Court, Levy argued that two of the statutes under which he was convicted were void for vagueness in violation of the Due Process Clause of the fifth amendment and overbroad under the first amendment. With respect to the vagueness challenge, Justice Rehnquist, writing for the majority, concluded that "[b]ecause of the factors differentiating military society from civilian society," the appropriate standard for reviewing the challenged statutes was "the standard which applies to criminal statutes regulating economic affairs." Applying that standard, the Court concluded that the statutes passed constitutional muster because Levy could not have had a reasonable doubt that his statements were within the scope of conduct made punishable by the statutes.

The Court then examined Levy's first amendment claim. Justice Rehnquist initially noted that in the first amendment area there is an exception from the traditional rule "that a person to whom a

106. See infra notes 121-44 and accompanying text.
108. Id. at 737-38; see Uniform Code of Military Justice art. 133, 10 U.S.C. § 933 (1982).
110. Levy, 417 U.S. at 733.
111. Id. at 736-37.
112. Id. at 756.
113. Id. at 756-57.
114. See id. at 757-61.
statute may constitutionally be applied will not be heard to challenge
the statute on the ground that it may conceivably be applied unconsti-
tutionally to others in other situations not before the Court."\textsuperscript{116}
Accordingly, at the time of Levy, it was a well established principle
of first amendment jurisprudence that civilian litigants could chal-
lenge overbroad statutes without "demonstrat[ing] that [their] own
court could not be regulated by a statute drawn with the requisite
narrow specificity."\textsuperscript{117}

Nonetheless, the Court reasoned that because of the military's
unique role within our governmental structure,\textsuperscript{118} members of the
military do not have standing to challenge overbroad statutes that
are constitutional with respect to their own particular conduct.\textsuperscript{119} In
this regard, the Court noted that Levy's public statements were "un-
protected under the most expansive notions of the First
Amendment."\textsuperscript{120}

What is particularly significant about Levy for the purposes of
this Note is that it represents one of the few instances in which the
Court has furnished a clear and unequivocal statement of the appro-
riate standard for reviewing servicemembers' constitutional claims.
While one might disagree with the Court's analysis, the articulated
standard of review is, at least, decipherable. It is unfortunate that
the Court, in addressing subsequent constitutional claims of ser-
vice members, has not acted with comparable precision.

The Court's next opportunity to discuss the appropriate stan-
dard for reviewing constitutional challenges in the military context
was in Schlesinger v. Ballard.\textsuperscript{121} In Ballard, a Navy lieutenant chal-
allenged a congressional statute that subjected male naval officers to
mandatory discharge if they failed for a second time to be selected
for a promotion to lieutenant commander.\textsuperscript{122} Ballard claimed that
the exemption of women from this mandatory discharge provision\textsuperscript{123}
constituted a violation of his right to equal protection of the laws.\textsuperscript{124}

\begin{itemize}
  \item \textsuperscript{116} Id. at 759.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id. at 760.
  \item \textsuperscript{119} Id. at 760-61.
  \item \textsuperscript{120} Id. at 761.
  \item \textsuperscript{121} 419 U.S. 498 (1975).
  \item \textsuperscript{122} Id. at 499-500; \textit{see} 10 U.S.C. § 6382 (repealed 1980).
  \item \textsuperscript{123} \textit{See} 10 U.S.C. § 6382(d) (repealed 1980) (providing that "[t]his section does not
  apply to women officers . . . or to officers designated for limited duty."). Instead, women of-
  ficers were subjected to 10 U.S.C. § 6401, which required discharge for want of promotion
  only after 13 years of active commissioned service. \textit{See} 10 U.S.C. § 6401 (repealed 1980).
  \item \textsuperscript{124} \textit{See Ballard}, 419 U.S. at 500. Ballard's claim was that "the application of § 6382
Although the Court did not clearly specify what level of scrutiny should be used in resolving gender-based equal protection claims brought by members of the military, the Court apparently adopted a rational relation test, stating, "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts, and that a longer period of tenure for women officers would, therefore, be consistent with the goal to provide women officers with "fair and equitable career advancement programs."\textsuperscript{125}

\textsuperscript{125}Id. at 508 (quoting H.R. REP. No. 216, 90th Cong., 1st Sess. 5 (1967)) (emphasis added). Under the traditional formulation of this standard of review, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." New Orleans v. Dukes, 427 U.S. 297, 303 (1976). Furthermore, legislation is not unconstitutional "simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' . . . [The rational basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy." Dandridge v. Williams, 397 U.S. 471, 485-86 (1970) (citations and footnotes omitted) (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

While the rational relation standard of review is not a toothless one, Mathews v. Lucas, 427 U.S. 495, 510 (1976), it is an inherently deferential standard in which the ultimate "burden rests on those challenging a legislative classification to demonstrate that it does not bear the 'fair and substantial relation to the object of the legislation' required under the Constitution." United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183-84 (1980) (Brennan, J., dissenting). The difficult burden imposed on plaintiffs by the rational relation standard is reflected in the fact that Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), was the first case in 25 years in which the Supreme Court, applying the rational relation test, held that a plaintiff's right to equal protection of the laws had been violated. W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 1148 (6th ed. 1986). Recent Supreme Court decisions suggest that the Court may be moving toward a rational relation standard with more judicial "bite" than previously afforded. See, e.g., Turner v. Safley, 482 U.S. 78 (1987) (holding that a prison regulation that prohibited inmates from marrying other inmates or civilians unless the prison superintendent found compelling reasons for permitting the marriage was not rationally related to a legitimate penological interest); Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (holding that a state tax that was more burdensome on out-of-state insurance companies did not advance a legitimate state purpose); City of Cleburne v. Cleburne Living Center Inc., 473 U.S. 432 (1985) (holding that a city zoning ordinance that required a special use permit for homes for the mentally retarded was not rationally related to a legitimate state interest); Hooper v. Bernallilo, 472 U.S. 612 (1985) (holding that a state statute that provided a property exemption to Vietnam veterans but only if the veteran became a state resident before a certain date was not rationally related to the asserted state interest); Zobel v. Williams, 457 U.S. 55 (1982) (holding that a state statutory scheme that distributed earnings from natural resource development on the basis of citizens' length of residence was not rationally related to a legitimate state interest); Lindsey v. Normet, 405 U.S. 56 (1972) (holding
In Brown v. Glines,\textsuperscript{126} Albert Glines, a captain in the Air Force Reserves, claimed that Air Force regulations requiring servicemembers to secure approval from their commanders prior to distributing petitions on the base violated the first amendment.\textsuperscript{127} Under the regulations, the base commander could prohibit the distribution of petitions if he determined that “a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission would result.”\textsuperscript{128} Upon making such a finding, the base commander was then obligated to inform his superiors of that determination.\textsuperscript{129} However, the base commander could not prohibit the distribution or posting of materials simply because they were critical of Government policies or officials.\textsuperscript{130} Moreover, “distribution of publications and other materials through the United States mail” was not prohibited.\textsuperscript{131} Finally, the regulations charged the base commanders with the affirmative obligation of “encourag[ing] and promot[ing] the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues.”\textsuperscript{132}

In upholding the regulations, the Court expressed what appeared to be a clear and workable standard for reviewing Glines’ first amendment challenge, namely, that the “regulations . . . protect a substantial Government interest unrelated to the suppression of free expression”\textsuperscript{133} and limit “speech no more than is reasonably necessary” to further that interest.\textsuperscript{134}

The Court’s opinion, however, is problematic for several reasons. First, the Court did not indicate whether its articulated standard of review was to be the definitive standard for reviewing all subsequent first amendment challenges to military regulations. In-

\textsuperscript{126} 444 U.S. 348 (1980).
\textsuperscript{127} Id. at 349.
\textsuperscript{128} Id. at 350 (quoting Air Force Reg. 35-15(3)(a)(2) (1970)).
\textsuperscript{129} Id. at 356.
\textsuperscript{130} Id. at 355.
\textsuperscript{131} Id. at 355-56 (quoting Air Force Reg. 35-15(3)(a)(1) (1970)).
\textsuperscript{132} Id. at 350 n.2 (quoting Air Force Reg. 35-15(3)(a)(5) (1970)).
\textsuperscript{133} Id. at 354.
\textsuperscript{134} Id. at 355.
stead, the Court simply began and ended its constitutional analysis by stating that the "regulations . . . protect a substantial Government interest unrelated to the suppression of free expression," and did not discuss how the Court arrived at this standard or the scope of its future applicability. Furthermore, in applying its adopted standard of review, the Court did not define the factors that are relevant in determining whether the government's interest is "substantial" and "unrelated to the suppression of free speech" or when the regulations restrict "speech no more than is reasonably necessary." Finally, the Court did not analyze how the burdens of proof were allocated between the government and the servicemember. Accordingly, while Glines seemed to express a meaningful standard for reviewing first amendment challenges to military regulations, it in fact represented a significant analytical regression from the Court's earlier decision in Parker v. Levy.

This regression continued in the Court's next principle of deference case, Rostker v. Goldberg. Golberg was a class action brought on behalf of "all male persons who [were] registered or subject to registration . . . for training and service in the armed forces," challenging the constitutionality of the Military Selective Service Act (MSSA). The plaintiffs claimed that section 453 of the MSSA, providing for registration of all males but not females, violated their right to equal protection of the laws.

135. Id. at 354.
138. Id. at 62.
140. Id. § 3, 62 Stat. at 605 (current version at 50 U.S.C. app. §§ 453 (1982)).
141. Goldberg, 453 U.S. at 61 n.2. The Due Process Clause of the fifth amendment has been interpreted to "incorporate" the Equal Protection Clause of the fourteenth amendment. Bolling v. Sharpe, 347 U.S. 497 (1954). The Court in Bolling stated:

The Fifth Amendment . . . does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifyable as to be violative of due process.

Id. at 499.
142. See Goldberg, 453 U.S. at 83. The majority noted that:
What is particularly striking about the Goldberg opinion is that in response to the Solicitor General's request that the Court adopt the more deferential "rational relation" standard of review as opposed to the more heightened level of scrutiny generally employed in gender-based discrimination cases, the Court expressly declined to adopt any definitive standard for reviewing the plaintiff's claims, stating:

We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further "refinement" in the applicable tests as suggested by the Government. Announced degrees of "deference" to legislative judgments, just as levels of "scrutiny" which this Court announces that it applies to particular classifications made by a legislative body may all too readily become facile abstractions used to justify a result. . . . Simply labeling the legislative decision "military" on the one hand or "gender-based" on the other does not automatically guide a court to the correct constitutional result.144

The irony of the Court's assertion is that while the Court was castigating the Government for its "facile abstractions," its refusal to establish a clear standard of review left unanswered the question of what should guide a court to a "correct constitutional result." Consequently, Goldberg, if anything, only added to the growing confusion regarding the appropriate standard of review in the military context.

The confusion produced by the Court's principle of deference opinions is clearly evident in the lower courts where judges have struggled to make sense of the mixed signals which the Supreme

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1 The reason women are exempt from registration is not because military needs can be met by drafting men. This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft. Congress' decision to authorize the registration of only men, therefore, does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently related, but also closely related, to Congress' purpose in authorizing registration.

Id. at 78-79.

143. See id. at 69. Under the heightened standard, "[t]o withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process clause, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Califano v. Webster, 430 U.S. 313, 316-17 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)).

144. Goldberg, 453 U.S. at 69-70.
Court's opinions convey. Applying the test enunciated by the Fifth Circuit in *Mindes v. Seaman*, five circuit courts and three district courts presently undertake a pre-merit assessment of servicemembers' constitutional claims to determine whether the claims should be dismissed even before considering the underlying substantive issues. The *Mindes* test requires a court to balance the following factors to determine whether it should proceed to evaluate the substantive merits of the constitutional challenge: "(1) the nature and strength of the plaintiff's challenge to the military determination. . . . (2) the potential injury to the plaintiff if review is refused. . . . (3) the type and degree of anticipated interference with the military function. . . . [and] (4) the extent to which the exercise of military expertise or discretion is involved." Two circuit courts have expressly rejected the *Mindes* test and ostensibly undertake some form of review. Finally, one recent decision by the Ninth Circuit, *Watkins v. United States Army*, while apparently acknowledging the principle of deference, applied the same standard of review otherwise applicable in the civilian context for evaluating equal protection claims.

145. 453 F.2d 197 (5th Cir. 1971).
147. While never formally adopting the *Mindes* test, the Second Circuit undertakes a similar balancing analysis. *See*, e.g., Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976).
148. *Cf.* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 389 (1984) (authored by Gabriel W. Gorenstein) (arguing that "the use of [the *Mindes*] balancing test to determine a court's power to review a constitutional claim against the military is not justified.").
149. *Mindes*, 453 F.2d at 201-02.
151. 857 F.2d 1428 (9th Cir. 1988).
152. *See id.* at 1448. In *Watkins*, an Army sergeant challenged an Army regulation which disqualified all homosexuals from Army service irrespective of the length or quality of their prior military service. *Id.* at 1429. Among other claims, Watkins argued that the regulation violated his right to equal protection under the fifth amendment by discriminating against him based on his sexual orientation. *Id.* at 1435. A divided panel of the Ninth Circuit ultimately held that the regulation violated Watkins' right to equal protection of the law. *Id.* at 1451. In so holding, the Ninth Circuit reached the following conclusions: that the regulation discriminated on the basis of sexual orientation, *id.* at 1436; that homosexuals were a suspect
IV. **Goldman v. Weinberger: A Watershed Case?**

The most recent, and perhaps most significant, principle of deference case is *Goldman v. Weinberger*. Simcha Goldman, an orthodox Jew, ordained rabbi, and Air Force captain, claimed that an Air Force regulation that prohibited him from wearing a yarmulke while on duty violated the Free Exercise Clause of the first amendment. In a 5-4 opinion, the Court held that the challenged regulation “reasonably and evenhandedly regulate[d] dress in the interest of the military’s perceived need for uniformity” and therefore did not violate the first amendment.

On the surface, the Court’s holding that the regulations were reasonable and even-handed might suggest a real, albeit deferential, standard of review. Other language in the opinion, however, undermines this conclusion. Although the Court adhered to its prior assumptions that servicemembers do not relinquish the protections of the Bill of Rights upon entry into the military and that the judiciary...
maintains an essential role in safeguarding these protections, the Court's holding that the appropriate military decisionmakers "are under no constitutional mandate to abandon their considered professional judgment" is wholly irreconcilable with these assumptions. If the political branches of government may enact any regulations that are deemed necessary to promote perceived military objectives without regard for independent constitutional limitations, then the inexorable conclusion must be that servicemembers have no constitutional rights, and the judiciary, by necessity, has no role to play.

If this is what Goldman signifies, then it would seem that the Court has finally unearthed that which had remained tenuously below the surface in its previous principle of deference cases; it also may explain why the Court has refused to articulate a clear and precise standard of review. On the other hand, this interpretation of Goldman may not be accurate since, in form, if not in substance, the Court adhered to its basic analytical framework. Accordingly, Goldman, like previous principle of deference cases, fails to provide any intelligible guidance beyond the confines of the particular facts of the case for resolving constitutional claims of members of the armed forces.

V. CONCLUSION

To say that the Court's military jurisprudence is in need of clarification is, perhaps, an understatement. In the fifteen years since the Court first expressed the principle of deference in Parker v. Levy, the Court has repeatedly failed to formulate a clear and coherent statement of the proper relationship between the political branches of government and the judiciary in defining servicemembers' constitutional rights. While the implications of some of the statements in Goldman may suggest that the Court is close to adopting a definitive resolution, namely, that the Bill of Rights are inapplicable to servicemembers, the Court's continued adherence to its traditional principle of deference analysis indicates that the Court has not yet

156. Id. at 507.
157. Id. at 509.
158. See, e.g., id. at 509-10.
159. See supra notes 52-74 and accompanying text (discussing the theoretical bases of the Court's principle of deference).
160. See supra notes 107-20 and accompanying text (discussing Levy).
161. See supra notes 121-59 and accompanying text.
162. See supra notes 157-58 and accompanying text.
reconciled this constitutional dilemma.\textsuperscript{163}

If the Court's failure to state a standard of review indicates—as Goldman may suggest—that servicemembers have no Bill of Rights protections and that the judiciary has no function in this context, this should be made explicit. If, however, the Court is sincere in its repeated assertions that the Bill of Rights is applicable to servicemembers and the judiciary does, in fact, maintain an essential role in protecting those rights, then the Court must formulate and express a clear standard of review. While reasonable people ultimately may disagree as to whether the adopted standard adequately reaches the proper balance between military necessity and servicemembers' rights,\textsuperscript{164} an intelligible articulation of that standard would add clarity, precision, and guidance to the Court's present analysis.

\textit{Barney F. Bilello}

\textsuperscript{163} See \textit{supra} note 159 and accompanying text.

\textsuperscript{164} For discussion of the standard of review proposed by two of the leading commentators in the field, see \textit{supra} note 102.