

## Statistics and the Military Deference Doctrine: a Response to Professor Lichtman

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**STATISTICS AND THE MILITARY DEFERENCE DOCTRINE:  
A RESPONSE TO PROFESSOR LICHTMAN**

JOHN F. O'CONNOR\*

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I. INTRODUCTION

There is a story, certainly apocryphal, about a kicker on a professional football team who is playing in an important game. After a drive by his team stalls, the kicker runs out on the field to attempt a field goal and promptly misses it by twenty yards to the left. Later in the same game, the kicker is called upon to attempt another field goal and misses it by twenty yards to the right. The head coach, incensed by such incompetence, runs over to the kicker on the sideline to yell at him for kicking so poorly. When the coach begins his tirade, however, the kicker turns to him and, not missing a beat, says, "What do you mean coach? On average, I'm kicking them right down the middle." The lesson of the story is that statistics, even when mathematically correct, do not necessarily provide meaningful or practical insight into the problem studied.

In an Article recently published in the pages of this *Law Review*,<sup>1</sup> Professor Steven B. Lichtman catalogues the cases of the Supreme Court of the United States since World War I in which the United States military was a litigant, and draws several conclusions from his

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1. Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907 (2006).

review about the scope and nature of the Supreme Court's tradition of deferring to military (and political branch) judgments about military matters. Of particular import, Professor Lichtman submits that while most scholars have analyzed the military deference doctrine by tracing its development over time, broad conclusions can be drawn about the doctrine by analyzing the Supreme Court's "military"<sup>2</sup> decisions by subject matter, irrespective of the time period of the decisions.<sup>3</sup> Professor Lichtman's analysis is primarily statistical in method, in that most of his conclusions stem from his calculations of the military rate of success in litigating various types of cases before the Supreme Court.<sup>4</sup>

Beyond his conclusion that the military deference doctrine may be analyzed productively by subject matter instead of by date of decision, Professor Lichtman makes a number of observations that are at least mildly provocative. For example, Professor Lichtman concludes from his analysis of the data that, contrary to the views of many commentators, "the deference tradition has distant roots and that if anything, the Court was much more deferential to the military before the Vietnam War" than it is today.<sup>5</sup> Indeed, Professor Lichtman offers the view that the Court's tradition of military deference has been a stable body of jurisprudence, one that has undergone only a "subtle evolution" over the many decades in which it has been applied.<sup>6</sup> Perhaps most significant, Professor Lichtman concludes from the data that "the Supreme Court's tradition of deference to the military does not extend—and, logically, *should* not extend—to cases involving nonmilitary persons."<sup>7</sup>

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2. This Article often uses quotation marks in discussing the terms "military" cases and "civilian" cases. These quotation marks reflect Professor Lichtman's treatment of any case in which the military effectively is a litigant as a "military" case, and cases in which the military is not a litigant as "civilian" cases. In this author's view, such a distinction is of little value in analyzing the military deference doctrine because the doctrine properly applies only to a small subset of cases that would fall into the category of "military" cases as that term is used by Professor Lichtman.

3. See Lichtman, *supra* note 1, at 910–11 ("Prominent accounts of the Supreme Court's tradition of deference to the military have analyzed the phenomenon in exclusively chronological fashion. Although political development approaches to understanding legal phenomena are usually preferable (especially vis-à-vis the modification of doctrine), this Article utilizes a subject-specific approach." (footnote omitted)).

4. See *id.* at 910 ("The tandem goals of this Article are to systematically examine just how successful the military has been before the Supreme Court and to extract from the cases the jurisprudential and philosophical explanations for that success.").

5. *Id.* at 945.

6. *Id.* at 915.

7. *Id.* at 940.

Professor Lichtman's article is a useful contribution to the existing literature on the military deference doctrine because it challenges a number of orthodoxies concerning the doctrine, such as the best way to group cases for analysis, as well as the origins and scope of the doctrine itself. Nevertheless, as someone who has studied and written about the military deference doctrine in some detail,<sup>8</sup> I have given considerable thought to Professor Lichtman's arguments and, upon deliberation, remain unconvinced as to several of the central theses of Professor Lichtman's analysis. Most of my criticisms of Professor Lichtman's analysis stem from his overly generalized approach to the military deference doctrine, one that tries to draw conclusions about the doctrine from statistics, instead of by reading and analyzing what the cases actually say. Indeed, by conducting his analysis solely by keeping track of "wins" and "losses," without delving into the analytical underpinnings of the Court's military deference jurisprudence, Professor Lichtman conducts his analysis from the wrong pool of cases and, consequently, arrives at substantive conclusions that are not justified by the existing case law.

As Part II of this Article explains, Professor Lichtman's analysis is flawed in that he begins with the faulty assumption that the military deference doctrine is best analyzed by taking into account the Supreme Court's decisions in the entire universe of "military" decisions, that is, every decision before the Court in which the military was a litigant. A review of the cases actually applying the military deference framework, however, makes clear that the rationale behind the doctrine will only support its application in a narrow category of "military" cases—cases where a challenge to statutes or regulations relating to the military require the Court, as part of its analysis, to weigh the government interest in the challenged statute or regulation. By beginning with a pool of cases that is over-inclusive in the extreme, Professor Lichtman is essentially attempting to draw conclusions about the military deference doctrine from the results in a universe of cases, the vast majority of which would never trigger deferential review.

Part III of this Article takes issue with Professor Lichtman's notion that it is at all useful to utilize subject matter, irrespective of the date of decision, as an organizing principle for analyzing the Court's application of the military deference doctrine. Professor Lichtman's thesis that subject matter is an appropriate organizing principle is

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8. See generally John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

heavily dependent on his conclusion that the Court's tradition of deference to the military has been relatively stable over the years. This conclusion, however, is demonstrably incorrect. A review of the cases shows a pronounced change in the Court's treatment of constitutional challenges in the military context beginning in the mid-1950s and extending through the 1960s, with the Court's decisions and its rhetoric evincing hostility toward the military's system of justice. Professor Lichtman's analysis essentially ignores this watershed shift in the Court's jurisprudential approach to military cases, which in turn skews the results of his analysis. Part III also explains how Professor Lichtman's conclusion that the military deference doctrine does not extend to cases involving nonmilitary personnel is not borne out by the case law. Even in the mere thirty years in which the Court's modern military deference jurisprudence has existed, the Court has utilized the doctrine in cases involving burdens placed on civilian persons and entities on multiple occasions.

Finally, Part IV of this Article examines the Court's likely treatment of the military deference doctrine going forward. Given that the extent of the Court's willingness to defer to political branch judgments about military affairs primarily has been a function of the Court's membership at the time in question, and not the product of a venerable analytical framework for considering such questions, it is reasonable to consider whether the doctrine is likely to evolve, or even disappear, in light of recent changes in the Court's membership. What little is known about the judicial philosophies of Chief Justice Roberts and Justice Alito suggests that each new Justice is likely to be sympathetic to the concept that the Court should defer to the political branches' judgments on regulation of the military. That being said, however, the modern military deference doctrine is very much the brainchild of Chief Justice Rehnquist, in that he authored virtually every majority opinion since 1974 in which the Court has applied the military deference doctrine. Only time will tell whether the analytical framework employed by the Court in considering constitutional challenges to military practices will change now that its creator and principal proponent is no longer on the Court.

## II. LIMITATIONS ON THE REACH OF THE MILITARY DEFERENCE DOCTRINE

Professor Lichtman begins his analysis by throwing all of the Supreme Court's "military" decisions into a single pot, recording the military's "victory" or "defeat" in each case, and then segregating the decisions, where appropriate, into subject-matter categories for fur-

ther analysis.<sup>9</sup> The most striking aspect of Professor Lichtman's analysis, however, is that he attempts to draw conclusions about the Court's willingness to defer to the military without examining in any detail the reasons given by the Court for its deference or the framework in which that deference occurred. This process, however, is based on a fundamental misunderstanding of the Court's military deference jurisprudence, as the military deference doctrine has no application in the vast majority of the "military" cases that come before the Court. As a result, Professor Lichtman's study attempts to draw predictive conclusions about the Court's military deference doctrine by examining a pool of cases, the vast majority of which have nothing whatsoever to do with the Court's deference jurisprudence.

Most importantly, the Court's military deference doctrine is limited to a deferential review of political branch judgments of the legitimate needs of the armed forces, but only to the extent that a weighing of governmental need is relevant to the Court's analysis. The military deference doctrine has no place, and has not been applied by the Court, in cases that merely apply or construe federal statutes and regulations governing the military, with no concomitant constitutional challenge to such statutes or regulations, or even in cases that challenge the constitutionality of military statutes or regulations where the government's interest is not part of the constitutional analysis.

These fundamental limitations on the scope of the Court's military deference jurisprudence are apparent from the analytical construct adopted by the Court in applying the military deference doctrine. The Court's military deference analysis flows from the Court's conclusion that "the military is, by necessity, a specialized society separate from civilian society."<sup>10</sup> The specialized and separate nature of the military community derives from the military's unique constitutional duty "to fight or be ready to fight . . . should the occasion arise."<sup>11</sup> To adequately perform this constitutional duty, "the military must foster instinctive obedience, unity, commitment, and esprit de corps."<sup>12</sup> As the Court has explained:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on

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9. Lichtman, *supra* note 1, at 911-12.

10. Parker v. Levy, 417 U.S. 733, 743 (1974).

11. Greer v. Spock, 424 U.S. 828, 838 (1976) (internal quotation marks omitted) (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

12. Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress.<sup>13</sup>

Indeed, the Court has noted that the need to foster obedience and discipline in the ranks compels the conclusion that “[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state.”<sup>14</sup>

Having acknowledged the distinct nature and specialized needs of the military community, the Court’s military deference jurisprudence recognizes that constitutional rights appropriately may apply differently in the military context than in civilian society as a whole. For example, in *Brown v. Glines*,<sup>15</sup> the Court observed that “[t]he rights of military men must yield somewhat ‘to meet certain overriding demands of discipline and duty . . . .’”<sup>16</sup> In *Parker v. Levy*,<sup>17</sup> then-Justice Rehnquist, writing for the Court in a First Amendment case, offered the classic statement of the different application of constitutional rights in the military context:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.<sup>18</sup>

Since the Court decided *Levy*, it has reaffirmed the notion that constitutional rights apply differently in the military context in cases involv-

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13. *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); see also *Brown v. Glines*, 444 U.S. 348, 357 (1980) (“Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.”); *Middendorf v. Henry*, 425 U.S. 25, 38 (1976) (recognizing “the difference between the diverse civilian community and the much more tightly regimented military community”); *Levy*, 417 U.S. at 744 (“An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” (internal quotation marks omitted) (quoting *In re Grimley*, 137 U.S. 147, 153 (1890))).

14. *Goldman*, 475 U.S. at 507.

15. 444 U.S. 348 (1980).

16. *Id.* at 354 (second alteration in original) (internal quotation marks omitted) (quoting *Levy*, 417 U.S. at 744).

17. 417 U.S. 733 (1974).

18. *Id.* at 758.

ing due process,<sup>19</sup> equal protection,<sup>20</sup> and First Amendment<sup>21</sup> challenges to federal statutes or regulations governing military affairs.

The means by which the Court allows for a different application of constitutional rights in the military context is through application of the military deference doctrine. The military deference doctrine requires that courts be particularly reluctant to second-guess the judgments of Congress and the executive branch as to the needs of the military when assessing constitutional challenges to federal statutes and regulations touching on the armed forces. For example, in overruling a prior decision placing due process limits on the subject matter jurisdiction of courts-martial, the Court explained its conception of deference as follows:

Decisions of this Court . . . have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. As we recently reiterated, [j]udicial 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.<sup>22</sup>

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19. *E.g.*, *Weiss v. United States*, 510 U.S. 163, 177 (1994) (“[W]e have recognized in past cases that ‘the tests and limitations [of due process] may differ because of the military context.’” (second alteration in original) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981))); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (“[W]hether . . . [due] process embodies a right to counsel depends upon an analysis of the interests of . . . the regime to which [the individual] is subject. In making such an analysis, we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.” (citation omitted)).

20. *E.g.*, *Goldberg*, 453 U.S. at 67 (“In that area [of military affairs], as any other, Congress remains subject to the limitations of the Due Process Clause, but the tests and limitations to be applied may differ because of the military context.” (citations omitted)). *Goldberg* involved a gender-based challenge to the Military Selective Service Act under the equal protection component of the Fifth Amendment’s Due Process Clause. *Id.* at 59.

21. *E.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. But ‘within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community.’” (alteration in original) (citation omitted) (quoting *Levy*, 417 U.S. at 751)); *Brown v. Glines*, 444 U.S. 348, 354 (1980) (“[W]hile members of the military services are entitled to the protections of the First Amendment, ‘the different character of the military community and of the military mission requires a different application of those protections.’” (quoting *Levy*, 417 U.S. at 758)); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (“The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.”).

22. *Solorio v. United States*, 483 U.S. 435, 447 (1987) (second and third alterations in original) (internal quotation marks omitted) (quoting *Goldman*, 475 U.S. at 508). Additionally, the *Weiss* Court stated:

Since 1981, the Court in reviewing its treatment of “military” cases has observed no less than five times that its deference to the political branches “is at its apogee” when reviewing challenges to military statutes and regulations.<sup>23</sup>

The Court has offered two principal rationales for its highly deferential review of political branch judgments as to the proper balance between military needs and constitutional rights. The first rationale concerns the Constitution’s explicit commitment to the political branches of the task of raising and regulating military forces.<sup>24</sup> With respect to federal statutes governing military affairs, the Court has found deferential review appropriate based on its view that “the Constitution contemplates that Congress has ‘plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.’”<sup>25</sup> The Court likewise has noted the President’s special, constitutionally conferred competence in military affairs as the Commander in Chief of the Armed Forces.<sup>26</sup> Similarly, the Court has found it appropriate to defer in reviewing regulations adopted by military officials acting as the proxies of those to whom control of the national defense has been constitutionally committed, as “military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy.”<sup>27</sup>

Having acknowledged the special, constitutionally recognized competence of Congress, the President, and military officials to assess the military’s needs, the Court’s second rationale for deferring to the

Our deference extends to rules relating to the rights of servicemembers: “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. . . . [W]e have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated.”

510 U.S. at 177 (alterations in original) (quoting *Solorio*, 483 U.S. at 447–48).

23. *E.g.*, *Goldberg*, 453 U.S. at 70; *Goldman*, 475 U.S. at 508; *Solorio*, 483 U.S. at 447; *Weiss*, 510 U.S. at 177; *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 126 S. Ct. 1297, 1306 (2006).

24. U.S. CONST. art. I, § 8, cls. 11–16.

25. *Weiss*, 510 U.S. at 177 (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)); *see also Middendorf*, 425 U.S. at 43 (“In making such an analysis, we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, that counsel should not be provided in summary courts-martial.” (citation omitted)).

26. *See Loving v. United States*, 517 U.S. 748, 768 (1996) (upholding Congress’s delegation of rulemaking authority to the President in a military context in part because “it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority” (citation omitted)).

27. *Goldman*, 475 U.S. at 507–08.

political branches' military judgments is its sense that the courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."<sup>28</sup> In upholding the Military Selective Service Act against a gender-based equal protection challenge, the Court succinctly contrasted the political branches' competence over military affairs with its own:

Not only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked . . . . "[I]t 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."<sup>29</sup>

Thus, the Court has justified its deferential review of "military" statutes and regulations based on the dual notions that the political branches, by virtue of their constitutional roles in regulating military affairs and their experience in performing those roles, have particular expertise in assessing military needs, while the judiciary is far less able to strike the proper balance between military needs and constitutional rights.

The Court has performed this deferential review in two ways. In some instances, the Court has rejected the constitutional tests applied to "civilian" legislation and instead has applied a different, more lenient test for "military" statutes and regulations. For example, in assessing due process challenges to the military justice system, the Court rejected the proposed application of its ordinary due process standards and instead held that, in the military context, a special, more deferential test would apply.<sup>30</sup> Thus, in the context of military legislation, a due process challenge will be upheld only if "the factors militating in favor [of the plaintiff's position] are so extraordinarily weighty

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28. *Id.* at 507 (internal quotation marks omitted) (quoting *Chappell*, 462 U.S. at 305).

29. *Rostker v. Goldberg*, 453 U.S. 57, 65–66 (1981) (second alteration in original) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); see also *Solorio v. United States*, 483 U.S. 435, 448 (1987) ("The notion that civil courts are 'ill equipped' to establish policies regarding matters of military concern is substantiated by experience under the service connection approach." (alteration in original) (quoting *Chappell*, 462 U.S. at 305)); *Midendorf*, 425 U.S. at 44 (adopting the observation of a United States Court of Military Appeals judge that courts "possess [ ] no special competence to evaluate the effect of a particular procedure on morale and discipline and to require its implementation over and above the balance struck by Congress" (quoting *United States v. Alderman*, 22 C.M.A. 298, 308 (1973) (Darden, C.J., dissenting))).

30. *Weiss*, 510 U.S. at 177.

as to overcome the balance struck by Congress.”<sup>31</sup> By contrast, in *Rostker v. Goldberg*,<sup>32</sup> the Court refused to apply a different, more lenient test for gender-based equal protection challenges in the military context, concluding that there was little to be gained from “further refinement” of the applicable equal protection standards.<sup>33</sup> Instead, the Court concluded that the appropriate course was to apply the same equal protection standards applicable in “civilian” cases, but to apply those tests in a more lenient way to account for the enhanced degree of deference to which Congress was entitled for legislation concerning military affairs.<sup>34</sup> Regardless of the mechanical means used by the Court to implement the military deference doctrine, it bears mention that since 1974—which, as I have argued elsewhere, is the advent of the Court’s modern military deference doctrine<sup>35</sup>—the Court has *never* invalidated legislation or regulations governing military affairs in a case in which it has invoked and applied the more deferential review called for under the military deference doctrine.<sup>36</sup> This is so even though the Court has repeatedly noted in these cases that the Bill of Rights applies to the military and that the Court has

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31. *Id.* at 177–78 (quoting *Middendorf*, 425 U.S. at 44). The *Levy* Court similarly used a deferential test for considering “void for vagueness” challenges to criminal offenses under the Uniform Code of Military Justice, holding that the lenient “void for vagueness” test for criminal statutes controlling economic dealings should apply “[b]ecause of the factors differentiating military society from civilian society.” *Parker v. Levy*, 417 U.S. 733, 756–57 (1974).

32. 453 U.S. 57 (1981).

33. *Id.* at 69–70 (internal quotation marks omitted).

34. *See id.* at 71–72.

35. O’Connor, *supra* note 8, at 164, 215. The historical development of the military deference doctrine is addressed in some detail in Part III of this Article.

36. *See, e.g.*, *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1313 (2006) (rejecting a First Amendment challenge to the Solomon Amendment); *Weiss*, 510 U.S. at 181 (rejecting a due process challenge to a statute that permitted military judges to serve without some fixed term of office); *Solorio v. United States*, 483 U.S. 435, 450–51 (1987) (rejecting a constitutional challenge to the exercise of court-martial jurisdiction over alleged offenses committed by a serviceman but not connected to his military service); *Goldman v. Weinberger*, 475 U.S. 503, 509–10 (1986) (rejecting a First Amendment challenge to an Air Force regulation that prevented on-duty officers from wearing a yarmulke while in uniform); *Goldberg*, 453 U.S. at 83 (rejecting an equal protection challenge to the Military Selective Service Act); *Brown v. Glines*, 444 U.S. 348, 361 (1980) (rejecting a First Amendment challenge to Air Force regulations that required pre-approval of petitions circulated within a military base); *Greer v. Spock*, 424 U.S. 828, 840 (1976) (rejecting a First Amendment challenge to a military base regulation that prohibited partisan political speeches and leaflet distribution on the base); *Middendorf*, 425 U.S. at 48 (rejecting Fifth and Sixth Amendment challenges to a statute that provided that defendants have no right to counsel at summary court-martial proceedings); *Levy*, 417 U.S. at 738, 760–61 (rejecting due process and First Amendment challenges to a statute that criminalized “conduct unbecoming an officer” and conduct “to the prejudice of good order and discipline in the armed forces” (internal quotation marks omitted) (quoting 10 U.S.C. §§ 933–934 (2000))).

not abdicated its duty to review constitutional challenges to military practices.<sup>37</sup>

This review of the rationales underlying the military deference doctrine—and the words used by the Court to express its conception of the doctrine—is important because it demonstrates why it is not useful to draw conclusions about the military deference doctrine by examining results from a pool of *all* “military” cases decided by the Court. The military deference doctrine is at once both potent and limited. The doctrine is potent because, as noted above, the Court has not invalidated a statute or regulation governing the military in a case in which it has invoked and applied the military deference doctrine in the thirty years since the Court first began applying the doctrine.<sup>38</sup> Nevertheless, the military deference doctrine is limited because it only applies to a subset of cases in which the military has an interest: principally certain types of constitutional challenges to statutes or regulations governing the armed forces.

This fundamental limitation on the reach of the military deference doctrine is evident from the language that the Court uses to describe it. For example, in *Solorio v. United States*,<sup>39</sup> a case in which the Court overruled Warren Court precedent placing due process limitations on the subject matter jurisdiction of courts-martial,<sup>40</sup> the Court explained that the military deference doctrine applies “when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”<sup>41</sup> The *Solorio* Court further observed that the Court had “adhered to this principle of deference in a variety of contexts where, as here, the *constitutional* rights of servicemen were implicated.”<sup>42</sup> In-

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37. See, e.g., *Weiss*, 510 U.S. at 176 (“Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings.”); *Goldman*, 475 U.S. at 507 (“These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment.”); *Goldberg*, 453 U.S. at 67 (“In that area [of military affairs], as any other, Congress remains subject to the limitations of the Due Process Clause . . . .”); *Brown*, 444 U.S. at 354 (“[M]embers of the military services are entitled to the protections of the First Amendment . . . .”); *Middendorf*, 425 U.S. at 43 (“We recognize that plaintiffs . . . are entitled to the due process of law guaranteed by the Fifth Amendment.”); *Levy*, 417 U.S. at 758 (“[M]embers of the military are not excluded from the protection granted by the First Amendment . . . .”).

38. See *supra* note 36.

39. 483 U.S. 435 (1987).

40. *Id.* at 450–51.

41. *Id.* at 447 (quoting *Goldman*, 475 U.S. at 508).

42. *Id.* at 448 (emphasis added). While the *Solorio* Court discussed the application of the military deference doctrine in the context of constitutional claims asserted by servicemembers, it is clear that the doctrine similarly affects the rights of nonservicemembers

deed, the limited scope of the military deference doctrine is apparent from the very essence of deference itself. The military deference doctrine manifests itself through judicial reluctance to upset legislative and executive branch judgments as to the proper balance between military needs and constitutional rights.<sup>43</sup> Thus, the starting point for a military deference case is a statute or regulation governing military affairs and a litigant's claim that the statute or regulation as written violates his or her constitutional rights.

Moreover, the rationale underlying the military deference doctrine supports the doctrine's application only for some, but not all, constitutional challenges to "military" statutes or regulations, and the Court has implicitly recognized as much. Reduced to its essentials, the military deference doctrine exists because, in the Court's view, the political branches are best able to assess the needs of the military and, consequently, better able than the courts to balance the needs of the military against the constitutional rights of those who might be affected by a "military" statute or regulation.<sup>44</sup> By its nature, then, the military deference doctrine generally applies to constitutional challenges where a court has to balance some claimed constitutional right against the claimed needs of the armed forces. A broader application—to disputes not involving an assessment of military need—would extend the military deference doctrine beyond the principles that the Court has used to justify it.<sup>45</sup>

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when the statute or regulation legitimately governs military affairs. See, e.g., *FAIR*, 126 S. Ct. at 1313 (holding, in part, that the Solomon Amendment did not violate law schools' First Amendment right to freedom of expressive association); *Greer*, 424 U.S. at 837–38 (applying the military deference doctrine to civilian political candidates' First Amendment claims).

43. See, e.g., *Loving v. United States*, 517 U.S. 748, 768 (1996); *Weiss*, 510 U.S. at 177; *Solorio*, 483 U.S. at 448; *Goldman*, 475 U.S. at 507–08; *Goldberg*, 453 U.S. at 64–66; *Middendorf*, 425 U.S. at 44.

44. See cases cited *supra* note 43 (illustrating the purpose of the military deference doctrine).

45. I can conceive of a few instances where the military deference doctrine, given its limited rationale, could apply outside of constitutional challenges. First, if Congress were to enact a statute that allowed certain conduct by the President or military officials "to the extent necessary for military readiness," or some similar standard, one could envision the Court holding that it was not about to second-guess the executive branch's view as to the extent of military need in the face of a statutory challenge to military actions. Congress enacted a statute of similar structure in 1795 that allowed the President to call forth the militia "whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827) (internal quotation marks omitted) (quoting Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424). In *Martin*, a case decided before the Court adopted its current military deference framework, the Court held that it lacked jurisdiction to second-guess the President's determination that an invasion was imminent. *Id.* at 30. If such a statute were in force

A number of constitutional provisions and rights are not absolute; they require a court to consider the challenge in light of the government's interest in the statute or regulation at issue. For example, courts evaluate equal protection challenges by considering the importance of the government's interest in the classification at issue and determining the extent to which the challenged classification relates to that governmental interest.<sup>46</sup> Due process challenges to procedures for reviewing the deprivation of benefits ordinarily require consideration of, among other things, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."<sup>47</sup> Indeed, since 1974, when, in my view, the Court first began applying the military deference doctrine,<sup>48</sup> the Court has repeatedly invoked the doctrine in response to constitutional challenges where the applicable test required a consideration of the government's interest in the challenged legislation or practice.<sup>49</sup>

By contrast, other constitutional provisions, often structural provisions not contained in the Bill of Rights, are absolute in their command and are not susceptible to a balancing of individual rights versus governmental need. That is, these provisions are black-and-white; they either have been satisfied or not satisfied. Since 1974, when the Supreme Court first began using its current deference terminology to

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today, it is possible that the Court could hold that review was barred by the political question doctrine, or the Court conceivably could apply the military deference doctrine to perform a deferential review of the President's determination that some particular action was necessary for military readiness. Similarly, to the extent some nonconstitutional doctrine required consideration of governmental interest in order to evaluate the plaintiff's claim, it is conceivable that the Court could apply a variation of the military deference doctrine to recognize its relative lack of competence in assessing military need. Such a strain of analysis can be seen in *Schlesinger v. Councilman*, in which the Court invoked the specialized nature of the military community and its enhanced need for obedience and discipline in holding that civilian courts ordinarily should not enjoin the prosecution of courts-martial proceedings on constitutional grounds. 420 U.S. 738, 756-58 (1975). The *Councilman* Court noted that the military need for obedience and discipline figured into the equitable considerations governing whether a federal court order enjoining court-martial proceedings was appropriate. *Id.* at 756-57. Thus, for example, the military deference doctrine presumably could apply to preliminary injunction proceedings, where courts balance the equities involved and assess the effect of an injunction on the parties and on the public interest.

46. See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."); *Dandridge v. Williams*, 397 U.S. 471 (1970) (holding that the Equal Protection Clause requires only that economic legislation is rationally related to a legitimate governmental interest).

47. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

48. O'Connor, *supra* note 8, at 226.

49. See cases cited *supra* note 43.

decide military cases, there have been a few instances where the Court has considered whether a statute or regulation governing the military violated one of these black-and-white constitutional commands. In deciding these cases, the Court has not invoked the military deference doctrine—a jurisprudential method consistent with the military deference doctrine’s narrow application to consideration of government interest and military necessity.

The dichotomy, for military deference purposes, between constitutional challenges requiring consideration of government interest and those not implicating such concerns, is well illustrated in *Weiss v. United States*.<sup>50</sup> In *Weiss*, the petitioner had been convicted of larceny at a special court-martial and challenged his conviction on two grounds: first, that the military judge presiding over his court-martial had not been appointed in accordance with the Constitution’s Appointments Clause,<sup>51</sup> and second, that the lack of a fixed term of office for the military judge violated the Fifth Amendment’s Due Process Clause.<sup>52</sup>

In considering the Appointments Clause challenge, the Court did not reference or apply the military deference doctrine, but instead applied its ordinary “civilian” Appointments Clause jurisprudence, explicitly holding that the Appointments Clause applies to military judges.<sup>53</sup> The Court did reference the military’s status as a “specialized society separate from civilian society,”<sup>54</sup> but it did not do so in order to justify a deferential review. Rather, the Court noted that one prong of its Appointments Clause jurisprudence considered whether the duties being performed by the government officer were “germane” to an official appointment previously received by the officer.<sup>55</sup> In that vein, the Court merely noted that the military is a specialized community in which “all military officers, consistent with a long tradition, play a role in the operation of the military justice system.”<sup>56</sup> Thus, the Court did not use the military’s unique place in American life to justify a more deferential Appointments Clause analysis. Instead it conducted the same “germaneness” analysis that it would in any “civilian” situation.<sup>57</sup> Such an analysis necessarily requires consid-

50. 510 U.S. 163 (1994).

51. U.S. CONST. art. II, § 2, cl. 2.

52. *Weiss*, 510 U.S. at 165–66.

53. *Id.* at 173–76.

54. *Id.* at 174 (internal quotation marks omitted) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

55. *Id.*

56. *Id.* at 175.

57. *See id.* at 174–76 (articulating the Court’s “germaneness” analysis).

eration of the functions traditionally performed by a particular government office, and whether the duties performed by the officer at issue were germane to the duties traditionally performed by the government office.<sup>58</sup> Having concluded that the duties performed by a military judge were germane to the duties traditionally assumed by commissioned officers, the Court concluded that military judges' original appointment as commissioned officers satisfied the Appointments Clause and that a second appointment to the office of military judge was not required by the Appointments Clause.<sup>59</sup>

By contrast, in deciding the petitioner's due process challenge, the Court began, and essentially ended, with the military deference doctrine. After a full-blown exposition on the considerable deference shown by the Court to Congress's judgments regarding the military, the Court proceeded to consider the appropriate due process test to be applied.<sup>60</sup> The Court rejected the positions of the petitioner and the Government, both of which had proposed application of "civilian" due process tests, and it instead adopted the distinctly deferential "military" test applied in *Middendorf v. Henry*:<sup>61</sup> whether the factors militating in favor of fixed terms of office for military judges "are so extraordinarily weighty as to overcome the balance struck by Congress."<sup>62</sup> Finding that Congress's decision not to require fixed terms of office for military judges satisfied this lenient standard, the Court rejected the petitioner's due process challenge.<sup>63</sup>

The *Weiss* Court's disparate treatment of the Appointments Clause and Due Process Clause challenges demonstrates the limits of the military deference doctrine; the doctrine affects constitutional analysis only where that analysis requires consideration of government interest. Where, as with an Appointments Clause challenge, government interest is irrelevant to the applicable test, the military deference doctrine is not applied. Indeed, the Court made this limitation clear in *Ryder v. United States*,<sup>64</sup> the Court's next Appointments Clause challenge to the service of military judges. *Ryder* involved an Appointments Clause challenge to the practice of appointing civilians, without Senate confirmation, to the appellate court that reviewed court-martial appeals for the Coast Guard.<sup>65</sup>

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58. *See id.* at 175–76.

59. *Id.* at 176.

60. *Id.* at 177–78.

61. 425 U.S. 25, 44 (1976).

62. *Weiss*, 510 U.S. at 177–78 (quoting *Middendorf*, 425 U.S. at 44).

63. *Id.* at 181.

64. 515 U.S. 177 (1995).

65. *Id.* at 179–80.

Thus, in *Ryder*, unlike *Weiss*, the judges whose appointments were being challenged did not have any sort of Senate-approved appointment to federal office at the time that they were designated as military appellate judges.<sup>66</sup> In applying its Appointments Clause jurisprudence, which did not require a weighing of government interest, the Court neither applied nor even mentioned the military deference doctrine in holding that the civilians' designation as military appellate judges ran afoul of the Appointments Clause.<sup>67</sup> Even more recently, the United States Court of Appeals for the Armed Forces correctly decided that a panel of the Air Force Court of Criminal Appeals had been improperly constituted because Senator Lindsey Graham, a lieutenant colonel in the Air Force reserves, had been appointed to the panel in violation of the Constitution's Incompatibility Clause,<sup>68</sup> which prohibits United States Senators from holding other offices of the United States.<sup>69</sup> In deciding this constitutional challenge, the court did not apply the military deference doctrine: a method of decision that was correct jurisprudentially because no part of the test for assessing alleged violations of the Incompatibility Clause requires a weighing of government interest.<sup>70</sup> Simply put, Senator Graham's appointment to the appellate court either violated the clause or it did not, without regard to military interest or exigencies entering the equation.

When the inherently limited application of the military deference doctrine is taken into account, it becomes clear that Professor Lichtman's statistical model is of questionable predictive value. Fundamentally, Professor Lichtman's analysis seeks to draw conclusions about the military deference doctrine—a doctrine that applies to only a small percentage of “military” cases decided by the Supreme Court—by statistically analyzing a pool of *all* “military” cases, with the end result being that most of the cases taken into account have nothing to do with the military deference doctrine. Of course, Professor Lichtman's survey of military cases reaches some conclusions about the Supreme Court's treatment of “military” cases that are in fact correct, but his analysis reaches these conclusions by using an unsound analytical basis.

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66. *Id.*

67. *Id.* at 187–88.

68. See U.S. CONST. art. I, § 6, cl. 2 (“[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.”).

69. *United States v. Lane*, 64 M.J. 1, 2, 7 (C.A.A.F. 2006).

70. *Id.* at 7.

Take, for example, Professor Lichtman's discussion of "substantive clusters" where the military did noticeably better or worse before the Supreme Court than its average rate of success.<sup>71</sup> Professor Lichtman notes that in two of these "substantive clusters"—conscientious objector/draft exemption cases and soldier pay cases—the military's "win rate" is significantly less than its historical average in all "military" cases.<sup>72</sup> To the extent that one places credence in a statistical success rate in cases before a court that has essentially unfettered discretion to set its own docket—a highly questionable proposition in my view<sup>73</sup>—it is entirely predictable that the military would fare worse in these categories of cases because they would almost never trigger a deferential review. As Professor Lichtman explains in his article, the conscientious objector/draft exemption cases typically involve disputes over whether an individual qualifies for a statutory exemption from the draft, or whether the draft board properly applied the required procedures in assessing an individual's claim.<sup>74</sup> But the military deference doctrine does not apply to cases considering whether the military complied with statutes or regulations, but rather applies when an individual litigant *challenges* the constitutionality of a statute or regulation governing military affairs.<sup>75</sup> Indeed, if Congress, as the branch of government constitutionally empowered to raise armies and regulate the armed forces,<sup>76</sup> established an exemption from the draft, it would be the antithesis of deference for a court to construe the exemption more narrowly so that the military could "win" a draft exemption case. The same is true of the soldier pay cases cited by Professor Lichtman, where the disputes centered around the application of statutes and regulations, instead of an evaluation of allegations that the statutes or regulations, as written, were unconstitutional.<sup>77</sup> Thus, it is hardly sur-

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71. Lichtman, *supra* note 1, at 929–36.

72. *Id.* at 929–30.

73. One of the principal problems with assigning weight to statistical "win rates" before the Supreme Court is that at least one of the litigants "wins" when the Supreme Court declines to grant review of a lower court decision, yet that "win" never shows up in the Court's record of reported decisions. For example, if the Court were of the view that some military regulation is constitutional, why should it count as a "win" for the military if the court of appeals gets it wrong and the Supreme Court has to grant certiorari to reverse, but does not appear in the statistics if the court of appeals gets it right and the Court merely denies a petition for writ of certiorari?

74. Lichtman, *supra* note 1, at 929.

75. See O'Connor, *supra* note 8, at 161 ("[T]he military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context.").

76. U.S. CONST. art. I, § 8, cl. 1, 12.

77. Lichtman, *supra* note 1, at 930–31.

prising that litigants asserting claims where the political branches are not entitled to deference statistically fare better as a group when compared to a universe of cases in which some percentage of the cases involve litigants fighting a decidedly uphill battle against the application of the military deference doctrine.<sup>78</sup>

Of course, what this proves is that Professor Lichtman's statistical analysis identified a few clusters of cases where something appears to be different because of the military's anomalously low rate of success in the Supreme Court.<sup>79</sup> But the analytical method for reaching this (ultimately correct) conclusion is backwards. If the Supreme Court merely issued one-line orders announcing that a lower court's decision was either affirmed or reversed, it might make sense to attempt to draw conclusions about the Court's jurisprudential thought by statistically analyzing the military's wins and losses. But we live in a world where the Court actually explains the reasons for its decisions. There is no guesswork in divining the Court's analytical method, as it is set forth in the opinions that accompany the Court's rulings.

Simply reading the Court's military deference decisions, discussed above,<sup>80</sup> discloses the contours of the military deference doctrine and makes it readily apparent that cases involving the *application*, *construction*, or *compliance with* statutes or regulations bearing on the military's affairs will almost never trigger a deferential review, meaning that there is no thumb on the scale that would give the military a better-than-expected chance of winning its cases. Using "win-loss" statistics to render conclusions about the scope of the military deference doctrine, instead of reaching those conclusions from how the Court explains the doctrine in its opinions, is a little like trying to determine what the weather is like outside by studying a weather almanac to see what the weather is usually like on the date in question instead of

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78. Indeed, even before the Court adopted the military deference doctrine, the Court had gone through a lengthy period of time where its jurisprudential approach to constitutional challenges to military statutes and regulations was to deny jurisdiction and leave the matter to the political branches. See O'Connor, *supra* note 8, at 165–97 (discussing the Court's doctrine of "noninterference," which prevailed for the most part from the Court's first consideration of constitutional challenges in the military context until the mid-1950s). The proliferation of noninterference cases in Professor Lichtman's statistical model also makes it predictable that cases, such as draft exemption and soldier pay cases, which ordinarily do not involve a constitutional challenge, would have a greater success rate for the individual litigant than the remaining universe of cases, which includes both deference and noninterference cases.

79. Lichtman, *supra* note 1, at 929.

80. See *supra* notes 20–37 and accompanying text (reviewing the Court's military deference doctrine decisions).

simply walking outside.<sup>81</sup> The statistical inquiry might prove correct, but it is not fail-safe, and certainly not the best available way to reach the right answer.

### III. THE CENTRALITY OF TIMING TO THE COURT'S MILITARY DEFERENCE JURISPRUDENCE

Professor Lichtman's methodological approach eschews a time-based analysis—one that examines how the Court's military deference jurisprudence has evolved over time—and instead seeks to reach conclusions about the military deference doctrine by examining the Court's "military" decisions on a subject-matter basis, without regard to when the decisions were issued.<sup>82</sup> Such an approach is fundamentally flawed, as an examination of the Court's military deference jurisprudence demonstrates that time, and not subject, is the principal variable around which the Court's jurisprudence is properly organized. The time of the decision matters far more than the subject matter of the dispute in predicting the result of disputes that fall within the scope of the Court's modern military deference doctrine.

Professor Lichtman justifies his subject-matter approach by characterizing the Court's military deference doctrine as a more or less unitary jurisprudential approach that has changed in only minor ways over the years. As stated by Professor Lichtman:

This [military deference] tradition has also undergone a subtle evolution. As John O'Connor has pointed out, in the early days of the tradition, the Supreme Court's deferential posture took the form of what he called "noninterference," in which the Court opted to screen off military matters from judicial consideration entirely, engaging in a pointed "refusal to conduct a substantive review, no matter how lenient, of military practices." It was only later that the Court's approach took on a more affirmatively deferential tone, in which the Court would consider the military's position on a

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81. *Cf. In re Marriage of Rosen*, 130 Cal. Rptr. 2d 1, 8 (Cal. Ct. App. 2003). The *Rosen* court stated:

The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: "You don't need a weatherman to know which way the wind blows." The California courts, although in harmony, express the rule somewhat less colorfully and hold expert testimony is not required where a question is resolvable by common knowledge.

*Id.* (citations and internal quotation marks omitted).

82. Lichtman, *supra* note 1, at 910–11.

given subject and accord that view significant weight in its own deliberations.<sup>83</sup>

While the Court's traditional respect for precedent might give a degree of intuitive sensibility to Professor Lichtman's theory of a subtly evolving military deference doctrine,<sup>84</sup> such a hypothesis is not borne out by history. The "evolution" of the Court's military deference jurisprudence was not subtle; it was seismic.

In describing changes to the Court's analytical approach in constitutional challenges to military statutes and regulations as "subtle," Professor Lichtman's analysis gives short shrift to the period of nearly two decades between the late 1950s and the mid-1970s when the Court was anything but deferential to political branch choices concerning the regulation of military affairs. During that period, the Court was openly hostile to the notion that the military could appropriately respect the constitutional rights of persons within its purview.<sup>85</sup> This hostility stands in stark contrast to the Court's confidence, expressed in its decisions since the mid-1970s, in the superior ability of the political branches to balance constitutional rights and military needs,<sup>86</sup> and the Court's seeming disinterest, expressed in decisions prior to the mid-1950s, in the political branches' ability to balance these sometimes competing values.<sup>87</sup> Arguing that similarities between the pre-1950s era of noninterference and the Court's current military deference doctrine reflect a "subtle evolution" in the Court's jurisprudence, without acknowledging the lengthy period when the Court was anything but deferential, is akin to an Englishman describing the transition from the regime of King Charles I to King Charles II as a subtle evolution, without acknowledging a fairly significant revolution in between and a lengthy period of time in which England had no monarch.<sup>88</sup> That the starting point and the finishing point have

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83. *Id.* at 915 (footnote omitted) (quoting O'Connor, *supra* note 8, at 170).

84. *See, e.g.*, U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26–27 (1994) ("Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." (internal quotation marks omitted) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))).

85. *See* O'Connor, *supra* note 8, at 197–214.

86. *See id.* at 226–61 (describing the development of the modern military deference doctrine).

87. *See id.* at 165–97 (describing the Court's earlier doctrine of noninterference with respect to challenges to statutes and regulations governing the military).

88. 2 WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE NEW WORLD 201–58 (1956).

significant similarities does not mean that the road was not bumpy along the way.

The Court's abrupt changes in its framework for considering challenges to military statutes and practices is most evident in the language used by the Court in deciding such cases. Prior to the late 1950s, the Court's disinclination to inquire into the constitutionality of military practices was palpable. In the nineteenth and early twentieth centuries, the Court issued a number of decisions in which it intimated that the Constitution placed no limits on court-martial procedure, and that the federal courts' sole purpose in reviewing collateral attacks on court-martial convictions was to ensure that the court-martial had jurisdiction over the person and offense in accordance with the statutory framework enacted by Congress.<sup>89</sup>

Even into the 1950s, the Court's rhetoric in considering legal challenges to military practices was notably strident, with the Court advising that it was not the role of the courts to concern themselves with the political branches' policy choices in regulating the military. A trio of cases from that era illustrate the Court's tone in addressing such challenges. In *Whelchel v. McDonald*,<sup>90</sup> Justice Douglas, writing for a unanimous Court, rejected a servicemember's claim that his court-martial conviction was invalid because there were no enlisted soldiers on the court-martial panel:

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89. See, e.g., *Grafton v. United States*, 206 U.S. 333, 346 (1907). The *Grafton* Court stated:

The [court-martial] had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority.

*Id.* (internal quotation marks omitted) (quoting *Ex parte Reed*, 100 U.S. 13, 23 (1879)); see also *Johnson v. Sayre*, 158 U.S. 109, 118 (1895) ("The court martial having jurisdiction of the person accused and of the offence charged, and having acted within the scope of its lawful powers, its decision and sentence cannot be reviewed or set aside by the civil courts, by writ of *habeas corpus* or otherwise."); *Ex parte Reed*, 100 U.S. at 21 ("The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court."). In *Dynes v. Hoover*, the Court stated:

These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.

61 U.S. (20 How.) 65, 79 (1857).

90. 340 U.S. 122 (1950).

The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions. Courts-martial have been composed of officers both before and after the adoption of the Constitution. The constitution of courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action.<sup>91</sup>

In 1953, the Court in *Burns v. Wilson*<sup>92</sup> rejected two habeas corpus petitioners' claims that their capital murder court-martial proceedings had suffered from a number of serious constitutional defects.<sup>93</sup> In rejecting the petitioners' claims, the Court focused on the unique nature of courts-martial as institutions established and regulated by Congress as part of its power to govern the affairs of the armed forces:

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.<sup>94</sup>

Also in 1953, in *Orloff v. Willoughby*,<sup>95</sup> the Court rejected a habeas corpus petition by a physician who had been drafted but was not permitted to serve as a military doctor because of concerns about his prior membership in organizations deemed by the Attorney General to be subversive.<sup>96</sup> Again, the Court rejected the petitioner's challenge based on its view that the Court had no legitimate role in overseeing decisions made by the military in managing military personnel:

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that

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91. *Id.* at 126–27 (citations and footnote omitted).

92. 346 U.S. 137 (1953).

93. *Id.* at 146 (plurality opinion). Among the defects alleged by the petitioners were that they had been subjected to illegal detention, that their confessions had been coerced, that they had been denied their counsel of choice, that military authorities suppressed exculpatory evidence, that military authorities procured perjured testimony, and that “their trials were conducted in an atmosphere of terror and vengeance, conducive to mob violence instead of fair play.” *Id.* at 138.

94. *Id.* at 140 (footnotes omitted).

95. 345 U.S. 83 (1953).

96. *Id.* at 85–86, 94–95.

there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. 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.<sup>97</sup>

Beginning in the mid-1950s, though, the Court not only began regularly deciding constitutional challenges to military statutes and practices against the military, but it did so using rhetoric that expressed overt skepticism as to the political branches' ability and/or willingness to protect constitutional rights in ordering military affairs. Gone were the days when the Court expressed a lack of interest in involving itself in military affairs, replaced by an era in which the Court's analytical framework was based on an institutional view that military practices—and in particular longstanding practices within the military justice system—were constitutionally suspect.

This sea change in jurisprudential approach began with a series of personal jurisdiction cases decided in the 1950s and early 1960s. In 1950, Congress enacted the Uniform Code of Military Justice (UCMJ),<sup>98</sup> which placed all services under a single set of regulations for conducting courts-martial. The UCMJ provided for court-martial jurisdiction over certain classes of civilians stationed overseas, including spouses of servicemembers and civilian employees residing on foreign military bases.<sup>99</sup> The UCMJ also provided for court-martial jurisdiction over crimes committed by former servicemembers while on active duty, which were punishable by confinement for five years or more and not triable in any civilian court in the United States—a provision that essentially covered serious offenses committed overseas.<sup>100</sup> One by one, the Court considered these provisions in the 1950s and

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97. *Id.* at 93–94.

98. Ch. 169, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–940 (2000)). See generally Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (explaining the creation of the UCMJ by its principal draftsman). See also Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 32–33 (1989) (discussing the enactment of the UCMJ and the motivations behind its birth).

99. 64 Stat. at 109 (codified at 10 U.S.C. § 802).

100. *Id.* at 109–10 (codified at 10 U.S.C. § 803).

1960s, found them unconstitutional, and in doing so, provided harsh commentary on the fitness of the military to protect constitutional rights.

The revolution began with a whimper, however. In 1952, the Court considered a habeas corpus petition by a servicemember's wife who had been convicted not by a court-martial, but by the United States Court of the Allied High Commission for Germany, an entity established to try criminal offenses occurring in occupied Germany.<sup>101</sup> In rejecting the petitioner's challenge, the Court gratuitously noted that she could have been tried not only by the occupation court that convicted her, but by a court-martial as well.<sup>102</sup> By 1955, however, the Court's hostility toward the assertion of court-martial jurisdiction over nonservicemembers was in full flourish, with the Court employing strident, almost superfluous, language to nearly characterize courts-martial as a necessary evil.

In *United States ex rel. Toth v. Quarles*,<sup>103</sup> the Court held that the military's exercise of court-martial jurisdiction over a former servicemember for a murder allegedly committed while on active duty in Korea, although jurisdiction was permitted under the terms of the UCMJ, ran afoul of the Constitution.<sup>104</sup> In so holding, the Court provided an extended commentary on its views of the quality of justice meted out in courts-martial:

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service. . . . But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.<sup>105</sup>

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101. *Madsen v. Kinsella*, 343 U.S. 341, 342-43, 357 (1952).

102. *See id.* at 345 ("Both United States courts-martial, and United States Military Commissions or tribunals in the nature of such commissions, had jurisdiction in Germany in 1949-1950 to try persons in the status of petitioner on the charge against her." (emphasis omitted)).

103. 350 U.S. 11 (1955).

104. *Id.* at 13, 23.

105. *Id.* at 22-23 (footnote omitted).

Over the succeeding years, the Court employed similar rhetoric in rejecting court-martial jurisdiction over civilian employees and spouses of servicemembers stationed on military bases overseas. After initially upholding the exercise of court-martial jurisdiction over military dependents stationed overseas on the last day of the 1955 Term,<sup>106</sup> the Court granted a rehearing the next Term and rejected the exercise of court-martial jurisdiction over both petitioners.<sup>107</sup> Again, the plurality's analytical framework was based on the accepted fact that courts-martial were inherently suspect in their ability to safeguard constitutional rights:

Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more tha[n] it does the even scales of justice.

. . . .

In summary, "it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual.<sup>108</sup>

The Court's institutionalized hostility to the military justice system in the late 1950s and 1960s was not confined to Congress's attempt under the UCMJ to subject civilians to trial by court-martial. In

106. *Kinsella v. Krueger*, 351 U.S. 470, 473, 480 (1956), *rev'd sub nom.*, *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion); *Reid v. Covert*, 351 U.S. 487, 488, 492 (1956), *rev'd*, 354 U.S. 1, 5 (1957) (plurality opinion).

107. See *supra* note 106. For commentary on the *Covert* decision by two eminent military justice commentators, see Robinson O. Everett, *Persons Who Can Be Tried by Court-Martial*, 5 J. PUB. L. 148, 162-63 (1956), and Wiener, *supra* note 98, at 50-54.

108. *Covert*, 354 U.S. at 38-39 (plurality opinion) (footnotes omitted). Three years later, the Court similarly held that the Constitution precluded the exercise of court-martial jurisdiction over civilian employees and military dependents for both capital and noncapital offenses. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (holding unconstitutional the exercise of court-martial jurisdiction over civilian government employees for noncapital offenses); *Grisham v. Hagan*, 361 U.S. 278 (1960) (holding unconstitutional the exercise of court-martial jurisdiction over civilian government employees for capital offenses); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (holding unconstitutional the exercise of court-martial jurisdiction over military dependents for noncapital offenses).

*O'Callahan v. Parker*,<sup>109</sup> the petitioner, an active duty servicemember, had been convicted by court-martial of assault and attempted rape.<sup>110</sup> Although the UCMJ, by its terms, allowed O'Callahan to be tried by court-martial based on his status as an active duty servicemember, O'Callahan argued that the exercise of court-martial jurisdiction was unconstitutional because the offense was not connected to his active duty service.<sup>111</sup> In holding that the exercise of court-martial jurisdiction for non-service-connected crimes was unconstitutional, the *O'Callahan* majority engaged in a lengthy diatribe about the quality of the military justice system:

While the Court of Military Appeals takes cognizance of some constitutional rights of the accused who are court-martialed, courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law. . . . A civilian trial, in other words, is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice.

As recently stated: “None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice.”<sup>112</sup>

In a final coup de grâce, the *O'Callahan* Court added a footnote to the above-quoted language in which it referred to the “so-called military justice” system.<sup>113</sup> Thus, by the end of the 1960s, the Court’s hostility to the military justice system was readily apparent from its decisions.

By the mid-1970s, however, the Court had made a complete about-face in the rhetoric with which it described the military justice system as well as its role in overseeing that system. Gone were descrip-

109. 395 U.S. 258 (1969).

110. *Id.* at 259–60.

111. *See id.* at 260–61. O'Callahan's charged offenses occurred while he was on authorized liberty, off base, and in civilian attire. *Id.* at 259. O'Callahan's argument that the Constitution limited court-martial jurisdiction to service-connected offenses was first raised in a law review article published nearly a decade earlier. Robert D. Duke & Howard S. Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 440–49 (1960).

112. *O'Callahan*, 395 U.S. at 265–66 (footnote omitted) (quoting Ira Glasser, *Justice and Captain Levy*, 12 COLUM. F. 46, 49 (1969)). For an interesting discussion of the *O'Callahan* decision and the application of the service-connection rule announced therein, see Robinson O. Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?*, 1969 DUKE L.J. 853.

113. *O'Callahan*, 395 U.S. at 266 n.7.

tions of the military justice system as “so-called military justice,”<sup>114</sup> “singularly inept” in protecting constitutional rights,<sup>115</sup> an organ of “retributive justice,”<sup>116</sup> marked by “travesties of justice perpetrated under the UCMJ,”<sup>117</sup> “emphasiz[ing] the iron hand of discipline more tha[n] it does the even scales of justice,”<sup>118</sup> and as a system that cannot have the “qualifications that the Constitution has deemed essential to fair trials” in the civilian context.<sup>119</sup> Instead, as the Court began to develop its modern military deference doctrine beginning in the 1970s, the Court’s opinions focused on issues of constitutional structure.

Rather than offering value judgments—accurate or not—on the quality of justice meted out at courts-martial, or the military’s ability to respect the constitutional rights of its members, the Court’s starting point in addressing challenges to a military statute or practice was the Constitution’s grant of power to Congress and the President to manage the armed forces. The Court considered those branches’ superior ability to balance constitutional rights against military needs, and the judiciary’s institutional incompetence in assessing the effect any particular ruling might have on military readiness. Not coincidentally, the military began winning more cases once the Court shifted from its institutional skepticism of military justice and toward a paradigm centered on the political branches’ superior ability to conduct the balancing required when individual rights potentially clashed with military necessity.<sup>120</sup>

It is difficult to discern how one could read the Supreme Court’s decisions from the mid-1950s through the end of the 1960s and conclude, as Professor Lichtman does, that the Court’s tradition of military deference has “undergone a subtle evolution”<sup>121</sup> since the period before the mid-1950s, when the Court had an express “hands off” approach to constitutional challenges to military practices,<sup>122</sup> until the

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114. *Id.*

115. *See id.* at 265.

116. *Id.* at 266.

117. *Id.* (internal quotation marks omitted) (quoting Glasser, *supra* note 112, at 49).

118. *Reid v. Covert*, 354 U.S. 1, 38 (1957) (plurality opinion).

119. *Id.* at 39 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

120. The rhetoric employed by the Court in applying the modern military deference doctrine is discussed in some detail in Part II of this Article. *See also* O’Connor, *supra* note 8, at 226–306 (discussing, in considerable detail, the language used by the Court in applying the military deference doctrine).

121. Lichtman, *supra* note 1, at 915.

122. Indeed, Chief Justice Warren famously described the Court’s “hands off” attitude toward military regulations governing its own personnel in a 1962 law review article. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186–87 (1962).

Court's establishment and application of its current military deference doctrine. The Court effectively rejected its prior policy of noninterference utilized in the 1950s and 1960s when it struck down several UCMJ provisions regarding court-martial jurisdiction and also adopted a new rule that limited courts-martial to the trial of service-connected offenses.<sup>123</sup> By the mid-1970s, the Court had effectively rejected its prior institutional skepticism toward the military justice system and replaced it with a jurisprudence based on the recognition that the balance between individual rights and military needs primarily should be struck by Congress and the President.<sup>124</sup>

One could argue that the difference between the era of noninterference—which essentially meant no review—and the current military deference doctrine—which involves a highly deferential review—is little more than semantics. Such a view could be entitled to some degree of credence based on the fact that the Supreme Court, since it began applying the military deference doctrine in the mid-1970s, has never found the doctrine applicable and then proceeded to invalidate some or all of the military practice being challenged.<sup>125</sup> Regardless of that debate, however, it is not correct to characterize the military deference doctrine as having subtly evolved from the era of noninterference to its present formulation. Moreover, there is little reason to draw conclusions on the scope of the Court's tradition of military deference by factoring into that analysis decisions from a bygone era where the Court was decidedly not deferential.

While the Court's own language in explaining its framework for deciding "military" cases is probably the best evidence that the Court's jurisprudence has undergone two watershed changes over the years—one in which the Court essentially abandoned its noninterference policy and the other when the Court rejected its prior hostility toward military justice in favor of the military deference doctrine—mere rhetoric is not the only evidence. If Professor Lichtman's hypotheses—that the Court's military deference jurisprudence had undergone only subtle changes over the years, and that the Court's jurisprudence le-

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123. See *supra* notes 109–113 and accompanying text.

124. See *supra* notes 114–120 and accompanying text.

125. See O'Connor, *supra* note 8, at 226–306 (discussing Supreme Court decisions applying the military deference doctrine). Indeed, if one were to review the chart from Professor Lichtman's article of "military" cases decided by the Supreme Court since 1974, when it first began applying the military deference doctrine, none of the exceedingly few cases that Professor Lichtman records as a "loss" by the military involved a case falling within the scope of the military deference doctrine, as discussed in Part II of this Article, and the Court did not purport to apply the doctrine in any of these "losses." See Lichtman, *supra* note 1, app. A at 950–53.

gittimately can be judged by subject matter instead of by timing of decision—were correct, one would expect that like cases would be decided the same way over the years. That is, if the jurisprudence has been more or less static, then results on various legal issues should be the same over time. But this has not been the case, and consistent with the Court's own rhetoric, the decisions less favorable to the military's position invariably occurred during the 1950s and 1960s.

This Article has already addressed the Court's change in position on the amenability of military dependents and civilian government employees to court-martial jurisdiction when they are stationed overseas.<sup>126</sup> In 1952, the Court observed, albeit in dictum, in *Madsen v. Kinsella*<sup>127</sup> that a court-martial would have had jurisdiction to try Madsen for the murder of her husband, who had been an active duty servicemember stationed in Germany at the time of his death.<sup>128</sup> In 1956, the Court upheld the exercise of court-martial jurisdiction over military dependents stationed with their spouses overseas in a pair of cases, only to have those cases reargued the following year, with the Court ultimately holding in both cases that the Constitution barred the exercise of such jurisdiction by courts-martial.<sup>129</sup> Thus, as the Court was developing its collective view as to the merits of the military justice system, it changed course from allowing the jurisdiction over civilians enacted in the UCMJ to prohibiting the exercise of such jurisdiction, all in the space of one year.

Similarly, the Court reached seemingly irreconcilable results in two cases addressing the proper application of Army Article of War 92,<sup>130</sup> a pre-UCMJ provision that gave courts-martial jurisdiction over charges of murder and rape taking place in the United States only during time of war.<sup>131</sup> In *Kahn v. Anderson*,<sup>132</sup> the petitioners had been tried by court-martial for a murder committed at Fort Leavenworth, Kansas, on July 29, 1918.<sup>133</sup> The convicted soldiers sought a writ of habeas corpus on the grounds that the hostilities of World War

126. See *supra* notes 101–108 and accompanying text.

127. 343 U.S. 341 (1952).

128. *Id.* at 342–43, 345.

129. *Kinsella v. Krueger*, 351 U.S. 470, 473, 480 (1956), *rev'd sub nom.*, *Reid v. Covert*, 354 U.S. 1, 5 (1957) (plurality opinion); *Reid v. Covert*, 351 U.S. 487, 488, 492 (1956), *rev'd*, 354 U.S. 1, 5 (1957) (plurality opinion).

130. Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 619, 664.

131. See *id.* (“[N]o person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.”).

132. 255 U.S. 1 (1921).

133. *Id.* at 5; see also *Lee v. Madigan*, 358 U.S. 228, 231 (1959) (noting the date of the offense at issue in *Kahn*).

I had ceased before the date of their trials, therefore depriving the court-martial of jurisdiction.<sup>134</sup> The Court rejected the petitioners' argument on the grounds that, although hostilities might have been over by the time of the charged offenses, Congress's declaration of war against the Central Powers had not yet been rescinded.<sup>135</sup> As the Court explained: "It is therefore difficult to appreciate the reasoning upon which it is insisted that, although the Government of the United States was officially at war, nevertheless, so far as the regulation and control by it of its army is concerned, it was at peace."<sup>136</sup>

Now, fast-forwarding to 1959, when the Court was in the midst of its period of considerable skepticism toward the exercise of court-martial jurisdiction, the Court reached the opposite result with respect to offenses occurring at the end of World War II. In *Lee v. Madigan*,<sup>137</sup> the Court considered the identical argument raised in *Kahn* with respect to a conviction for conspiracy to commit a murder that occurred at Camp Cooke, California, in 1949.<sup>138</sup> As in *Kahn*, the petitioner's offense had occurred after the cessation of actual hostilities but before Congress officially terminated its declaration of war on Germany in 1951 and on Japan in 1952.<sup>139</sup> Contrary to its decision in *Kahn*, however, the Court rejected the exercise of court-martial jurisdiction in *Lee*.<sup>140</sup> In reaching that result, the Court characterized as dicta the portion of the *Kahn* opinion pertaining to the timing of the official proclamation of peace and declared that a "particularized and discriminating analysis" was required to determine whether the United States was actually in a state of war at the time of the offense charged.<sup>141</sup> Without question, there are differences at the margins between *Kahn* and *Lee*—after all, the offenses in *Lee* occurred nearly four years after the end of active hostilities and over two years after President Truman had declared the end of all hostilities.<sup>142</sup> Nevertheless, it remains difficult to reconcile the two decisions given the Court's pronouncement in *Kahn* that actual rescission of a declaration of war by Congress was the event that terminated court-martial juris-

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134. *Kahn*, 255 U.S. at 9.

135. *Id.* at 9–10.

136. *Id.* at 9.

137. 358 U.S. 228 (1959).

138. *Id.* at 229.

139. *Id.* at 230.

140. *Id.* at 230–31, 236.

141. *Id.* at 230–31.

142. *Id.* at 229–30.

diction under Army Article of War 92.<sup>143</sup> The seemingly inconsistent results are explainable, however, by the time in which each decision was issued—*Kahn* during the Court's era of noninterference and *Lee* during the Court's period of skepticism toward the military justice system.

These examples show how the Court reached different results in seemingly similar cases where one was decided in the Court's era of noninterference and the other decided in the late 1950s and 1960s, with the decision less favorable to the military position coming second in time. This phenomenon also can be seen at work in the opposite direction, in pairs of seemingly similar cases where the first occurred prior to the Court's adoption of the military deference doctrine and the second occurred once that doctrine had been established by the Court, with the second decision invariably being more favorable to the military position. In *Flower v. United States*,<sup>144</sup> a case decided in 1972, the Court summarily reversed the petitioner's conviction for distributing leaflets along a public road within the limits of Fort Sam Houston, Texas, when previously he had been prohibited from doing so by the post's deputy commander.<sup>145</sup> In so holding, the Court observed that the base commander could "no more order [the] petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street."<sup>146</sup> Yet, four years later, the Court upheld a base commander's decision not to allow applicants to distribute campaign materials and conduct partisan political speeches within public areas of Fort Dix.<sup>147</sup> The Court attempted to distinguish its *Flower* decision by stressing its understanding that the road at issue in *Flower* "was a completely open street[ ] and that the military had abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue."<sup>148</sup> This factual distinction is hardly convincing, though, because Fort Dix had a number of public roads and footpaths that ran through the base, which were open to use by civilian drivers and pedestrians; there was not usually a guard posted at the base's main entrances; and civilians were allowed in any unrestricted area in the base.<sup>149</sup> Perhaps sensing that its factual

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143. See *Kahn v. Anderson*, 255 U.S. 1, 9–10 (1921) (explaining that "the effect of the Armistice and the cessation of hostilities" did not constitute peace "in the legal sense" under Army Article of War 92).

144. 407 U.S. 197 (1972) (per curiam).

145. *Id.* at 197–99.

146. *Id.* at 198.

147. *Greer v. Spock*, 424 U.S. 828, 832, 839–40 (1976).

148. *Id.* at 835 (internal quotation marks omitted) (quoting *Flower*, 407 U.S. at 198).

149. *Id.* at 830.

distinctions were less than convincing, the Court added that *Flower* had been decided “without the benefit of briefing or oral argument.”<sup>150</sup> Instead, a more plausible explanation for the differing results is that *Flower* had been decided before the Court had developed the military deference doctrine, while *Greer* was decided just as the Court was formulating that doctrine.

Finally, in arguably the most astounding reversal within the Court’s military jurisprudence, the Court in *Solorio v. United States*<sup>151</sup> overruled its *O’Callahan* decision and abandoned its service-connection limitation on court-martial jurisdiction, more than a decade into the Court’s modern military deference era.<sup>152</sup> In all of the other cases discussed above where the Court reached different results on seemingly similar facts, the Court made at least a token effort to distinguish the prior precedent on its facts, though none of these efforts strike me as particularly convincing. *Solorio* involved no such effort. Rather, the Court expressly rejected its prior decision in *O’Callahan*, remarking that the *O’Callahan* precedent “must bow to the lessons of experience and the force of better reasoning.”<sup>153</sup> Indeed, Justice Stevens’s concurrence accused the majority of “reaching out to reexamine the decision[ ] in *O’Callahan*”<sup>154</sup> when the Court could have disposed of the case by finding that the offenses charged were in fact service-connected under the test announced in *O’Callahan*.<sup>155</sup> The juxtaposition of these sets of different results in similar cases, together with a review of the Court’s changing rhetoric, demonstrates the significant difference in the Court’s treatment of constitutional challenges to military practices in the late 1950s and 1960s as compared to the period before and the period after this era.

One final note on the debate over whether military deference decisions are best analyzed by subject matter or by time of decision. Professor Lichtman’s own statistical approach shows a significant change in the military’s “success rate” from the mid-1950s through the 1960s as compared to prior and later years.<sup>156</sup> Professor Lichtman’s

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150. *Id.* at 835.

151. 483 U.S. 435 (1987).

152. *Id.* at 450–51.

153. *Id.* at 450 (internal quotation marks omitted) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407–08 (1932) (Brandeis, J., dissenting)).

154. *Id.* at 451 (Stevens, J., concurring in the judgment).

155. *See id.* at 451–52 (asserting that, unless the Court disagreed with the Court of Military Appeals’s conclusion that the petitioner’s crimes were sufficiently service-connected to create court-martial jurisdiction, the propriety of the *O’Callahan* decision was not properly before the Court).

156. *See* Lichtman, *supra* note 1, app. B at 965 (contrasting the military’s win-loss record in the Warren Court with preceding and subsequent Courts).

“scorecard” has the military winning 75.9% of the cases decided during the Vinson Court, which immediately preceded the Warren Court, as well as 62.7% and 84.2%, respectively, of the cases decided during the Burger and Rehnquist Courts.<sup>157</sup> Yet Professor Lichtman calculates that the military won only 44.4% of the cases it litigated during the Warren Court from 1953 to 1969, a period that roughly coincides with the period in which the Court’s rhetoric concerning military justice turned hostile.<sup>158</sup> Thus, even Professor Lichtman’s “scorecard” approach suggests an anomaly during the Warren Court as it relates to military cases coming before the Court.

One of the principal theses of Professor Lichtman’s article is that his subject-matter approach, borne out of a statistical computation of the military’s “win-loss” record in the Supreme Court, reveals that the military is most likely to lose cases in the Supreme Court when it is attempting to exercise control over persons not in the armed forces.<sup>159</sup> As Professor Lichtman explains:

What these cases show is the one dimension of the Supreme Court’s relationship with the military in which their workaday deference drops away: the Supreme Court’s tradition of deference to the military does not extend—and, logically, *should* not extend—to cases encompassing non-military persons. Instead, in these cases we see the Supreme Court taking an active role in reaffirming the constitutional guarantees of everyday citizens; to a certain extent, then, these cases really are not about the military at all.<sup>160</sup>

Not surprisingly, Professor Lichtman’s conclusion that the Court declines to defer to the political branches in cases where the military is seeking to impose its will on civilians is based on two clusters of cases—conscientious objector cases and court-martial personal jurisdiction cases<sup>161</sup>—where the military deference doctrine typically would not apply for reasons other than the civilian status of the individual litigant. The conscientious objector cases tell us little about the military deference doctrine because they, for the most part, involve *applying* statutes enacted by Congress, and not *challenges* to the constitutionality of statutes enacted by Congress. In those cases, the Court defers to Congress by faithfully applying the framework established by statute, and one would expect a Court inclined toward deference to

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157. *Id.*

158. *Id.*

159. *Id.* at 939–40.

160. *Id.* at 940.

161. Lichtman, *supra* note 1, at 939–40.

find for the conscientious objector when the military is seeking to deviate from the framework enacted by Congress. With respect to the cases characterized by Professor Lichtman as instances where the military lost cases involving the court-martial of civilians, the majority of those cases were decided in the period from 1959 to 1960, when the Court's jurisprudence was inclined toward hostility to military justice in general, with the military repeatedly losing jurisdiction cases over both civilians *and* active duty servicemembers.<sup>162</sup>

These methodological differences aside, Professor Lichtman's conclusion that "the Supreme Court's tradition of deference to the military does not extend—and, logically, *should* not extend—to cases encompassing nonmilitary persons"<sup>163</sup> is demonstrably incorrect. Even starting with the handicap that the Court's true military deference jurisprudence extends back only to 1974—a theory which necessarily limits the pool of cases available to refute Professor Lichtman's thesis—there is no shortage of instances in which the military deference doctrine has been applied to burden civilians in the name of military readiness. In *Greer v. Spock*,<sup>164</sup> the Court upheld the power of a base commander to prohibit civilians from distributing leaflets on a public street that happened to pass through Fort Dix.<sup>165</sup> In reaching that conclusion, the Court found it appropriate to defer to the military's determination that it was necessary to burden the free speech rights of civilians in the name of fostering military readiness: "In short, it is 'the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.' And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum."<sup>166</sup>

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162. *Id.* app. B at 964 & n.178. Professor Lichtman's listing of cases involving attempts by the military to court-martial civilians does not, but should, include *Covert*, a case where the Court held unconstitutional the exercise of court-martial jurisdiction over a military dependent for a murder committed in Germany. *Reid v. Covert*, 354 U.S. 1, 3, 5 (1957) (plurality opinion); see also *supra* notes 107–108 and accompanying text. Regardless, as with the cases listed by Professor Lichtman, the *Covert* case was decided during the period in which the Court was skeptical of the exercise of court-martial jurisdiction generally, both in cases involving civilians and in cases involving military personnel. See *supra* notes 137–143 and accompanying text (discussing the Court's rejection of court-martial jurisdiction over a servicemember in *Lee v. Madigan*, 358 U.S. 228 (1959)); see also *supra* notes 109–113 and accompanying text (discussing the Court's adoption of the service-connection test for court-martial jurisdiction in *O'Callahan v. Parker*, 395 U.S. 258 (1969)).

163. Lichtman, *supra* note 1, at 940.

164. 424 U.S. 828 (1976).

165. *Id.* at 832, 840.

166. *Id.* at 837–38 (citation omitted) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

Granted, *Greer* theoretically could be waved off as a case more about the military's authority to control conduct within the confines of a military base and less about the military's attempt to exercise control over civilians. Fair enough. But Professor Lichtman treats the military's attempt to prosecute a conscientious objector as the quintessential case of the military's exercise of control over a civilian where, in Professor Lichtman's formulation, the military deference doctrine does not and should not apply.<sup>167</sup> That notion is directly refuted by the Court's decision in *Rostker v. Goldberg*,<sup>168</sup> where the Court rejected a claim that the Military Selective Service Act violated the Fifth Amendment's Due Process Clause because it required men to register with the selective service but did not impose the same requirement on women.<sup>169</sup> In rejecting the due process challenge, the Court explicitly applied the military deference doctrine, noting that "[t]he case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."<sup>170</sup>

Even more recently, the Court invoked the military deference doctrine in *Rumsfeld v. FAIR*,<sup>171</sup> where it rejected a constitutional challenge to the Solomon Amendment.<sup>172</sup> The *FAIR* decision upheld Congress's right to place burdens on nonmilitary entities, that is, colleges and universities, by requiring them to provide certain access for military recruiters as a condition of the receipt of specific types of federal funds.<sup>173</sup> If Professor Lichtman were correct that the military deference doctrine does not apply when the dispute involves the imposition of burdens on nonmilitary personnel,<sup>174</sup> a discussion of the doctrine would have had no place in the *FAIR* decision. Instead, once the Court had disposed of a question raised by amici concerning the proper construction of the Solomon Amendment, the Court invoked the military deference doctrine *first* in analyzing whether the statute, as construed, was constitutional.<sup>175</sup>

All of this is not to say that the fact that a military statute or regulation primarily burdens nonmilitary personnel or entities is *irrelevant* to the military deference doctrine. In balancing—however deferen-

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167. Lichtman, *supra* note 1, at 939–40.

168. 453 U.S. 57 (1981).

169. *Id.* at 59, 78–79.

170. *Id.* at 64–65.

171. 126 S. Ct. 1297 (2006).

172. *Id.* at 1306.

173. *Id.*

174. Lichtman, *supra* note 1, at 939–40.

175. *FAIR*, 126 S. Ct. at 1306.

tially—the individual rights at issue against the political branches’ assessment of military need, it seems perfectly reasonable that a court might consider the extent to which the statute or regulation affects persons other than servicemembers. In this age of an all-volunteer military, it is reasonable for a court to distinguish in some circumstances between those who elected to submit to military authority and civilians who did not. But the point is that, contrary to Professor Lichtman’s thesis, it is incorrect to assert that the military deference doctrine does not apply where the aggrieved party is a civilian because the historical record proves otherwise.

It also is far from clear that the lesson to be drawn from the military deference doctrine is that the military is most likely to lose in the Supreme Court when it seeks to burden civilians. Most of the cases that Professor Lichtman relies on for this proposition were issued in the late 1950s and 1960s when the military was faring worse in all of its cases, largely because of the Court’s changing view toward the proper role of the courts in overseeing military justice matters. Indeed, I would posit that the military is most likely to lose cases in the Supreme Court when it litigates those cases in the Warren Court, because the timing of the case appears to be, by far, the most significant factor in determining the degree to which the Court is likely to be deferential to the political branches’ assessment of military need.

#### IV. THE MILITARY DEFERENCE DOCTRINE NOW AND IN THE FUTURE

As I have written elsewhere, one of the most important aspects of the military deference doctrine, and one that many commentators misunderstand,<sup>176</sup> is that the military deference doctrine is not a venerable doctrine that has existed since the early days of the Republic.<sup>177</sup> Indeed, a review of the Court’s military deference jurisprudence could lead one to the conclusion that the doctrine was more or less the brainchild of Chief Justice Rehnquist, who wrote virtually every important military deference decision that the Court has is-

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176. While we clearly have different viewpoints concerning the utility of the military deference doctrine, Professor Diane Mazur is one commentator who has correctly perceived that the military deference doctrine is an outgrowth of a series of decisions issued in the mid-1970s, most of which were authored by then-Justice Rehnquist. See Diane H. Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 704 (2002) (maintaining that the military deference doctrine was a creation of then-Justice Rehnquist).

177. See O’Connor, *supra* note 8, at 306 (rejecting the myth that the military deference doctrine stems from the Court’s early nineteenth-century military jurisprudence).

sued.<sup>178</sup> While notions of stare decisis may militate against a retreat from the military deference doctrine by the Court, the fact remains that the doctrine is one of fairly recent vintage, which was developed and perpetuated mainly through judicial opinions written by a Justice who is no longer on the Court. Moreover, while stare decisis is a nice concept in the abstract, that doctrine did not prevent the Court from radically changing its approach to constitutional challenges to military practices twice before. Therefore, it is not out of the realm of possibility that the military deference doctrine could recede in importance with personnel changes on the Court. This could occur through an express overruling of the doctrine, through decisions narrowing the doctrine's application, or through a more subtle process whereby the Court continues to pay lip service to its need to defer to political branch judgments but nevertheless accords little or no actual deference to the policy determinations of Congress and the President.

But early indications from the Roberts Court, with Chief Justice Roberts and Justice Alito replacing Chief Justice Rehnquist and Justice O'Connor, respectively, provide reason to believe that the military deference doctrine will continue to be a robust feature of the Court's military jurisprudence, at least in the near term. In *FAIR*, the first "military" case decided by the Roberts Court, the Court upheld the Solomon Amendment against a constitutional challenge and, in so doing, began its constitutional analysis by extolling the virtues of the military deference doctrine when Congress legislates pursuant to its constitutional power to raise and support armies:

The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy." Congress' power in this area "is broad and sweeping," and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation. But the fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in *Rostker*, "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support armies.<sup>179</sup>

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178. See *id.* at 309 (noting that Rehnquist wrote the majority opinions in *Parker v. Levy*, 417 U.S. 733 (1974); *Middendorf v. Henry*, 425 U.S. 25 (1976); *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Solorio v. United States*, 483 U.S. 435 (1987); and *Weiss v. United States*, 510 U.S. 163 (1994)).

179. *FAIR*, 126 S. Ct. at 1306 (alterations in original) (citations omitted).

While it is always dangerous to draw conclusions from a single case, all participating members of the Court—Justice Alito did not participate—joined Chief Justice Roberts’s opinion, which invoked the military deference doctrine as its first step in constitutional analysis once the Court resolved what the statute in fact provided.<sup>180</sup> Moreover, this is a case that could have been decided on a number of grounds, such as a pure Spending Clause or First Amendment basis,<sup>181</sup> without invoking the military deference doctrine, and the Court’s prominent reliance on the military deference doctrine to support its decision suggests that there is no move afoot to eradicate the doctrine, explicitly or through subtle narrowing. For his part, Justice Alito noted prominently in his confirmation hearing that he had joined a conservative Princeton alumni group because, as an alumnus who attended Princeton on an ROTC scholarship, he was unhappy that the school had decided to abolish the campus ROTC program.<sup>182</sup> While, again, predicting judicial attitudes based on personal history is always a risky proposition, Justice Alito’s background makes him seem like an unlikely candidate to take up the sword against the military deference doctrine, particularly when every other member of the Court joined an opinion applying it in *FAIR*.

## V. CONCLUSION

This Article is by no means an attempt to catalogue every military deference case decided by the Court, or to discuss every nuance in its application.<sup>183</sup> It is important, however, that the doctrine be understood, both in terms of the facts surrounding its development and the limited scope of the doctrine as evidenced by the framework in which it is applied. Professor Lichtman’s article on the military deference doctrine is thought provoking in that it challenges the orthodoxy by which the military deference doctrine is viewed—through the lens of time rather than through the lens of subject matter irrespective of time.<sup>184</sup> Ultimately, however, I have come to the conclusion that Professor Lichtman’s analysis of the military deference doctrine is flawed in several important respects, all of which result in a fundamental mis-

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180. *Id.*

181. *See id.* at 1306–07 (addressing Spending Clause and unconstitutional conditions arguments); *id.* at 1307–10 (addressing First Amendment arguments).

182. Maura Reynolds, *Alito Is Sworn in as Next Supreme Court Justice*, L.A. TIMES, Feb. 1, 2006.

183. For a considerably more exhaustive analysis that traces the development of the Court’s military deference doctrine through three jurisprudential eras, see O’Connor, *supra* note 8.

184. Lichtman, *supra* note 1, at 910–11.

understanding of the doctrine. In my estimation, the principal flaws in Professor Lichtman's analysis include: focusing on "win-loss" records rather than on the analytical framework in which those wins and losses occurred; failing to perceive that the military deference doctrine should—and does—apply only to a narrow category of "military" cases; incorrectly casting the military deference doctrine as a longstanding and relatively stable doctrine that has only subtly evolved since the early twentieth century; determining that subject matter, rather than timing, is the proper variable around which to organize an analysis of military deference decisions; and concluding that the military deference doctrine does not—and should not—apply to statutes and regulations burdening civilians instead of military personnel.

The military deference doctrine is, at once, both historically immature and limited, yet potent when applicable. After the disruption that occurred in the course of the Court's prior rejection of the doctrine of noninterference, the Court ultimately landed on the military deference doctrine as an appropriate analytical framework, where applicable, in the mid-1970s, and the Court has largely remained in the same place with its military jurisprudence ever since. The Court's rejection of its noninterference policy beginning in the mid-1950s likely came about as a result of what the Court perceived as overreaching by the political branches in subjecting persons—military and civilian—to courts-martial in a willy-nilly fashion. If the military deference doctrine were to recede in importance in the future, it would be a good bet that it happens because some collection of Supreme Court Justices perceives that Congress and the President are overreaching in the exercise of their constitutional powers to raise armies and regulate the armed forces. At present, though, there is no sign that such an upheaval is anywhere on the horizon.