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Countenancing Corruption: 
A Civic Republican Case Against 
Judicial Deference to the Military

Kirstin S. Dodge†

I. INTRODUCTION

In recent years, courts have increasingly deferred to military decisionmakers in judicial review of servicepersons’ claims that the armed forces have constrained or abridged their constitutional rights. Courts have failed to declare unconstitutional regulations prohibiting political rallies or speeches on bases, barring the distribution of political pamphlets or circulating petitions directed to Congress without prior approval, and forbidding symbolic headgear such as yarmulkes. Courts have also deferred to the judgment of “military experts” that exclusion of gay and lesbian citizens from military service and women from combat positions serves important military goals.

Judicial deference to the military takes place on two levels. Some decisions defer to the military on the merits of a particular case. In addition, the judiciary increasingly fails to engage in any analysis or balancing of military needs against individual constitutional claims and is moving toward creation of a doctrine that military matters are non-justiciable.

Those who defend judicial deference argue that since national security depends on an effective fighting force, governmental measures that are indefensible in any other societal sphere are defensible and appropriate for the “unique institution” of the military.

Most critics of judicial deference have either denied that the military is, in fact, a “separate sphere,” or have argued that it is not separate enough to justify exceptions to constitutional doctrine. This article presents a different view. It accepts that the armed forces constitute a “separate sphere” unlike any other institution but argues that courts must be particularly skeptical of military decisions precisely because of the military’s unique characteristics.

Section II describes the recent history and current state of the deference doctrine. It then examines criticisms of the doctrine and the counter-response. Section III suggests that the military, because of its nature and functions, is

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in certain respects dangerous to the maintenance of a working democracy. As a foundation for understanding the concerns motivating this article, the section describes civic republican notions of politics and society that influenced the nation’s founders and the rediscovery and development of these ideas by modern constitutional theorists. Civic republican conceptions of democracy led the founders to extol the virtues of national defense by a militia of citizen-soldiers and to caution against the influence of a standing army. While a standing army rather than a militia has since been considered essential for our national defense, this section posits that neo-republican ideals of communicative, participatory democracy combined with the militia ideal evident in early civic republicanism provide a good guide for evaluating modern military policies. These ideals suggest that promotion of a strong democracy and protection of the citizenry from threats posed by a powerful armed forces require diverse citizen involvement in the military and promotion of servicepersons’ involvement in democratic politics. Scrutiny of military policies against these templates would allow the nation to support an effective, professional armed forces while guarding against the dangers inherent in standing armies.

Section IV applies the lessons of Section III to the modern United States’ military and concludes that policies excluding women from combat and gay and lesbian people from all military service create a dangerous exclusivity and partisanship in the armed forces and contribute to discrimination, a lack of communicative politics, and subordination of women and homosexuals in society as a whole. These policies of exclusion, combined with those that curtail the political activities of military personnel, effectively disable servicepersons from involvement and growth as citizens in a diverse polity. They also limit the public information about internal military affairs, knowledge crucial to citizen control of the armed forces. Recent revelations about abuses within the military illustrate that the military expertise courts use to justify a doctrine of deference is often shaped not by military necessity but by the personal prejudices and interests of military decisionmakers.

Section V anticipates the charge that modification of speech, dress, or exclusion policies would reduce discipline within the ranks and thereby endanger the nation’s security. It points out that the military has already successfully modified traditional practices once thought essential for effective discipline. Proponents of judicial deference to current policies ignore greater dangers posed by policies that allow the military to contribute to the decay of democracy in a pluralistic society—by not allowing military members to develop skills required for democratic participation, by teaching that constitutional constraints do not apply to the military, and by promoting a patriotism of blind obedience. Furthermore, the risk that military force might be turned against the civilian population is far greater from an obedient, unquestioning force representing only a subsection of society than from a
reflective and diverse body of servicemembers.

Finally, Section VI anticipates and addresses the charge that the judiciary is not the proper body to effect the changes proposed in this article. It argues that the judiciary, given its role in our democracy, must take responsibility for carefully scrutinizing matters concerning the military and holding that institution accountable for its actions.

II. CURRENT DOCTRINE, ITS CRITICS, AND DEFENDERS

A. Judicial Deference to the Military

The Supreme Court has repeatedly asserted that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Despite this proclamation, the Court has presided over a steady erosion of servicepersons' rights and a concomitant expansion of the military's power over those it conscripts or employs. The Court has defended the importance of judicial deference not only to the political branches charged with controlling the military but also to the judgments of military decisionmakers themselves. While the Court has asserted that it cannot "abdicate [its] ultimate responsibility to decide constitutional question[s]," it has proceeded to do just that through a series of decisions in which it has found either that the interests of the military outweigh the constitutional claims presented, or that claims against the military are unreviewable.

The basic justification for deference was set forth in *Orloff v. Willoughby*, one of the earliest of the judicial deference cases:

[J]udges are not given the task of running the Army. The responsibility for setting up the channels through which such grievances can be considered and fairly settled rests upon 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.

4. Even earlier than *Orloff v. Willoughby* was *Korematsu v. United States*, 323 U.S. 214 (1944), in which the Supreme Court deferred to military and political leaders in allowing the internment of Americans of Japanese descent during World War II, a decision that has since been widely criticized. *See infra* notes 73-77 and accompanying text. However, perhaps because of the infamy of the case, courts seem never to cite *Korematsu* as precedent for the military deference doctrine.
One commentator has described the Orloff dictum as "a charter for judicial abdication." 6

The constitutional foundation for judicial deference to the military is found in the explicit grant to the Congress of the power to "raise and support Armies," 7 to "provide and maintain a Navy," 8 "[t]o make Rules for the Government and Regulation of the land and naval Forces," 9 and in the status of the President as "Commander in Chief of the Army and Navy of the United States." 10 Courts also have referred to the broad authority granted to the political branches, especially Congress, to delegate many decisions to the military itself. Combined with these constitutional provisions, some have found support for a doctrine of deference in the words of the nation's founders, who argued that the Constitution should not place limits on the power of the new nation to provide for its defense. 11 Concerns regarding constitutional allocation of power and the importance of national defense are central to courts' hesitancy to subject the military to scrutiny.

1. Curtailment of Political Speech and Religious Expression

One significant line of cases in the development of judicial deference concerns the first amendment rights of servicepersons to speak out against military mobilizations. In Parker v. Levy 12 a conscripted physician assigned to train medical personnel refused to train special-forces personnel 13 and urged enlisted men, particularly African-American soldiers, to refuse to fight in Vietnam. 14 Levy was convicted under the general articles set forth in the Uniform Code of Military Justice, which forbid "conduct unbecoming an

8. Id. at cl. 13.
9. Id. at cl. 14.
These powers [essential to the common defense] ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them . . . . And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinable limits . . . it must be admitted, as a necessary consequence, that there can be no limitation of that authority which is to provide for the defence and protection of the community, in any matter essential to the formation, direction, or support of the NATIONAL FORCES.
(citing THE FEDERALIST No. 23, at 200 (Alexander Hamilton) (B.F. Wright ed., 1961)).
14. Id. at 769-70 (Douglas, J., dissenting).
officer" and conduct prejudicial "to good order and discipline."\textsuperscript{15} He challenged the general articles as unconstitutionally vague, arguing that they chilled the free speech of servicemembers.

The Supreme Court, through Justice Rehnquist, upheld the regulations. While recognizing the Court's departure in the case from established constitutional vagueness standards, Rehnquist defended the decision by asserting, "the military is, by necessity, a specialized society separate from civilian society . . . 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."\textsuperscript{16} Rehnquist justified carving out a special military exception to otherwise clearly unconstitutional regulations by reference to "[t]he extreme degree of discipline that the military establishment must maintain in order to serve its crucial function."\textsuperscript{17} The Court invoked that justification repeatedly in the years after Parker.

In two other cases in which military regulations were challenged on the basis of first amendment claims the Court sharply limited the degree to which military personnel can engage in collective political activity. First, in Green v. Spock,\textsuperscript{18} civilians seeking access to a military base challenged local base regulations that required anyone seeking to distribute political literature or hold political speeches on the base to gain approval from local commanders.\textsuperscript{19} Under these regulations, a commander had authority to bar literature or speeches that the commander believed would constitute a "clear danger to the loyalty, discipline, or morale of troops on the base."\textsuperscript{20} The Court held that the regulations did not violate the First Amendment. Although the Court stated that a particular incident of restraint by a particular commander might be struck down if the regulations were "applied irrationally, invidiously, or arbitrarily,"\textsuperscript{21} the majority did not suggest what would constitute an unconstitutional application of the regulations.

Next, in Brown v. Glines,\textsuperscript{22} the Court upheld Air Force regulations requiring servicemembers to obtain permission from their commanders before soliciting signatures for petitions on Air Force bases.\textsuperscript{23} The Court found unpersuasive the argument that Green was distinguishable because civilians not

\textsuperscript{16.} Parker, 417 U.S. at 743, 758.
\textsuperscript{18.} 424 U.S. 828 (1976).
\textsuperscript{19.} Id. at 831 (quoting Fort Dix Reg. 210-26 (1968); Fort Dix Reg. 210-27 (1970)).
\textsuperscript{20.} Id. at 840.
\textsuperscript{21.} Id.
\textsuperscript{22.} 444 U.S. 348 (1980).
\textsuperscript{23.} The plaintiffs in Brown had sought to circulate a petition addressed to members of Congress and to the Secretary of Defense regarding Air Force grooming standards. Id. at 351.
otherwise connected with the base had brought the challenge. In upholding the Air Force regulations, the Court expressed a willingness to trust a commander's determination of what kinds of material would constitute "a clear threat to the readiness of his troops." It defended this willingness by pointing to the wording of the Air Force regulation that "advises commanders to preserve servicemen's 'right of expression . . . to the maximum extent possible.'"

Brown is disturbing for two reasons. First, while previous opinions had found a military interest in disciplining servicepersons to obtain their "effective response to command," the Court in Brown asserted the importance of the military's interest in the "unquestioned" obedience of military members. The move from "effective" obedience to "unquestioned" obedience seems small when considered at the level of a response to a particular command at a particular moment. When considered in the more general context of the military's power as an institution, the difference suggests that the military has a legitimate interest in stifling all internal dissent. Furthermore, it suggests that courts ought not allow armed forces' personnel to question military determinations by way of legal challenges to military regulations or policies.

Second, and perhaps most disturbing, was the Court's willingness to ignore the impact such regulations controlling political speech have on military personnel. Since military members often live as well as work on base, regulations that limit what they say or hear while at work limit what they say and hear altogether. As a result of the Brown decision, not only are servicemembers stripped of their First Amendment freedoms, but they become vulnerable to imposition of penalties that do not exist outside the military. Under the Uniform Code of Military Justice, members of the armed forces are subject to a broad array of criminal sanctions for certain types of speech.

The most recent and most ominous case decided by the Supreme Court with regard to First Amendment rights is the 1986 decision Goldman v. Weinberger. There, the Court upheld an Air Force regulation that forbids uniformed servicepersons to wear headgear indoors. Goldman, an Air Force psychologist and rabbi whose religious convictions required him to wear a yarmulke at all times, challenged the regulation as an unconstitutional infringement on the free exercise of religion. The Court, citing past decisions

24. Id. at 356 n.13.
25. Id. at 353.
26. Id. at 355 (quoting Department of Defense Directive 1325.6 (1969)).
28. See id.
29. Sugin, supra note 6, at 869. See also infra note 161 and accompanying text.
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regarding judicial deference to the military, rejected his claims.\textsuperscript{32} The most disturbing aspect of \textit{Goldman} was the Court's failure to reach the merits of the case.\textsuperscript{33} In response to Goldman's claim that the Air Force had failed to offer a "scintilla of proof"\textsuperscript{34} in support of its policy, the majority stated that need for or effectiveness of a policy was "quite beside the point" because "appropriate military officials" had decided that the dress regulations were desirable.\textsuperscript{35} The Court effectively declared it would uphold any regulation promulgated by the military, "no matter how absurd or unsupported it may be"\textsuperscript{36} on the mere assertion by the military that the rule was necessary.\textsuperscript{37}

The Court's increased deference to military regulations restricting political and religious expression has coincided with a steady expansion of the military's jurisdiction. While courts-martial originally had jurisdiction only over felonies committed by military personnel in wartime,\textsuperscript{38} they are now the fora in which servicepersons are tried and convicted for nearly all crimes they commit, whether such crimes are related to the military or not.\textsuperscript{39} This authority includes jurisdiction over "personnel on active duty, reservists while on active or inactive duty, and retirees who are entitled to pay."\textsuperscript{40}

2. Exclusion of Citizens from Military Service

Courts have also consistently deferred to military judgments that the military mission necessitates the exclusion of certain segments of the citizenry

\textsuperscript{32} For a more complete discussion of the case, see Donahue, \textit{supra} note 17; Sugin, \textit{supra} note 6, at 871-76.

\textsuperscript{33} In \textit{Goldman} the Court seemed to decide a debate among circuit courts over whether judicial deference to the military properly occurs through refusing to review claims against the military or at the merits stage. Several circuits had regularly applied the "\textit{Mindes test}," first articulated in \textit{Mindes v. Seaman}, 453 F.2d 197, 201 (5th Cir. 1971). The \textit{Mindes} test provided a structure for ascertaining whether to get to the merits of a challenge to a particular internal military decision by weighing the nature and strength of the plaintiff's claim and the potential injury to the plaintiff if review is refused against the extent of interference in military affairs such review would cause and the extent to which military discretion or expertise is involved. \textit{Mindes}, at 201-02; Gabriel W. Gorenstein, Note, \textit{Judicial Review of Constitutional Claims Against the Military}, 84 \textit{COLUM. L. REV.} 387, 390-96, 404-09 (1984). \textit{But see Pruitt v. Cheney}, 963 F.2d 1160, 1166-67 (9th Cir. 1992), \textit{cert. denied}, 61 U.S.L.W. 3413 (U.S. Dec. 8, 1992) (No. 92-389) (remanding case concerning military discharge of a lesbian and demanding that district court review the merits of plaintiff's claim where "[t]he Army does not argue—and the district court did not hold—that the \textit{Mindes} test precludes review here.").

\textsuperscript{34} Brief for Petitioner at 16, Goldman v. Weinberger, 475 U.S. 503 (1986).

\textsuperscript{35} Goldman, 475 U.S. at 509.

\textsuperscript{36} Id. at 515 (Brennan, J., dissenting).

\textsuperscript{37} Id. In response to the \textit{Goldman} decision, Congress mandated that military members be permitted to wear "neat and conservative" religious apparel so long as it does not "interfere with the performance of the member's military duties." 10 U.S.C.S. § 774 (Law. Co-op. 1992). The Air Force then re-wrote its regulations to allow black or dark blue religious headgear that does not exceed six inches in diameter. Air Force Reg. § 35-10 (1989). \textit{See also Dept. of Defense (DoD) directive 1300.17 (Feb. 3, 1988) (military policy on religious accomodation); infra note 210 and accompanying text.}

\textsuperscript{38} \textit{See Note, Military Justice and Article III}, 103 \textit{HARV. L. REV.} 1909, 1914-17 (1990) [hereinafter \textit{Military Justice}]. \textit{See also Sugin, supra note 6, at 860-64.}


\textsuperscript{40} Id. at n.5 (citing 10 U.S.C. § 802 (1988)).
from service. Currently, the military excludes all women from serving in combat positions\(^4\) and excludes all homosexuals from any military service whatsoever.\(^2\)

Military regulations exclude women from “combat positions.”\(^3\) No woman has directly challenged these regulations. In Rostker v. Goldberg,\(^4\) however, the Court implicitly upheld the exclusion of women from combat positions in an equal protection challenge brought by a man to the regulations exempting women from mandatory registration for a possible future draft.\(^5\)

In this case, Justice Rehnquist denied that the judiciary had a role in overseeing the balance of power between the President, Congress, and the military: “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.”\(^6\) Rehnquist went on to argue that since drafts are designed to

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\(^4\) For a more complete discussion and criticism of this exclusion, see Karst, supra note 6, at 523-45; Judith Stiehm, Arms and the Enlisted Woman (1989); Lori S. Kornblum, Women Warriors in a Men's World: The Combat Exclusion, 2 LAW & INEQ. J. 351 (1984).


\(^6\) Until mid-1991, Congress barred Air Force women from duty “in aircraft engaged in combat missions,” 10 U.S.C. § 8549 (1988), and women in the Navy and Marines from duty “on vessels . . . that are engaged in combat missions.” 10 U.S.C. § 6015 (1988). The Congressional ban was lifted by the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-90, § 531(a), 105 Stat. 1290, 1365 (1991). The Army has been free from such statutory limitation on its placement of women, but has also excluded them from combat positions. For a review and analysis of Defense Department policy changes with respect to women, see Stiehm, supra note 41, at 56-67, 134-54. For a discussion of the services' various definitions of combat, see Kornblum, supra note 41, at 357-65. See also Karst, supra note 6, at 523 n.90. In early 1992, President Bush formed a Presidential Commission on the Assignment of Women in the Armed Forces to study and make recommendations on the issue. The Pentagon and President Clinton have pledged to reconsider the issue of the combat exclusion in 1993 and to consider the Commission's recommendations. In November 1992, the commission recommended that women be allowed to serve on most warships but urged that the ban on women flying combat planes be recodified into law. The composition of the 15-member panel has been highly controversial. Michael R. Gordon, Panel is Against Letting Women Fly in Combat, N.Y. TIMES, Nov. 4, 1992, at A24. Twelve of 15 panelists are current or former military personnel, and many are admittedly hostile to the idea of putting women in combat. Michael R. Gordon, Curb on Women in Combat is Urged, N.Y. TIMES, Nov. 3, 1992, at A7; Rowan Scarborough, Foxtale Privacy at Issue: Women and War Hearings Continue, WASH. TIMES, Aug. 11, 1992, at A1.


\(^45\) Karst, supra note 6, at 566.

\(^46\) Rostker, 453 U.S. at 65-66 (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)). Interestingly, in this case the Court chose to defer to Congress' decision when that decision conflicted with the judgment of the President and military leaders who had argued before Congress that registration should include women.
raise combat troops and women are ineligible for combat, they are "not similarly situated" for purposes of equal protection analysis.\textsuperscript{47}

The Court also implicitly accepted the exclusion of women from Naval combat positions in \textit{Schlesinger v. Ballard}.\textsuperscript{48} There the Court held against a military member who claimed that the Navy promotion system denied men equal protection of the laws because it guaranteed female junior officers a longer window of time in which to be promoted within the Navy's system of hierarchy. Usually, officers must be promoted within a certain time frame or they are discharged.\textsuperscript{49} The Court justified the disparate treatment by reference to the greater difficulty faced by female officers in gaining experience for promotion because so many positions are closed to them. In so doing, the Court implicitly approved of the exclusion of female officers from many duty assignments.\textsuperscript{50} Courts have also deferred to the military in cases challenging regulations that bar single parents from enlistment,\textsuperscript{51} a restriction that disproportionately hinders women seeking to join the military.

The Supreme Court has not spoken directly to the issue of exclusion of homosexuals from military service, but it has denied certiorari petitions in a number of circuit court decisions that have deferred to military judgment on this question. Each of the service branches mandates the discharge of military members found to be homosexuals.\textsuperscript{52} Military decisionmakers justify the policy by proclaiming that "[h]omosexuality is incompatible with military service" and "seriously impairs the accomplishment of the military mission."\textsuperscript{53} The exclusion of gay men and lesbians from military service is authorized solely by military regulation. Congress' only word on the subject has been the criminalization of all sodomy by servicemembers, both homosexual and heterosexual.\textsuperscript{54} The fact that the anti-sodomy statute applies

\begin{enumerate}
\item Karst, \textit{supra} note 6, at 566.
\item 419 U.S. 498 (1975).
\item See Hirschhorn, \textit{supra} note 27, at 197.
\item See id. at 197-99.
\item See Army Reg. 635-200, chpt. 15; AFM 39-12 (Change 4) Oct. 21, 1970, para. 2-103 (Air Force); SECGNA Instructon 1900.9A, ¶ 2-21 (Navy and Marines).

Even if President Clinton makes good on his campaign pledge to lift the ban, many fear that implementation of an end to the policy would be difficult and slow. \textit{See, e.g.}, Thomas L. Friedman, \textit{Clinton to Open Military's Ranks to Homosexuals}, \textit{N.Y. TIMES}, Nov. 12, 1992, at A1; Eric Schmitt, \textit{Challenging the Military}, \textit{N.Y. TIMES}, Nov. 12, 1992, at A1. Some fear that an executive order lifting the ban will not halt continued discharge of gay or lesbian servicemembers through selective enforcement of other military regulations. Melissa Healy, \textit{Clinton to Stress Conduct as Key for Gays in Military}, \textit{L.A. TIMES}, Nov. 13, 1992, at A1. If President Clinton in fact signs an executive order lifting the ban, judicial review of challenges to such discharges may be a critical part of the implementation of an end to the policy.
to all sexual orientations led the Ninth Circuit, in one case, to question the appropriateness of deference to military decisionmakers in this area. The court stated that the statute "reflects an absence of congressional intent to discriminate on the basis of sexual orientation."\footnote{Watkins v. United States Army, 847 F.2d. 1329, 1349-50 (9th Cir. 1988), vacated, 875 F.2d. 699 (9th Cir. 1989), cert. denied, 111 S. Ct. 384 (1990).}

Typically, courts reviewing challenges to the exclusion policy rely on\footnote{See ben Shalom v. Marsh, 881 F.2d 454, 459-62 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990); Beller v. Middendorf, 632 F. 2d 788, 810-11 (9th Cir. 1980), reh'g denied, 647 F.2d 80 (9th Cir. 1981), cert. denied, 452 U.S. 905 (1981); Hatheway v. Secretary of Army, 641 F.2d 1376, 1381-82 (9th Cir. 1981), cert. denied, 454 U.S. 864 (1981); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U. S. 1003 (1990).} Parker, Brown and Rostker to assert the importance of judicial deference to the military.\footnote{See, e.g., Beller, 632 F.2d at 811-12. The regulations provide the following explanation for the policy: The presence of [homosexual] members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security. 32 C.F.R. § 41, app. A, pt. 1.H (1991).} They then find that the military’s restrictive regulations themselves provide sufficient explanation of the government interest at stake to justify the exclusion.\footnote{Older cases considered homosexuals a quasi-suspect class but found the military’s explanation satisfactory even if subjected to intermediate scrutiny. See Beller, 632 F.2d at 810 ("government interests . . . outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct"); Hatheway, 641 F.2d. at 1381-82 (army may selectively prosecute homosexual acts of sodomy and not heterosexual acts of sodomy because prosecution of homosexual acts "bears a substantial relationship to an important government interest."). More recent cases have applied only rational review to military exclusion cases, finding homosexuals do not constitute a suspect class. See ben Shalom, 881 F.2d at 464, 465-66; Woodward, 871 F.2d at 1074 (citing Bowers v. Hardwick, 478 U.S. 186 (1986) (homosexual sodomy may be criminalized by states without violating due process)).} The language of the Seventh Circuit in\footnote{See ben Shalom v. Marsh, 881 F.2d 454, 461 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).} ben Shalom v. Marsh is typical of such decisions:

The Commander-in-Chief, the Secretary of Defense, the Secretary of the Army, and the generals have made the determination about homosexuality, at least for the present, and we, as judges, should not undertake to second-guess those with the direct responsibility for our armed forces. If a change of Army policy is to be made, we should leave it to those more familiar with military matters than are judges not selected on the basis of military knowledge. We, as judges, although opponents of prejudice of any kind, should not undertake to order such a risky change with possible consequences we cannot safely evaluate. The Congress, as overseer of the Army and the other military branches, is also better equipped to make such determinations. . . . [T]he branches of the military have great leeway in determining what...
policies will foster the military mission, and courts will rarely second-guess those decisions.\textsuperscript{59}

Since the 1980s, only one court has refused in a final decision to defer to the military regarding the expulsion of a homosexual servicemember, and even then, only on grounds of estoppel that are likely to be applicable in very few cases.\textsuperscript{60}

In addition to the explicit exclusion of women from combat and gay men and lesbians from all military service, judicial deference to regulations regarding uniforms and physical appearance of servicepersons results in de facto exclusion of citizens of several religious faiths from military service. Because of the Goldman decision, those whose religious faith requires outward demonstration of piety may be forced to avoid military service in order to maintain their religious convictions. As a consequence, by deferring to exclusionary regulations, the judiciary has effectively stated that the military may prevent entire segments of society from joining its ranks, and thereby maintain itself as an institution that is unrepresentative of American society as a whole.\textsuperscript{61}

\textsuperscript{59} Id.

\textsuperscript{60} See Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989), \textit{cert. denied}, 111 S. Ct. 384 (1990) (Army could not refuse to reenlist 14-year veteran solely on grounds of his homosexuality where Army had known of his homosexuality from time of enlistment and had accepted him for two prior terms of reenlistment). The Ninth Circuit explained its lack of deference by reference to the narrow scope of its decision:

To estop the Army from denying Sgt. Watkins reenlistment on the basis of his homosexuality would not disrupt any important military policies or adversely affect internal military affairs. It would simply require the Army to continue to do what it has repeatedly done for fourteen years with only positive results: reenlist a single soldier with an exceptionally outstanding military record.

\textit{Id. at} 706.

Two other cases in which courts seemed ready to challenge the policy were making their way through the courts as this article went to press. In one case, the Ninth Circuit remanded a discharge decision asking the Army for a rational explanation of its policy, the first time a court has demanded an explanation beyond the language of the policy itself. Cheney v. Pruitt, 963 F.2d 1160 (9th Cir. 1992), \textit{cert. denied}, 61 U.S.L.W. 3413 (U.S. Dec. 8, 1992) (No. 92-389). \textit{See infra} notes 79-82 and accompanying text. The other concerned Keith Meinhold, a Naval petty officer discharged after he publicly declared himself to be gay. U.S. District Court Judge Terry Hatter, Jr., first ordered the Navy to reinstate Meinhold pending resolution of his case. \textit{Judge Orders Gay Sailor Temporarily Reinstated}, \textit{N.Y. Times}, Nov. 8, 1992, at 38. Judge Hatter ultimately rescinded Meinhold’s discharge and permanently enjoined the Navy from discharging or denying enlistment to any person based solely on his or her sexual orientation. Meinhold v. Dept. of Defense, No. 92-6044TJH, 1993 U.S. Dist. LEXIS 726, at *9 (C.D. Cal. Jan. 29, 1993). Citing \textit{Pruitt}, Judge Hatter found that the Navy had failed to “establish, through a factual record, that its policy is rationally related to its permissible goal.” \textit{Id. at} *3. It is too early to calculate the impact of the Meinhold decision. Unlike other district court cases unfavorable to the military, the Clinton administration is unlikely to appeal the decision given the President’s stated intention to lift the ban. The opinion, however, has only persuasive power beyond the Central District of California, and may have only limited impact on challenges brought by discharged military members in other courts.

\textsuperscript{61} Sugin, \textit{supra} note 6, at 874.
3. Immunity from Tort Liability

Judicial deference has not been limited to allowing the military nearly complete control over servicepersons’ actions and the overall composition of the armed forces. That deference has also allowed the military to escape tort liability for injuries to servicepersons, even injuries inflicted intentionally. In 1983 the Court denied enlisted military personnel the right to sue superior officers for damages resulting from infringements of their constitutional rights. Since then, the Court has expanded tort immunity to cover government officials who have subjected unsuspecting servicepersons to medical experiments and to cover civilian suppliers of military equipment from product liability claims for design defects. Taken together, these cases suggest that issues involving national defense are “inherently above the law and hence unreviewable regardless of the legal rights transgressed . . . ”

The reasoning of United States v. Stanley demonstrates the frightening degree to which the Court will permit the military free rein in its treatment of personnel. The Supreme Court in Stanley denied tort recovery to a serviceman who was subjected to LSD experiments conducted by the Central Intelligence Agency without his knowledge or consent. The Court did not disagree that Stanley suffered lasting injuries from the ordeal, nor that the experiment was a violation of his constitutional due process rights “to be free to decide for himself whether to submit to drug experimentation.” But Justice Scalia argued that any inquiry into military actions to establish the requisite factors for liability constituted an unacceptable intrusion into military affairs. He reasoned that judicial process, such as forcing military officers to testify about their commands, “would . . . be problematic” and “would disrupt the military regime . . . .”

The dissenting opinions correctly point out what was at stake in Stanley. Justice O’Connor wrote that the CIA’s use of Stanley in LSD experimentation was “so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission.” Justice Brennan, joined by Justices Marshall and Stevens, referred to lessons learned at the Nuremberg trials “that experimentation with unknowing human subjects is morally and legally unacceptable.”

In its zeal to avoid “intrusion into military affairs,” the Stanley opinion

62. For an extensive discussion of this area of doctrine, see Barry Kellman, Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?, 1989 DUKE L.J. 1597 (1989).
68. Kellman, supra note 62, at 1617.
69. Stanley, 483 U.S. at 682-83.
70. Id. at 709.
71. Id. at 687.
suggests that the Court will no longer ask the military to answer some of the
most basic questions of administrative law including whether it claimed
statutory or executive authority to implement a program, whether individual
decisionmakers had the appropriately delegated authority, and whether the
actual implementation complied with a program’s basic plan. The Court’s
willingness to exempt the military from any obligation to provide answers, let
alone proof, as a defense against tort claims is a complete abdication of judicial
review power similar to that in Goldman v. Weinberger where constitutional
challenges against the military were at issue.

B. Criticism of Current Doctrine

One of the oldest and most grievous cautions against military deference is
found in Korematsu v. United States, perhaps the most infamous case of
judicial deference to military judgment, and one which is often invoked as a
warning against such deference. In Korematsu, the Supreme Court upheld
the relocation and internment of 120,000 persons of Japanese ancestry in
defence to the “professional judgment” of military officials, the President,
the War Department, and the Congress that the move was necessary for
national security. In the half-century since the internment, Korematsu’s
conviction for failure to cooperate with military authorities has been
overturned and Congress has apologized to those interned and provided
restitution to them. At the same time, the doctrine of deference to military
necessity has grown stronger.

The courts’ increasing deference to military decisionmaking has not gone
unchallenged. In Brown v. Glines, Justice Brennan led the dissenters,
protesting that the “Court abdicates its responsibility to safeguard free

72. See Kellman, supra note 62, at 1623.
73. 323 U.S. 214 (1944).
74. See Karst, supra note 6, at 568-59; Kellman, supra note 62, at 1601-02. The dangers evident in
Korematsu were best articulated by Judge Patel:
As historical precedent it stands as a constant caution that in times of war or declared military
necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a
cautions that in times of distress the shield of military necessity and national security must not
be used to protect governmental actions from close scrutiny and accountability. It stands as a
cautions that in times of international hostility and antagonisms our institutions, legislative,
executive and judicial, must be prepared to exercise their authority to protect all citizens from
the petty fears and prejudices that are so easily aroused.
75. For a more complete discussion of the decision, including the degree to which racism influenced
the judgments of decisionmakers, see Eugene Rostow, The Japanese American Cases—A Disaster, 54 YALE
L.J. 489 (1945); Francis Biddle, In Brief Authority (1962); Roger Daniels, The Politics of
Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese
Exclusion (1962); Morton Grodzins, Americans Betrayed: Politics and the Japanese
Evacuation (1949); Peter Irons, Justice at War: The Story of the Japanese American
Internment Cases (1983).
expression when it reflexively bows before the shibboleth of military necessity.”78 One commentator has suggested that the nation’s “strength grows from the resolve to subject military force to constitutional authority . . . .”79 Resisting an interpretation of Goldman that would force courts to forego on-the-merits review of military policies,80 the Ninth Circuit recently remanded a case concerning the discharge of a lesbian Army Reserve officer, demanding that the district court make a decision on the merits rather than invoke stock phrases that courts must defer to military decisions about the matter.81 In Pruitt, the court was particularly concerned that the Army had “submitted no evidence justifying its regulation,” and that the plaintiff had had no opportunity to rebut the Army’s position.82 The court acknowledged precedents demanding deference to the military, however it cautioned against employing deference to the extent of denying all reviewability.83

While many commentators warn of the dangers of allowing the military to escape judicial review altogether, many argue only for getting to the merits stage in suits against the military and say little or nothing about the degree of deference the courts should apply when reviewing the merits of a case. Some critics explicitly qualify their arguments by suggesting courts show significant deference to military decisions once the merits of a claim are reached.84 For example, in Goldman v. Weinberger, Justice O’Connor objected to the majority’s failure to reach the merits of Goldman’s claim. She proposed instead that the military’s interests should be incorporated into the assignment of the level of governmental interest in the challenged policy and taken into account at the balancing stage of the analysis. Justice O’Connor claimed that such a test would be “sufficiently flexible to take into account the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending.”85


79. Kellman, supra note 62, at 1597.

80. See supra notes 33-37 and accompanying text.


82. Id. at 1165.

83. Id. at 1166 (citations omitted). See also Watkins v. United States Army, 847 F.2d at 1350 n.31 (“Goldman and Rostker require judicial deference, not the abdication of our Article III duty to hold the other branches of government, even the military, accountable to the Constitution.”).

84. See, e.g., Donahue, supra note 17, at 103 (“[I]t is not the fact of the invocation of the deference policy which is problematic in Goldman, but the degree to which that policy was implemented.”); Kellman, supra note 62, at 1649 (“[I]t is hard to disagree that the judiciary should be deferential about the need for weaponry, the best method of testing and developing such weaponry, or the allocation of risks associated with such weaponry”); Sugin, supra note 6, at 889 (standard proposed in Note “would allow the military to pursue an . . . unfettered policy in wartime combat”); Gorenstein, supra note 33, at 389, passim (accepting “lesser scope in the military sphere” of many rights and criticizing holdings of military deference cases for finding non-justiciability, not because of their substantive outcomes).

85. Goldman, 475 U.S. at 530-31 (O’Connor, J., dissenting). See also Donahue, supra note 17, at 107-09 (supporting O’Connor’s dissent in Goldman).
Perhaps commentators focus on justiciability because it seems an achievable improvement in the current state of doctrine. It is certainly a minimum necessary requirement—if courts demand an explanation from the military, it is at least possible that they may find a particular explanation unconvincing. But the holdings of cases prior to Goldman, in which the Court reached the merits and yet deferred to military decisionmakers, show that application of a balancing test that is unduly deferential to the military may not be sufficient. Whether through balancing or nonreviewability, denial of a military member’s claim constitutes an identical infringement of that citizen’s interests.

C. The “Separate Sphere” Defense of Deference

A strong theme running throughout the deference cases is the claim that the armed forces constitute a “separate community” where significant constraints on individual liberty are justified. One commentator who supports a doctrine of deference based on a separate-community description of the military, posits four propositions underlying the doctrine:

First, as a matter of observation and history, the armed forces are a distinct subculture in which the individual is subordinated to the organization in a manner unlike any other government activity. Second, the existence of this peculiar relationship is evidence that it rationally serves both the armed forces’ internal purposes and the larger society’s interests. Third, when individual rights appear to conflict with the smooth working of the armed forces, the Court distrusts its own ability to reconcile them without harming military effectiveness. Fourth, its exceptional reluctance to intervene on behalf of judicially developed individual rights is justified because the purpose of the armed forces, “to fight wars,” is fundamentally different from any other government activity.

Professor Hirschhorn criticizes both the majority on the Court and its critics for failing to address the relationship between the courts and the military on a fundamental, functional level. In deference cases, Hirschhorn argues, the fact “that military personnel do not enjoy the same rights as civilians is advanced as a reason why they should not.” The absence of reasoned justification, Hirschhorn complains, makes assertions of military necessity and

86. See Goldman, 475 U.S. at 516 (Brennan, J., dissenting) (arguing that the military should “provide, as an initial matter and at a minimum, a credible explanation of how the contested practice is likely to interfere with the proffered military interest.”).
87. Hirschhorn, supra note 27, at 178 (citations omitted).
88. Id. at 201-02.
89. Id. at 179-180.
90. Id. at 202 (emphasis added).
of the separate community "vulnerable to criticism." 91

In his article, Hirschhorn articulates a justification for deference based on the nation's constitutional system and on problems of authority within the military and between military and civilian powers. 92 Hirschhorn argues that because "the primary purposes for which the armed forces exist, the successful use or threat of force against other sovereigns, is outside the constitutional system . . . the courts . . . have no basis on which to decide that a military practice which rationally furthers that purpose is less important than its cost to servicemen's liberty interests." 93 Hirschhorn faces squarely the implications of the separate sphere defense of military deference:

The result is an approach to judicial review that accepts the segregation of a relatively limited class of persons from the constitutional norms of civilian society. It accepts that the 'separate community' is one in which . . . individuals exist not as ends in themselves but as means to their superiors' ends. 94

He defends his position through a lesser-evil argument that accepts sacrifice of the rights of many for the good of the nation.

Hirschhorn criticizes those opposed to military deference for their failure to understand that a self-contained military culture is crucial for military effectiveness. 95 Indeed, critics of the separate sphere defense have tended to attack as inaccurate the description of the military as a separate sphere. Commentators have criticized the majority on the Court for relying "upon an arguably outmoded appraisal of the military." 96 Professor Karst, for example, has written that because the nation has moved to a large, peacetime military made up of volunteers, the armed forces are no longer seen as a separate community but rather as "just another job." 97

Rather than challenge Hirschhorn's description of the military as a unique entity, this article explores the issue of military deference on the terms set forth by Hirschhorn and by the current majority of the Court. It criticizes military deference based on concerns arising from the military's position as a separate sphere within the United States' constitutional system. Concerns about the military's unique place within and effect on the nation's democracy were central to the republican philosophies that influenced our nation's founders, but have been largely ignored by current critics of judicial deference.

91. Id. at 204.
92. See id. at 180.
93. Id. at 252.
94. Id. at 253.
95. Id. at 252.
97. Karst, supra note 6, at 571 (citations omitted).
This article seeks to revive attention to these concerns while taking seriously the nation's need for a disciplined, effective fighting force.

III. THE DANGEROUSNESS OF "THE SEPARATE SPHERE"

The most salient feature of a military force is its control of a tremendous store of weaponry. In addition, a "standing army," as opposed to a "militia" of part-time citizen-soldiers, exists in times of peace as well as war and is populated to a large degree by professional officers and soldiers—the career military. Our nation’s founders feared the potential power of a standing army for reasons that are as valid today as they were then.

In order to understand the founders' wariness of the armed force, it is necessary to place their discussion of military concerns in the political context of the time, an era that was heavily influenced by a civic republican conception of politics. This section first describes civic republicanism as it was understood by the framers of the Constitution, and as it has since been explored in relation to modern social and political culture. It then discusses the dangers identified by the nation's founders in establishing a professional armed force and describes the advantages of the type of military they would have preferred: the citizen militia. The section concludes by suggesting that general civic republican commitments, including the ideal of a citizen militia, provide an appropriate standard for evaluating the wisdom or potential danger of current military policies.

A. Civic Republicanism

In recent years, constitutional theorists have rediscovered and revived the "civic republican" conception of politics and society. These "neo-republicans" have enriched our understandings of the contours and influence of republican thought by researching the influence of civic republicanism on the formation of the United States Constitution and by exploring the possible application of republican ideals to law and politics in the modern United States.

Early republicans conceived of politics as a project in which citizens come together to decide matters of policy "united in their commitment to good faith pursuit of their common good." Civic republicanism emphasizes the process  

98. A democracy may take many different forms and elevate many different ideals. Modern proponents of republican democracy often contrast the republican ideal of democracy with libertarian or individualistic ideals of democracy or with "understandings [of democracy] that treat governmental outcomes as a kind of interest-group deal, and that downplay the deliberative functions of politics and the social formation of preferences." Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L. J. 1539, 1590 (1988).
of self-government rather than particular outcomes of this process. This political paradigm views people as social and political beings whose self development depends on coming together with other citizens as coequals to decide matters of common concern.\textsuperscript{100}

Stressing political deliberation among citizens, republicanism demands that citizens engage in political interaction, and listen to and learn from one another.\textsuperscript{101} It demands that when a society makes laws, it takes into account the concerns of all its citizens rather than the self-interest of only a segment of society—"that political actors . . . look through the eyes of all those affected."\textsuperscript{102} Professor Brest calls the republican process "discursive participation—participation that induces us to listen to other people's positions and justify our own."\textsuperscript{103} Professor Michelman calls it "deliberative politics"—"an argumentative interchange among persons who recognize each other as equal in authority and entitlement to respect."\textsuperscript{105}

Reaching agreement on common affairs was much easier in the small, early republics where the citizenry, for political purposes, included only landholding white men. Neo-republican theorists have sought to overcome the elitist history of republicanism and the difficulty of applying republican ideals to the modern, heterogeneous United States. They argue that deliberative politics does not require "dissolution of difference, but conciliation within reason"\textsuperscript{106} of the diverse perspectives of a pluralist body politic.

The possibility of invoking republican ideals to promote a politics of inclusion in the United States is perhaps best explored in the work of political theorist Iris Young. According to Young, a heterogeneous population may still engage in republican interaction if differences are recognized, accepted and mutually respected.\textsuperscript{107} Failure to recognize and affirm differences in society makes the true participatory democracy envisioned by republicans impossible. Young argues that such failure results in identification of needs and imposition of norms that appear to be neutral and universal, but instead serve those of the privileged groups who seek to deny the existence of differences in society.\textsuperscript{108} Instead of insisting on false homogeneity, "participatory democracy must promote the ideal of a heterogeneous public, in which persons stand forth with their differences acknowledged and respected, though perhaps not completely
understood, by others." 109

Young describes the kind of participatory politics toward which a pluralistic society should aim as a “communicative democracy.” 110 Like deliberative republican politics, communicative democracy requires citizens to come together in good faith to discuss their collective ends and the best means to achieve them. 111 Such a program requires that all voices be heard, that no voice be silenced by physical, economic, or political means or the “more subtle force that silences those who give reasons or make pleas of the ‘wrong’ form.” 112 But communicative democracy, as distinct from traditional republican deliberative democracy, “assumes a starting point of distance and difference, that participants in communicative interaction must reach out to one another to forestall or overcome misunderstanding.” 113

Communicative democracy not only accepts differences among members of a public, it embraces them as necessary and desirable. By bringing differing perspectives and commitments to political and social discussion, participants are forced to identify the polity’s full range of needs and will “aim at the result that is the most just, as the one that all can agree to as most fairly accommodating the needs and interests of everyone.” 114 Exposure to the experiences and styles of fellow citizens is important to this process because assumptions made on a subconscious level affect the judgments people make about whether policies or laws are necessary or appropriate. 115 Engagement with the broad range of a diverse citizenry is a prerequisite to overcoming assumptions that are based on “fears, aversions, and devaluations of groups marked as different.” 116

The importance of engaging with one’s fellow citizens lies not only in its potential for strengthening the political decisionmaking process. Civic republicans also believe that individual self-development depends on participatory politics for its full expression. 117 The process of engaging in participatory, communicative politics not only lets a citizen reshape the attitudes and preferences of those around her, but she herself may be transformed in the process:

109. Id. at 119.
111. See id. (manuscript at 11-12).
112. Id. at 9 (citing Kenneth Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1 U. ILL. L. REV. 95 (1990)).
113. Id. at 10.
114. Id. at 13.
115. See YOUNG, supra note 107, at 134.
116. Id.
117. See, e.g., Michelman, supra note 105, at 450. Tracing its roots back to Aristotelean political theory, this aspect of traditional civic republicanism blends easily with postmodern and feminist conceptions of human development as contingent and socially determined.
By having to speak and justify his or her preferences to others who may be skeptical, a person becomes more reflective about these preferences, accommodates them to the preferences of others, or sometimes becomes even more convinced of the legitimacy of his or her claims. By listening to others and trying to understand their experience and claims, persons or groups gain broader knowledge of the social relations in which they are embedded, and of the implications of their proposals. These circumstances of a mutual requirement of openness to persuasion often transform the motives, opinions and preferences of the participants.¹¹⁸

To republican theorists, citizenship and participation in politics “is also a vehicle for the inculcation of such characteristics as empathy, virtue, and feelings of community.”¹¹⁹

Civic republicans emphasize the importance of providing “outlets for the exercise of citizenship”¹²⁰ within society because citizens must learn to govern themselves, a task taught only by the exercise of democratic participation: “[o]nly such participation . . . can give persons a sense of active relation to social institutions and processes, a sense that social relations are not natural but subject to intervention and change. The virtues of citizenship are best cultivated through the exercise of citizenship.”¹²¹ The fora in which citizens gain such experience include every aspect of their communal lives from schools and social clubs to workplaces and street life.¹²² A republican citizen who is disabled from participating in decisionmaking on a daily level and who “live[s] in a ‘condition of unalterable subordination during much of his life, [cannot] acquire the habits of responsible choice and self-government which political democracy calls for.”¹²³

Taken together, republican ideals suggest several conditions for maintenance of a healthy democracy and citizenry: First, interaction, dialogue, and debate must form the center of political decisionmaking. Second, controlling influences such as coercion or extreme dependence that prevent individuals from participating in good faith in the process of governance must

¹¹⁸. Young, supra note 110, (manuscript at 12-13).
¹¹⁹. Sunstein, supra note 98, at 1556 (citing C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970)).
¹²⁰. Id. at 1556.
¹²¹. Young, supra note 107, at 92.
¹²². Michelman, Law’s Republic, supra note 100, at 1531. See also Brest, supra note 100, at 1624-25 (“Political discourse . . . may take place in connection with paradigmatic political activities such as lobbying or voting; or as part of ‘direct action’ such as a labor strike or a civil rights sit-in; or it may consist simply of talk among citizens.”).
¹²³. Brest, supra note 100, at 1626 (quoting T. B. Bottomore, The Insufficiency of Elite Competition, in FRONTIERS OF DEMOCRATIC THEORY 127, 135 (H. Kariel ed. 1970)). Brest also notes, “John Stuart Mill spoke of the meaninglessness of a ‘political act to be done only once in a few years, and for which nothing in the daily habits of the citizen has prepared him.’” Id. (quoting JOHN STUART MILL, ESSAYS ON POLITICS AND CULTURE 229 (G. Himmelfarb ed. 1962)).
be eliminated so that the opinions and needs voiced in the dialogue are those of the participants, not those who control them. Third, voices of the broadest possible range of persons in society must be heard in interactions of all kinds to expose everyone to the opinions and needs of others. Only through such exposure are opinions revised, assumptions and commitments challenged.

B. The Corruption of Standing Armies and the Militia Ideal

Because the republican conception of society and politics depends on coming together in good faith to learn from one another and to reach decisions for the common good, "corruption" of citizens, and thereby of the nation as a whole, was an ever-present danger to republicans: "Corruption is the subversion, within the political motivation of any participant, of the general good by particular interest. By extension, corruption is also a participant's material dependence upon another's will. . . ."124

Among the corrupting influences feared by early republicans was a standing army.125 Alexander Hamilton addressed and echoed the fears of many at the nation's founding that provision of a federal standing army would constitute a direct danger to democracy and civilian government:

On the smallest scale [a standing army] has its inconveniences. On an extensive scale its consequences may be fatal. On any scale it is an object of laudable circumspection and precaution. A wise nation . . . whilst it does not rashly preclude itself from any resource which may become essential to its safety, will exert all its prudence in diminishing . . . the danger of resorting to one which may be inauspicious to its liberties.126

A standing army presented several potential dangers: first, having been entrusted with the nation's instruments of coercive power, an army might overthrow the government and the democracy; second, through express or implied threat of such overthrow, a standing army might indirectly control the state, inducing lawmakers to legislate in a manner calculated to mollify military interests; third, those in the military might corrupt democracy by intimidating non-military citizens; and finally, a standing army threatens to corrupt those in the military themselves because of their reliance on the military for their salary, career advancement, and professional and personal prestige.

In a standing army, the prestige of the military as an institution rises and falls according to the degree to which the nation relies or focuses on the

125. For an extensive discussion of the history and philosophy behind such fears, see David C. Williams, Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment, 101 YALE L.J. 551, 572-86 (1991).
military. In times of war or armed conflict, all eyes are on the military. Its prestige, and that of its members, is heightened. Combat becomes a proving ground for the professional soldier, a key part of his career development and self-image. This results in the perverse situation that those charged with the defense of the nation have an interest in assuring that the nation is constantly or at least repeatedly threatened. As a consequence, there is a danger that the military will push for foreign policy decisions that rely on military force, a move that also raises the specter of the nation slipping into direct military rule. As Alexander Hamilton pointed out two centuries ago, when a nation is continually threatened with external invasion,

\[ \text{[t]he continual necessity for their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil . . . and by degrees the people are brought to consider the soldiery not only as their protectors but as their superiors. The transition from this disposition to that of considering them masters is neither remote nor difficult.}^{128} \]

When the military is a standing army, its members also have an interest in assuring that the military as an institution reserves for itself the highest degree of power and autonomy possible within the government and society.\(^{129}\) Not surprisingly, such a military might argue that it should not be accountable to civilian courts of law or even to civilian politicians. While the military might respect the President as Commander in Chief, or Congressmembers as those with the power to create or alter military law, it would also not be surprising that professional officers would seek to sway the commands and policies of the political branches by arguing for special treatment because of special "military necessities" only they understand.

Civic republicans also feared the corrupting effect of military life on citizens who chose a military career. They believed that "soldierhood and citizenship fostered inconsistent values as the one insisted on slavish obedience and the other fostered independent judgment."\(^{130}\) Citizens conditioned to obey rather than to think for themselves would be hampered from participating as equals in political discussions regarding the common good, and their self-development through political participation would suffer.

Civic republicans contrasted the dangers of a standing army with the advantages of a citizen militia. A citizen militia is composed of the citizenry as a whole, each of whom, by turns, serves in the military in addition to maintaining a civilian trade. Although he urged the formation of a federal

\(^{127}\) In contrast, the citizen-soldier with another profession spends only a brief time in military service and relies on civilian pursuits for material, social, and psychological sustenance.

\(^{128}\) The Federalist No. 8, at 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\(^{129}\) See Williams, supra note 125, at 573-74.

\(^{130}\) Id. at 601 n.275 (citations omitted).
standing army, Hamilton recognized that a citizen militia posed fewer dangers to the state and its citizens:

Where in the name of common sense are our fears to end if we may not trust our sons, our brothers, our neighbors, our fellow-citizens? What shadow of danger can there be from men who are daily mingling with the rest of their countrymen and who participate with them in the same feelings, sentiments, habits, and interests?131

Samuel Adams agreed: "The Militia is composed of free Citizens. There is therefore no Danger of their making use of their Power to the destruction of their own Rights, or suffering others to invade them."132 By including all citizens in its ranks, a militia was thought to be less dangerous than a standing army because it would work for the common good.132 Furthermore, because a citizen militia incorporates more citizens than a professional military, more citizens would want to voice their opinions about the content of military regulations, the formation of foreign policy, and other matters of national defense.

Despite their fears of a standing army, the founders acknowledged the advantages of a professional armed force. Hamilton, for example, argued that the practice, expertise, and experience needed for a strong military were too difficult to achieve in a citizen militia. Attempts to achieve the necessary level of proficiency by citizens only drained energy and resources from their full-time trades.134 Conditions of modern warfare, with the technical complexity of most modern weaponry and equipment, make reliance on a standing army inevitable. They also, however, make such reliance more dangerous. Thus, despite accepting the existence of a standing army, the nation should continue to heed warnings about its dangers.

The central challenge in making decisions concerning the military is to ensure continued civilian control over the military and to lessen its potentially corrupting influence on citizens and politics while maintaining an effective fighting force. A key to finding this balance in scrutinizing military policies may be invocation of what Professor Williams has called the "militia ideal."135 The militia ideal draws on republican commitment to a universal militia of citizen-soldiers and emphasizes the importance of widespread citizen participation in and power over their government and its institutions. Professor Williams finds constitutional underpinnings for use by modern courts of the
militia ideal in the Second Amendment, which evidences the concern of the founders that power remain with the people rather than being completely usurped by a standing military. He argues that the absence of a true citizen militia in the nation should create a heightened constitutional suspicion of the standing army and the police. Those bodies have, in a sense, usurped the militia's control of the means of force, and they have systematic interests in making their hold more effective at the expense of the liberties of the people. . . .

This suspicion should be at its height when the standing army and the police come into contact with the general populace and seek to restrict citizens' control over their own lives. For example, the Supreme Court should not have deferred to the military's claims of necessity in the Japanese-American internment cases.

The republican concerns that gave rise to the Second Amendment and the militia ideal suggest that heightened scrutiny of the nation's professional armed forces is appropriate not only with regard to military decisions that directly touch the civilian population, but also those that affect servicepersons, and thereby indirectly affect the citizenry and the nation's democratic system.

In addition to scrutiny based on the militia ideal, the standards of communicative politics provide a conceptual framework for evaluating the composition, policies, and practices of the modern standing army of the United States. The social and political prerequisites for communicative democracy are calculated to maintain and strengthen participatory democracy. Republican ideals of communicative politics explain how and why policies that isolate segments of the citizenry from one another or that stifle political interaction are destructive to democracy. Looking at the military through the lens of the militia ideal and neo-republican conceptions of democracy reveals the degree to which policies within the military that have such an effect are destructive to servicepersons and dangerous to the maintenance of democracy in a heterogeneous society. The standard set by civic-republican ideals suggests that precisely because of the unique, separate role played by the armed forces in a democratic society, courts should insist on a military that approximates to the greatest degree possible a universal citizen militia.

IV. REPUBLICAN DEMOCRACY AND THE MODERN MILITIA

Applying the lessons and warnings outlined above to the problem of judicial

136. U.S. Const. amend. II.
137. Williams, supra note 125, at 553-54, 606.
138. Id. at 601.
deference suggests that courts should be wary of self-interested rule-making and advice by military decisionmakers, of military policies restricting service by certain segments of the larger population, and of regulations tending to suppress servicepersons' involvement as citizens in the political and social life of the nation. But modern judicial deference to military judgments has opened the door to precisely the kind of dangers civic republicans fear. Courts have allowed exclusion of segments of society from full participation in the armed services and strict control of the expressive political activities of military members. This section argues that such practices ignore the degree to which self-interest motivates the policies and recommendations developed by military experts, allow inculcation of attitudes among military personnel that significantly reduce the possibility of developing a politics of communicative self-government in the nation, and promote discrimination and subordination within the military and in society as a whole.

A. Expertise Versus Corruption

The modern United States' military is populated by significant numbers of career officers and enlisted persons and is supported by half of the nation's budget. Those who question military decisions or argue against special deference to the armed forces are often told that they do not understand the military. But civic republicanism cautions against accepting too readily the advice of military experts.

By invoking its expertise and delegitimizing its critics, the military ensures that those most influential on military policy have spent a great deal of time in the armed forces. Those making decisions about the military are likely to be service-academy trained, and of middle- to upper-income background. They are also likely to come from backgrounds that aggrandize the military forces, and that view a career as a professional military officer as superior to all others. They will have been steeped in military culture during their formative years. If trained in service academies, they will have had little contact with a racially diverse population or with women as peers or as leaders and will have learned the military's official version of history and politics.139

Furthermore, when military decisionmakers are asked for advice on how military members ought to be treated, courts essentially ask those giving the

139. Military training is central to the service academies. See US Air Force Academy, AIR FORCE MAGAZINE, May 1991, at 132. The military, because it controls the curriculum, controls what future officers learn about the military. For example, at West Point, there is no required course on the Vietnam War. Only one elective, "Korea, Vietnam and the American Military Experience," discusses that chapter of American military history and it does so by "cover[ing] the Indochinese conflict in seven lessons .. . . [1991's] primary text was written by ... Gen. William Westmoreland's chief intelligence officer." See Bill Turque, Erasing the Vietnam Nightmare, NEWSWEEK, Feb. 4, 1991, at 67. The academies are still predominantly white, male institutions: in the Class of 1991, women comprised 9% of their class at the Naval academy, 11% at West Point, and 15% at the Air Force academy, and minority group members comprised only 15-16% of their class at each of the three service academies. See Richard Halloran, Military Academies Are Becoming Even Tougher on Body and Mind, N.Y. TIMES, May 22, 1988, § 4, at 4.
orders how they ought to be allowed to treat their subordinates. The question military decisionmakers then ask themselves is not the civic-republican inquiry "what laws shall we in this institution give to ourselves" but rather the self-interested, corruption-inducing question "how much power shall we, the ruling class in this institution, be allowed to have?"

Civilians who gain the status of the title "military expert" tend to depend on military decisionmakers for their employment or economic gain. For example, there is a well-known "revolving door" between employment in the defense industry and the Pentagon or Defense Department. Secretary of Defense Carlucci insisted that those involved in procurement for the military be "under the authority, direction, and control of the secretary of defense." The Pentagon spends $2.2 billion to $3.9 billion a year hiring consultants, and defense firms pay as much as $1,000 a day for help in obtaining defense contracts. One of these consulting firms is "known as 'rent-a-general' because its principals are retired military officers with the rank of admiral or general . . . ."

These "military experts" have all been socialized in the military's traditional ways of functioning. Maintenance of their preferences, power, or fortunes depends on securing greater power for the military. Because of their dependence on the military and their particularized interest in political or judicial outcomes regarding the military, the advice of these experts with regard to military affairs is, in republican terms, corrupt.

One might argue that it is nevertheless appropriate and desirable to entrust specialized matters to subsections of society who are experts in the area. The advantage and necessity of the standing army is, after all, that it permits levels of experience, knowledge and ability that are not obtainable with a

140. See, e.g., Barbara Boxer, Lessons from the Pentagon Procurement Scandal, CHRISTIAN SCIENCE MONITOR, Aug. 15, 1988, at 12.
141. Id.
142. Ralph Frammolino and Carla Lazzareschi, Lawmakers Seek Controls on 'Shadowy' Consultants, L.A. TIMES, July 10, 1988, at 1. Recent moves to limit access of military officials to secret documents or to reduce their influence over decisions of national security affecting the defense industry have been successfully fought by "veterans organizations, and former generals and admirals—including some of the most valued consultants and contractors in the defense industry." Melissa Healy, Shifts in Defense Policy Tied to Pressure, L.A. TIMES, June 25, 1988, at 1.
143. Sugin, supra note 6, at 889 n.253 (quoting Hirschhorn, supra note 27, at 228) ("[S]tudies have shown that '[t]he armed forces are not always rational; superiors frequently develop emotional attachment to military practices that do not enhance efficiency but do alienate the men subject to them.'").
144. See supra notes 124-133 and accompanying text. In addition to the traditional republican corruption of dependency and self-interested decisionmaking, current and former military officials have been implicated in corrupt activities in the modern sense of the word, such as fraud and bribery in procurement decisions. See also Healy, supra note 142.
145. Cf. Andrew Fraser, Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society, 1 REV. CONST. STUD./REV. ETUDE CONST. (1992) (formerly ALBERTA L. REV.) (proposing that Canadian society delegate a significant share of constitutional decisionmaking power to the bar, because lawyers' training and expertise lend them the professional virtue (telos) to carry out such responsibilities). I owe development of this subsection to questions posed by Professor Michelman in light of the suggestions contained in Professor Fraser's article.
Countenancing Corruption

But the negative side to group expertise is group particularism. Military experts are likely to formulate and explain decisions concerning the armed forces in a manner that is infused with military culture as they know it. Such decisions may be presented to civilians, including the judiciary, in a manner so intertwined with that culture that particular care must be taken to reframe the issues and their solutions by reference to broader social or constitutional considerations.

Furthermore, allowing military experts to decide the constitutionality of military policies is problematic and dangerous. It leaves such decisions to people who are expert in fighting or administering the armed forces, but are not experts with regard to democratic principles, constitutionalism, or the degree of power the military may appropriately reserve to itself in a constitutional system such as ours that depends for its survival on a complex web of checks and balances.

The dynamics of decisionmaking by military experts point toward the corruption feared by early republicans: it is decisionmaking by a select subsection of the citizenry, isolated from the range of concerns and interests shaping the broader population. Furthermore, it is decisionmaking that places the military and its needs as an institution in the center of the calculus and fails to consider the common good of the nation as a whole. Even if some military officers are capable of avoiding the temptations of power, the fact that some may show restraint is not the test. A society that wishes its democracy to survive must be wary of the advice of those who control military resources and avoid establishing structures such as a doctrine of judicial deference that may tempt decisionmakers to turn military policies to their own advantage.

B. Restrictions on Political Activities

The ideals of communicative politics and the exercise and development of habits of democracy call into question the wisdom of judicial deference to military policies that limit servicepersons' political speech. Military commanders and recruiters motivate citizens to risk their lives or endure hardship through appeals to patriotism and protection of democracy. Ironically,

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146. See supra note 134 and accompanying text.
147. Cf. Goldman v. Weinberger, 475 U.S. 503, 523 (1986) (Brennan, J., dissenting) ("Our Nation has preserved freedom of religion, not through trusting to the good faith of individual agencies of government alone, but through the constitutionally mandated vigilant oversight and checking authority of the judiciary.").
148. See supra notes 98-123 and accompanying text.
149. Constitutionally speaking, concerns regarding freedom of political expression and freedom of religious expression are closely intertwined. However, in the military context, religious expression is primarily limited through dress-code policies that effectively exclude members of certain religious groups from military service. See supra notes 31-37, 61 and accompanying text. Civic republican criticism of Goldman v. Weinberger is better grounded in arguments analogous to those set forth in Section IV.C., infra, on exclusion of women, gay men, and lesbians than arguments in this section which concentrate on suppression of political activities.
this patriotism is then mixed in the military environment with absolute
deferece to authority, absence of dissent, and prior restraint on political
gatherings or communications.\textsuperscript{150} This powerful combination is presented to
young people in their formative, first years away from home. In this context,
the “Democracy” that the United States stands for, the democracy they are
charged with protecting, is more mythical than real. It would come as no
surprise if those socialized in such an environment came to associate patriotism
and democracy with blind flag-waving and a willingness to “Fight for
America” without consideration and discussion of the goals or means of
military activities.

In a republican democracy, all citizens are ideally politically-engaged
members of the polis. This ideal is more readily attained by servicepersons in
a militia than those in a standing army. Citizen-soldiers who come together
temporarily to train or fight in the nation’s defense circulate in and out of
the military, bringing their opinions from civilian life to their military service.
Their military experience likewise shapes their contributions to debates about
military needs, treatment of servicemembers, and the like. Everyone sees
herself as potentially in need of protection by the military, as potentially called
upon to guard the country, and as potentially subject to military regulations.

In the modern volunteer military, however, where universal service of
citizens is neither demanded nor allowed, some serve in the military for several
years while many others spend no time at all in military service, hampering
the circulation and dialogue that might help to keep military policies in check.
If military personnel are allowed to vote but are constrained in their ability to
communicate with their colleagues, fellow community members, or political
representatives,\textsuperscript{151} they are effectively excluded from meaningful political
participation. Civilians, on the other hand, do not care to familiarize
themselves with conditions in the military because they will never be directly
affected by military law. These developments represent a serious breakdown
of communicative politics.\textsuperscript{152} Predictably, under such conditions, the
populace will rely on military decisionmakers' “expert” opinions: on what
other information are people to rely?

The implications of this state of affairs are particularly disturbing when the
standing army is an all-volunteer force that attracts a disproportionate number
of its members from lower-income groups and racial minorities, groups still
by and large excluded from political decisionmaking in society as a whole.\textsuperscript{153}

\textsuperscript{150}. See supra notes 12-30 and accompanying text.
\textsuperscript{151}. See supra notes 22-26 and accompanying text.
\textsuperscript{152}. See supra notes 99-123 and accompanying text.
\textsuperscript{153}. The difference class and race make in decisions about the appropriateness of particular military
engagements has been noted in conflicts throughout the last half century. African-Americans, who are
disproportionately represented among the poor in this country and who make up 20.6\% of the armed forces,
have tended to be less supportive of the military campaigns of the United States armed forces. See Andrew
H. Malcolm, \textit{Confrontation in the Gulf: Opponents to U.S. Move Have Poverty in Common}, N.Y. TIMES,
The exclusion of certain groups from participation in the polis is disturbing not only because of the effects of such exclusion on the democracy, but also because of its effect on the excluded individuals. If engagement in the political process is part of the essence of being human, military policies that forbid military members from participating in collective political activity rob them of their humanity.

C. Exclusion of Women, Gay Men, and Lesbians

Imagine yourself as an Army general who attended West Point before women were admitted to the Academy. From graduation to the present, you have been socialized to the norms of the service. Those norms promote the ideology of masculinity at every turn. By the time some judge certified you as an expert on military morale and discipline, you had spent your whole professional life immersed in a belief system that entirely excluded competing points of view on manhood and the Army's mission.

The military, of course, tends to produce homogenized individuals who think—as well as march—in unison.

The military provides education and training for many of the nation's young adults. The armed forces teach not only specific job skills, but self-discipline and responsibility. The military prides itself on "teach[ing] by example." Many recruits enter the service at age eighteen and spend their first years away from home in the military. The self-images, attitudes, and habits learned in the service filter into their later civilian lives. Where the military excludes certain segments of the population from service, it teaches that such exclusion is necessary and appropriate. Under current policies of exclusion, recruits learn that women and homosexuals are less than full citizens.

In addition to its educative function, the military is a "total institution" for servicepersons: "The individual's relation to the military organization is comprehensive since it is 'his employer, landlord, provisioner, and lawgiver

154. See supra notes 117-19 and accompanying text.
155. Karst, supra note 6, at 576.
157. Karst, supra note 6, at 527.
158. Fifty percent of the men in the Army are between the ages of 17 and 24. Gender Discrimination, 1992: Hearings Before the Defense Policy Panel and Subcommittee on Military Personnel and Compensation of the House Armed Services Committee, July 30, 1992 (transcript available from Federal News Service) [hereinafter Gender Discrimination Hearings]. The military recognizes and takes account of this dynamic in developing its policies and programs. See, e.g., Gender Discrimination Hearings (statement of Admiral Frank B. Kelso, Ill, Chief of Naval Operations, U.S. Navy) ("[W]e have a great responsibility to the young people that come into our services and to their parents to ensure that they're taught the right things in life and live the right kind of life.")
159. See Karst, supra note 6, at 527-28.
If military personnel do not come into contact with women, gay men, or lesbians in the course of their duties, they are unlikely to encounter them at all. The consequent lack of contact, discussion, and common mission deprives servicepersons of the ability to engage in communicative interaction with such citizens. Thus exclusion within the armed forces results in a military sphere marked by a nearly complete lack of dialogic interaction on issues of gender and sexual orientation. The opinions of military "experts" become tainted by the prejudices inculcated in an isolated atmosphere and their stereotypes and attitudes regarding the excluded Other are never challenged.

Decisions about exclusion should be subject to special scrutiny because they may be motivated by concerns unrelated to military necessity. The military decisionmaker's self-image may be at stake: "For many men who have invested their lives in a career that places so high a value on [the] pursuit [of manhood], suggestions that seem to undermine the ideology of masculinity are deeply threatening." Such attitudes will change only when heterosexual military men live and work side by side with women and with openly gay men and women in all areas of service. But only non-military authorities may possess the will to create the conditions for such interaction. Military women have commented on the unwillingness of the "old guard" generation, the men highest on the military's chain of command, to address problems of sexism in the armed forces. Given the entrenched sexism and homophobia in our armed forces, military decisionmakers may never voluntarily change their policies of exclusion. When the Court defers to the opinions of decisionmakers steeped in a culture of heterosexual masculinity, it ignores the possibility that judgments cloaked in terms of national security may be motivated by mere personal preference.

Ironically, this deference has increased even as recent events have led to forthright admissions by top military leaders that their attitudes about women in the military are based on personal preferences rather than military need. For example, General Merrill A. McPeak, Air Force Chief of Staff, testified before a Congressional panel that he would choose a male pilot over a female pilot with superior qualifications, even though it did not make sense, because "That's the way I feel." He admitted that the combat exclusion is discriminatory, that it works to the disadvantage of women, and that he "couldn't think of a logical reason—a logical argument for defending a policy

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162. Karst, supra note 6, at 576. See also STIEHM, supra note 41, at 226.
163. The MacNeil/Lehrer NewsHour: Conduct Unbecoming (Educational Broadcasting & GWETA, July 1, 1992) [hereinafter MacNeil/Lehrer, Conduct Unbecoming].
164. See, e.g., supra notes 5, 35, 59 and accompanying text.
of excluding women from combat assignments." Nevertheless, he asserted that he has a "very traditional attitude about wives and mothers and daughters being ordered to kill people." General Carl E. Mundy, Commandant of the Marine Corps, concurred with General McPeak:

when you get right down to it . . . combat is killing. Combat in the sense that we usually associate with the direct combat role is looking another human being in the eye and killing him. And it's not a pleasant job. And often times it's not done with a precision guided munition, . . . it sometimes is done with your hands, its done with a shovel, and it's done at close range. And it's not—it's not good. It's debasing. And it's something that I would not want to see women involved in, and for which, I do not believe—and I'm grateful that this is my perception—that women are suited to do.

This personal aversion to women in combat is echoed by male veterans who have served in all-male units, who justify exclusion of women by reference to the lack of plumbing or private toilets in the field and to an unwillingness by some to send their daughters into situations like those they encountered in Vietnam.

Deferece to warnings that an end to exclusion policies would threaten the nation's safety also ignores historical reality. Whenever more bodies were needed, as in World War II and after the move to the all-volunteer force in the 1970s, the military altered its exclusion policies to allow women, gay men and lesbians to serve. The most recent example of this occurred during the Persian Gulf War. The military reportedly adopted a "stop loss policy" which "suspended homosexual discharges among reserve units during the war, and openly gay and lesbian soldiers were sent overseas. When the war ended, the discharges resumed."

The vicious cycle of prejudice generated by exclusion policies does more than color the professional judgment of military decisionmakers. The exclusion of women from combat jobs and complete exclusion of gay men and lesbians from military service communicates to servicepersons at large that such discrimination is acceptable. When combat is held up as the ultimate contribution and proving ground during military service, the message conveyed by exclusion of women from combat is that women are not fully capable

166. Gender Discrimination Hearings, supra note 158.
167. Id.
168. Id.
170. Karst, supra note 6, at 579.
172. See Karst, supra note 6, at 557.
members of the armed forces. This cannot help but lead male servicepersons to hold women in lesser esteem than their male peers. Examples of disrespect and abuse of women in the military are legion.

A 1988 study found that nearly two out of three military women surveyed had experienced sexual harassment and that military women were fifty percent more likely to be harassed than their civilian counterparts.\textsuperscript{173} Five percent of respondents reported actual or attempted rape or sexual assault during the previous twelve months.\textsuperscript{174} A 1990 report by the Pentagon "described a pervasive denigration of women in an atmosphere where policies aimed at preventing abuse are frequently not enforced."\textsuperscript{175} A 1992 \textit{Washington Post} investigative report of women serving on a Navy repair ship found widespread harassment of and hostility toward women on the ship.\textsuperscript{176}

Lack of respect for female colleagues exploded into the public consciousness in the Fall of 1991 with revelations that naval aviators at a convention of the Tailhook Association had forced fellow officers and other female guests to walk through a "gauntlet" of men who threw drinks on the women, subjected them to verbal abuse, and sexually molested them.\textsuperscript{177} Soon after the incident, a retired Navy official admitted that the Tailhook convention in 1991 was "not an isolated incident. . . . [t]here's always a boys-will-be-boys attitude . . . ."\textsuperscript{178} Lieutenant Paula Coughlin, one of the women who came forward with complaints about the incident, stated that she was "attacked by naval officers and marine officers that knew who I was and it was a sport to them . . . . They wouldn't have done it to their sister . . . . But for them it was a sport."\textsuperscript{179}

At the same time that the Tailhook incident was under investigation, female veterans and enlisted women testified before a Senate panel that during their careers they had been raped or sexually abused by fellow servicemen, but when they reported the incidents, they were not believed or the incidents were minimized.\textsuperscript{180} Army Reserve Specialist Jacqueline Ortiz testified that she had complained to her superiors of being forcibly sodomized by her first sergeant in Saudi Arabia while serving in the Gulf War. At first, her superiors doubted her story. When she pursued the complaint, she was reprimanded for "sexual impropriety."\textsuperscript{181}

Military women link their exclusion from combat to such abuse. Commander Rosemary Mariner, U.S. Navy, explained, "if you cannot share

\textsuperscript{173}. Sharon Shahid, \textit{Sexual Harassment in the Military}, USA TODAY, May 27, 1992, at 9A.
\textsuperscript{175}. \textit{Id}.
\textsuperscript{178}. \textit{Id}.
\textsuperscript{179}. \textit{MacNeil/Lehrer, Conduct Unbecoming}, supra note 163.
\textsuperscript{180}. Sciolino, supra note 174, at A1.
the equal risks and hazards in arduous duty, then you are not equal. And if
the institution can discriminate against you, then it's not a big leap . . . to
decide that well, I can harass you and I can get away with it."182 This
explanation captures in practical terms the dynamic that may result from lack
of the "dialogic . . . encounter with others"183 to which civic republicans
are committed. Because Navy women cannot serve as combat aviators, male
aviators' preconceived notions about women escape the challenge that
communicative interaction with women as equals might bring. Although
nominally present, women in the Navy are not perceived to hold authority or
be supported by those in authority. As a result, their needs, opinions, and
welfare are not included in any calculation of the common good. Such
discounting of women's interests inevitably led to the Tailhook aviators'
perception that an assault on their female colleagues was an enjoyable group
event.

In the wake of the Tailhook incident and increasing Congressional and
public scrutiny of abuse of women within the military, military policymakers
themselves are recognizing the importance of ceding some control over military
matters to decisionmakers free from traditional military indoctrination and
independent of the military chain of command.184 Acting Secretary of the
Navy Sean O'Keefe announced in September, 1992, that in order to address
"a cultural problem which has allowed demeaning behavior and attitudes
toward women to exist within the Navy Department," he was placing a civilian
in the position of Commander of the Naval Investigative Service, a position
formerly held by one-star admirals. O'Keefe explained that "this civilian
director will be better able to investigate uniformed officials of any rank with
independence."185

Disrespect for women inculcated in the military environment not only
influences treatment of servicewomen, but impacts upon development of
communicative politics at all levels of civilian society. It would be surprising
if servicemen, and even civilian men who work in the military
environment,186 could simply discard attitudes that discount women when
they interact with women as citizens in the broader political and social
realm.187 Communicative, republican democracy in society as a whole is

182. MacNeil/Lehrer, Conduct Unbecoming, supra note 163.
183. Michelman, Conceptions, supra note 105, at 450. See also supra notes 99-105 and accompanying
text.
184. During the investigation of the Tailhook incident, one of the senior admirals in charge of the
investigation reportedly called female pilots "prostitutes" and "go-go dancers." Defense Department Regular
185. Id. For more on the problems of command influence in the Naval Investigative Service, see Peter
186. In investigations after Tailhook designed to uncover similar problems within the Army,
investigators reported as many as 100 accusations of "open, vicious sexual harassment" by senior and
middle-level civilian supervisors against female civilian employees on one military base. Eric Schmitt, Army
difficult to achieve when men in the military lack interactions with women that might result in revision of previously held beliefs about women’s capabilities or status. Evidence of the connection between military policies and the general position of women within the nation as a whole includes the common claim that many would never accept a woman in the position of President of the United States because they would not want a woman in the position of Commander in Chief of the military. On issues of national security and foreign policy, women’s voices are rarely heard or taken seriously.

Many feminists have argued that militarism itself teaches men that oppression of women is acceptable and normal. While this claim is debatable, it is true that traditional military training practices tend to motivate men by reference to the inferiority of women. This combination can result in sometimes deadly hostility to women:

In one of the many press accounts following Tailhook, it was pointed out that the airmen at the convention were fresh from flying bombing sorties over Iraq. During the war, as they prepared to fly these missions, many of them watched pornographic videos. Military training is replete with the suggestion that violence and sexual potency are inseparable.

There is not only the famous chant, “This is my rifle, this is my gun (accompanied by a slap to the genitals), one is for killing, the other’s for fun,” but also the running assumption, repeated in nearly every drill, that virility is manifested by aggression, that a passive (or pacifist) man is a “faggot” or “girl.”

During combat in Vietnam, rape and murder had become frequent enough to enter the slang of our armed forces. A “double veteran” referred to a man who had sex with a woman and then killed her.

It would be remarkable if such training and culture did not lead to development of lasting attitudes in young men that women are objects for men to fight over, dominate, use, or even kill if a man’s pleasure or purpose so dictates.

Military training also affects the attitudes of those in the armed forces about gay men and lesbians. The exclusion of gay and lesbian citizens communicates the message that these citizens are not even on the team — they are outsiders.

188. See supra notes 114-119 and accompanying text.
189. See also Karst, supra note 6, at 528 (“In a radio discussion of women in combat shortly after the invasion of Panama, I heard a male retired general say, ‘I have been there, and I know.’ The subtext was, ‘You haven’t been there, and you have no right to speak.’”).
Exclusion from military service and lack of acceptance in society reinforce each other. Recruits who have never lived or worked with people of other races learn to do so by necessity and by example in the military, but homophobia is reinforced in an organization that vigorously asserts the unacceptability of gay men and lesbians.

Exclusion of gay men and lesbians seriously interferes with promotion of communicative politics and participatory, republican democracy. The ban contributes to exclusion of gay men and lesbians from the national community and lack of authoritative voice in the political realm. It denies to heterosexual servicepersons the opportunity for political growth and self-development that comes from communicative interaction with the full range of one’s fellow citizens. It denies to gay and lesbian citizens the opportunity to have their voices heard and to challenge the interests, commitments, and opinions of many of their fellow citizens during their most formative years. Military exclusion policies influence the political and social life of the nation. Each year, citizens who complete their military service return to civilian life and politics and infuse the democratic discourse with disdain for the opinions and leadership capabilities of women, and for the very existence of gay men and lesbians as fellow citizens.

The comments of a former Air Force pilot’s wife provide a raw example of the interaction of exclusion of gay men and lesbians from the military and from consideration as full citizens. During a talk show on which Colonel Margarethe Cammermeyer, who was discharged in 1992 for stating she was a lesbian, appeared, the caller exclaimed: “My husband spent thirty years in the Air Force, thirty years of his life, to protect our country from people like you.” The comment reveals not only lack of acceptance of gay men and lesbians as co-equal citizens, but a perception that they are enemies of the nation. If this woman’s husband had served side by side with openly gay men or lesbians in defense of the nation, her impressions might well have been different.

The military claims that heterosexual servicepersons may exercise their free speech right to call for gay rights or talk about issues of sexual orientation. But mere speech about gay and lesbian rights by heterosexuals is no substitute for the personal effect openly gay and lesbian persons have on their colleagues. When a gay serviceperson such as Reverend and Captain Dusty Pruitt comes out as a lesbian,

her straight Army colleagues and superiors [who] knew her as an outstanding officer ... are challenged to reconsider their understanding of what it is to be homosexual—to reshape their abstract and
threatening idea of “a homosexual” in a way that will make room for this real person whom they know and respect.194

Other prominent servicepersons discharged for homosexuality have similarly changed their colleagues’ assumptions about homosexuals. When Colonel Margerethe Cammermeyer was discharged in 1992 from her position as Chief Nurse of the Washington National Guard, her commanding officer wept as he officiated over her expulsion.195 Col. Cammermeyer’s discharge reverberated throughout the military, affecting all the personnel with whom she had worked during her twenty-seven years of service, including a fourteen month stint in Vietnam which earned her a Bronze Star.196 Similarly, when Midshipman Joseph Steffan was discharged for homosexuality shortly before his graduation from the U.S. Naval Academy at Annapolis, his friends rallied around him, and many more midshipmen at the academy expressed their support as well as admiration for his courage and integrity.197 By excluding gay and lesbian voices, the military completely removes any hope of true communicative interaction on the subject of sexual orientation and homophobia, and thus substantially reduces the hope of such dialogue in the larger body politic among a citizenry already conditioned to ignore or reject gay and lesbian voices.198

Exclusionary policies also interfere with the ability of citizens who spend their formative years in the military to engage in dialogic self-government when faced with the full range of political opinions, genders, and sexual orientations of their fellow citizens after leaving the military. Citizens trained in this manner learn to accept without question the attitudes and commitments of their superiors and the military environment as a complete substitute for dialogue, disagreement, and resolution through democratic means. As a result, they may suffer from frustration or confusion when confronted with such debate. These feelings may be suppressed or channelled into hostility toward persons in groups from which they were kept isolated in the military.

194. Karst, supra note 6, at 562.
196. Id.
198. In the climate created by current exclusion policies, visibility as a gay man or lesbian may also subject a servicemember to abuse at the hands of his or her colleagues. The Navy recently admitted that a gay seaman awaiting discharge for homosexuality was murdered by two of his shipmates who had beaten him so far “beyond recognition” that the seaman’s mother was able to identify the body only by her son’s tattoos. Death of Gay Sailor is Investigated as Bias Crime, N.Y. TIMES, Jan. 10, 1993, § 1 at 17; H.G. Reza, Homosexual Sailor Beaten to Death, Navy Confirms, L.A. TIMES, Jan. 9, 1993, at A1. Even if the exclusion regulations are lifted, gay and lesbian servicemembers will be caught in a dangerous Catch-22: changing their colleagues’ attitudes may require coming out, but disclosing their sexual orientation leaves open the threat of ostracism or even violent attack. This danger may be particularly great once the exclusion policy ends, if resentful, homophobic servicepersons engage in a backlash of violence against newly-out colleagues.
The importance of communicative democracy within the military is not only an issue of politics or the personal growth of servicepersons. The nation’s founders considered the existence of many subsections of citizens with differing interests a crucial component of maintaining democratic government\textsuperscript{199} and preventing the military from turning its weapons against the citizens it was formed to protect.\textsuperscript{200} Current exclusionary policies turn the military into a faction that is ignorant of and hostile to the interests of the excluded groups. What is to prevent such a military from someday turning its weaponry against women, lesbians or gay men? While the threat of full-scale military assault on women, gay men or lesbians is perhaps somewhat exaggerated, hostility toward these citizens by those in the military poses a threat on a smaller scale that is no less cause for concern. Military men trained in hand-to-hand combat, whose aggressiveness is honed in an environment condoning hostility to women, are arguably more likely than men who are not so trained to engage in violent acts against women in society, whether they be their girlfriends, wives or strangers. Members of the military, often in groups, have physically attacked, severely injured, and sometimes even murdered, gay men in areas near military bases.\textsuperscript{201}

The murder of Michael Wayne Hamilton by two Navy corpsmen illustrates the potentially deadly consequences of hostility toward lesbians and gay men that military culture breeds. The corpsmen met Hamilton in a Los Angeles area known to be frequented by men interested in soliciting sex with other men. They “got the older man drunk and waited until the time was right,”\textsuperscript{202} then slashed Hamilton’s throat and stabbed him eight times. Corpsman Todd Fluette later defended his actions by explaining that he had never seen a homosexual before and was “repulsed” and “infuriated” because Hamilton made advances toward his buddy after the men had been drinking together for some time.\textsuperscript{203} When his friend did not react to Hamilton’s touching, Fluette pulled out a butterfly knife and slashed Hamilton’s throat.\textsuperscript{204} Given the context, Hamilton’s advances were not out of place. Fluette’s reaction, especially his refusal to believe that his buddy might have wanted sexual contact with a man,

\begin{itemize}
  \item \textsuperscript{199} THE FEDERALIST No. 51, at 323-24 (James Madison) (Mentor ed., 1961).
  \item \textsuperscript{200} See supra notes 126-28 and accompanying text.
  \item \textsuperscript{201} See, e.g., Frank Buttino, Attacks on Gays, L.A. TIMES, July 19, 1992, at B2 (Letter to Editor) (describing recent assault on two gay men by “an active-duty Marine who was accompanied by two other Marines” and charging that many of those responsible for gaybashings “are active-duty military people assigned to San Diego.”); Gay Bashing Charges Against Four Servicemen, S.F. CHRONICLE, Feb. 28, 1992, at A26 (group of six men from Navy and Marines attacked gay man); Melissa Healy, Clinton to Stress Conduct as Key for Gays in Military, L.A. TIMES, Nov. 13, 1992, at A1 (gaybashing by “bands of young Marines” stationed near the nation’s Capitol became commonplace in the summer of 1990, leading to formal meetings between representatives of the gay and lesbian community and Marine Corps Commandant); Patrick McCartney, Victim of Gay Bashing Sues City, L.A. TIMES, May 20, 1992, at B3 (gay man permanently disfigured by three Navy recruits who kicked and beat him).
  \item \textsuperscript{202} Thom Mrozek, Wife Testifies in Murder Trial, L.A. TIMES, Aug. 21, 1992, at B2.
  \item \textsuperscript{203} Id.
  \item \textsuperscript{204} Id.; Thom Mrozek, Navy Corpsman Sentenced to Life in Park Slaying of Homosexual, L.A. TIMES, Nov. 14, 1992, at B10.
\end{itemize}
exemplifies the threat posed by military personnel inclined to act out hostilities they learn in their military training against the very civilians they are supposed to protect. Such incidents provide further caution against delegating full power for creating and maintaining military culture to military decisionmakers.

V. THREATS TO NATIONAL SECURITY

A. Discipline Within the Ranks

Defenders of the military’s current speech, dress, and exclusion codes rely on arguments that discipline is the military’s major concern, is critical to the nation’s defense, and would be harmed by changes in military policies. Strict discipline is necessary to condition soldiers to obey orders quickly, without questioning or hesitating, even under great stress and unpleasant conditions.

The traditional approach to military training relies on

physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination of values. The process is designed to foster . . . doubts about previous beliefs and experiences and to instill . . . new values which [the institution] seeks to impart.205

Proponents of this system have insisted that homogeneity of gender is a necessary element of such training.206 But integrated military units have successfully trained recruits of different genders despite modification of the traditional model. When the Navy began experimenting with sexually integrated bootcamps, instructors discovered to their surprise that the integrated setting improved the training by fostering increased cooperation and teamwork.207 Such an experiment demonstrated that people do not have to look or be the same to accomplish a task together.

Although homogeneity of uniforms also has been regarded as an essential element of military training,208 people need not wear clothes that are identical down to the last detail in order to accomplish their mission. While men and women working in field assignments dress in identical uniforms,209 they do

206. See, e.g., id. at 896-98.
207. Anna Quindlen, Public & Private: With Extreme Prejudice, N.Y. TIMES, June 24, 1992, at A21. Since integrated boot camps were instituted at the Orlando Naval Training Center in February, 1992, “more than half the sexually integrated companies have won the Navy’s highest ranking, compared to an overall rate of less than one percent during the Orlando base’s 24-year history.” Larry Rohter, Naval Training Changes to Curb Sex Harassment, N.Y. TIMES, June 22, 1992, at A1.
208. Absolute uniformity of hair and dress is one disciplinary tool. See, e.g., Goldman v. Weinberger, 475 U.S. 503 (1986).
209. “Battle Dress Uniforms” or “BDUs” are the field uniform popularly known as “fatigues,” consisting of combat boots, loose-fitting pants with gear pockets, a buttoned workshirt, T-shirt, and functional hat with sun-visor.
not wear identical standard or dress uniforms. The military apparently does not believe it interferes with discipline when servicemen dress in slacks and tied shoes while servicewomen dress either in slacks or skirts with pumps. Men and women are also assigned significantly different styles of headgear. Similarly, there is no reason to think that disobedience within the ranks would follow if some servicepeople wore regulation yarmulkes or turbans while others had traditional military headgear. Military personnel are already trained to put aside racial and class preconceptions in order to work together to accomplish their mission.

In contrast, a culture that breeds hostility and intolerance has been shown to interfere with the maintenance of discipline and order. Ironically, an institution that has supposedly required obedience and discipline has turned out to be a breeding ground for disruptive, even criminal, behavior. The Tailhook incident and allegations of widespread sexual harassment and rape constitute extreme breaches of discipline,\textsuperscript{211} as does the recent murder of a gay seaman by his shipmates.\textsuperscript{212} Commitment to strict hierarchy may be undermined by prejudices that are fed by exclusionary policies. For example, when midshipmen in their plebe summer at the U.S. Naval Academy were encouraged by upperclassmen to play a sexually harassing and humiliating “practical joke” on their female squad leader.\textsuperscript{213} Such insubordination and disrespect can only be explained by the prevalence of expressions of hostility to women at the academy.\textsuperscript{214}

Similarly, aversion to allowing gay men and lesbians to serve in the military recently led to a standoff of constitutional dimension between military and civilian authorities. After a district court judge ordered the Navy to temporarily reinstate gay Petty Officer Keith Meinhold,\textsuperscript{215} Naval authorities at Meinhold’s base refused to take him back when he reported for duty. The Navy backed down after Meinhold moved for contempt sanctions and the judge reaffirmed his order, reminding the Navy that the United States “is not a military dictatorship . . . . Here, the rule of law applies to the military.”\textsuperscript{216} The Navy’s contempt of the order, though brief, provided a glimpse of the ultimate breakdown in military discipline: failure of military officials to obey

\textsuperscript{210} Indeed, in the wake of Congressional reaction to the decision in \textit{Goldman v. Weinberger}, the Air Force altered its regulations to allow for a “regulation yarmulke.” The regulations, however, do not appear to contemplate permitting religious headgear such as turbans. See supra note 37 and accompanying text.

\textsuperscript{211} During the Gulf War, with its deployment of over 195,000 Army troops, Army women filed 16 complaints of sexual harassment by men, and six men were court-martialed for raping women. By contrast, the Army’s Criminal Investigative Division prosecuted only four cases of homosexual sodomy, of which three were incidents of consensual sodomy. Jeff Stein, \textit{Gays in the Gulf: They Were Far Better Behaved than the Straights}, \textit{WASH. POST}, Nov. 22, 1992, at C1.

\textsuperscript{212} See supra note 198.

\textsuperscript{213} STEFFAN, supra note 197 at 56-58.

\textsuperscript{214} See id.

\textsuperscript{215} See supra note 60.

\textsuperscript{216} Seth Mydans, \textit{Navy is Ordered to Return Job to a Gay Sailor}, \textit{N.Y. TIMES}, Nov. 11, 1992, at A8.
the orders of a civilian court.

Discipline need not imply enforced political disengagement by servicemembers. As long as it is not coerced, involvement in politics, including petitions to Congressional representatives, should be permitted. If the military were a citizen militia, we would expect citizen-soldiers to discuss the politics or desirability of a mobilization even on the eve of a battle. Shouldn’t citizens in a democracy discuss issues as paramount to their nation’s survival such as whether to engage in an armed conflict? Why then should servicepersons in the modern military be silenced on such matters? In a majoritarian democracy, the political branches may commit the nation to a war and then demand that citizens who serve in the military, even dissenters, fight as the majority has decided. Thus in a military mobilization, disobedience such as desertion or refusal to obey orders appropriately may be punished. But in a democracy, matters of policy are never irrevocably decided. Dialogic interaction, debate, and protest may all affect the course of a mobilization. Military members’ input in such debates provides important information and perspective.

Disciplinary concerns or concerns about potential coercion of servicepersons within the command structure may well necessitate greater limitations on servicepersons’ political activities than those placed on civilians. Respect for participatory democracy, however, suggests that courts should place the burden on military decisionmakers to defend their policies with something more than vague references to the importance of discipline.

B. Threats to National Security Caused by Current Policies

Traditionalists repeatedly assert that the nation cannot afford to make the military a “social laboratory for leading the breakdown of barriers.” Speculation that change within the military might weaken the armed forces in unforeseeable ways does not outweigh the concrete dangers posed to the nation and its citizens by current policies of suppression and exclusion. Those opposed to any change to current practices ignore threats to national security caused by the policies that courts have let stand.

1. Military Coups

Some might argue that giving military members too much voice would create the same problems feared by early republicans wary of a standing army. Allowing political activity by servicemembers would risk politicizing the

217. Compare Brown, supra notes 22-30 and accompanying text.
218. Compare Parker, supra notes 12-17 and accompanying text.
219. Conscientious objectors may receive an exemption, an issue beyond the scope of this article.
220. MacNeil/Lehrer, Conduct Unbecoming, supra note 163 (quoting John Lehman, former naval aviator and Secretary of the Navy in the Reagan administration).
Countenancing Corruption

military. Servicemembers might attempt to influence politics by voting as a block, or even by threatening to use force or participating in a military coup. But protecting the rights of enlisted personnel to engage in ad hoc or grassroots political actions such as signing petitions is unlikely to lead to military overthrow. Rather, the real danger posed to democracy by military efforts lies in the power of senior officers to organize and to command masses of servicemembers in an effort to influence or to overthrow the civilian government. The power and influence of senior military officials are heightened by a doctrine of judicial deference that allows superiors to demand unquestioned obedience to orders and discourages review of challenges to regulations. If an officer ever sought to defy civilian authorities, servicepersons who were absolutely obedient would follow their commander, especially if they have been isolated from large segments of society and are therefore potentially less reluctant to turn their weapons against the citizens they are supposed to defend. If the courts refuse to question the military and leave servicepersons unprotected by constitutional or other external civilian restraints, military personnel will come to rely exclusively on the command hierarchy for benefits and protection, and thus may develop a loyalty to their commanders that surpasses their loyalty to the Constitution or civilian authorities.

2. Internal Decline

At present, our democracy seems to be facing a crisis of political participation more threatening than any external threat. Notwithstanding a high turnout in the 1992 Presidential election, percentages of the population who vote, let alone actively participate in politics in other ways, have fallen drastically in past years. Many young people learn, or fail to learn, habits of democracy in the first few years of reaching the age of majority. By suppressing political participation, the military only exascerbates the problem. It also impedes development of democratic participation skills including the ability to encounter diverse perspectives or opinions. When military members

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221. See, e.g., Greer v. Spock, 424 U.S. 828, 841-42 (1976) (Burger, C.J., concurring) ("the real threat to the independence and neutrality of the military ... —and the need to maintain as nearly as possible a true 'wall' of separation—comes ... from the risk that a military commander might attempt to 'deliver' his men's votes for a major-party candidate."); Zillman & Imwinkelried, supra note 96, at 405-06. Chief Justice Burger's concern was echoed during the 1992 elections in response to the Defense Department's largest effort ever to encourage military personnel to vote. Barton Gellman, Pentagon Seeks to Mobilize Voters: Effort Targets 75,000 "Counselors" to Get Troops to the Polls, HOUSTON CHRONICLE, Sept. 27, 1992, at A23. While military members should be encouraged to vote, as long as the military excludes whole segments of the citizenry, as it does now, and therefore breeds and strengthens particular prejudices and ideologies, massive efforts by the executive branch to turn out the military vote should indeed be a cause for scrutiny and concern.

222. Sugin, supra note 6, at 883.

223. See Brown v. Glines, 444 U.S. 348 (1980) (upholding air force regulations requiring service members to obtain approval from their commanders before circulating petitions on the base) and text accompanying notes 27-28.
return to civilian life, they may do so with heightened willingness to censor their opinions and to accept the actions of those in power without becoming participants in democratic self-government.224

3. Dilution of Constitutional Protections

Judicial deference to the military also threatens to degrade constitutional protections enjoyed by civilians. When the judiciary asserts as a general, overriding rule that servicepersons have lesser constitutional protections than other citizens because national defense so demands, it is in danger of breeding a widespread conviction that constitutional protections are automatically subservient to national security concerns—precisely the environment that resulted in the Korematsu internments.225

VI. THE ROLE OF JUDICIAL REVIEW

Because republicanism promotes self-government and places power in the hands of the people, many neo-republicans object to modern applications of republicanism that seem to rely on the judiciary as a primary player in reviving civic republicanism. They are wary of the judiciary as an elitist institution and suggest instead a need to “turn our attention to popular institutions,” especially local institutions and politics.226 The heightened judicial review called for in this article may not appear to be a fitting civic-republican response to the dangers of the standing army. But the judiciary serves an important controlling and checking function in the United States’ constitutional democracy. Judicial review is an important component of civilian control of the military directly limiting the power of the military and ensuring the public greater scrutiny of military policies.

In addition, norms of justice in our political culture demand that “[e]very norm, every time, requires explanation and justification in context.”228 Some strains of civic republicanism conceive of judicial review as a means by which the people are held to their highest ideals. Through reasoned resolution of conflicts, the judiciary helps ensure that citizens are treated similarly, and that the laws they make serve the citizenry as a whole, not just the self-interest of a select few. Judicial review is also crucial to the civic-republican process of self-development:

The Court helps protect the republican state—that is, the citizens politically engaged—from lapsing into a politics of self-denial. It

224. See supra notes 98-123 and accompanying text.
225. See supra notes 73-77 and accompanying text.
227. Id. at 1605. See also Brest, supra note 100, at 1623.
228. Michelman, supra note 99, at 76.
challenges “the people’s” self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends.\textsuperscript{229}

Giving extensive power to review military affairs to the judiciary might make civic republicans nervous. The judiciary is less accountable to the people than the political branches and is particularly subject to control by elites. In these respects, judicial review over the military could become a civic republican’s worst nightmare: a standing army accountable to a non-accountable branch of the federal government. If the question were purely whether there should be either judicial control or broader citizen control over the military, republican reservations might counsel against urging a strong role for the judiciary. But this is not the question facing the nation. Rather, we face a situation in which the judiciary has come close to abdicating any role or responsibility for reviewing questions regarding the military, leaving the people and their representatives with the full burden of seeking to demand accountability. At the very least, the judiciary must take greater responsibility for insuring that power over military matters does not rest primarily with military decisionmakers themselves.

VII. CONCLUSION

James Madison’s well-known exhortation about the need to control factions is no less important in the military context than in the political. The military, even if it can be separated meaningfully from other governmental institutions into its own functional and doctrinal sphere, cannot be separated from politics or society as a whole.

The most critical aspect of the military’s separateness is the practical reality that it controls the nation’s means of coercive force. It also wields extraordinary economic power and is responsible for the training and socialization of a large mass of the citizenry. If anything, the separateness of such an entity calls for more skepticism and scrutiny, and more demanding constitutional review than is demanded from any other political or administrative sphere. As Madison reminds:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is,

\textsuperscript{229}. Michelman, \textit{Law’s Republic}, supra note 100, at 1532.
no doubt, the primary control on the government; but experience has
taught mankind the necessity of auxiliary precautions.\textsuperscript{230}

Judicial review is a critical component of our constitutional system. When
the judiciary abdicates its role, it denies to the people an important layer of
protection. When the judiciary defers to military decisionmakers, it grants them
near-absolute power over the political and self-development of servicemembers
and gives them the power to influence not only military personnel, but the
nation as a whole. A doctrine of judicial deference to the military ignores the
wisdom and cautions of the nation’s founders and the civic-republican ideals
that influenced them, and undermines the nation’s ability to maintain and
strengthen democratic self-government in our modern, heterogeneous social
and political culture.

\textsuperscript{230} \textit{The Federalist} No. 51, at 322 (James Madison) (Mentor ed., 1961).
As this article went to press, the military's exclusion of gay men and lesbians was at the center of public debate. The present conflict confirms the applicability and immediacy of the arguments set forth here. The delay of an executive order lifting the ban represents, in part, blatant mollification of the military out of fear that an order of the President, the highest civilian authority, would be unenforceable in the face of massive resistance by military leaders and personnel.

The conflict demonstrates the degree to which the military is a powerful player in the political system, a fourth branch of government which the founders feared and excluded from the Constitution. Congressional reaction to lifting the ban illustrates that many political leaders seek to maintain the military as a faction within society, a group composed of a carefully crafted subsection of the whole. These leaders attempt to use the military as a political tool—as an internal political force pitting citizens against each other rather than a force united against external threats to our national security.

Military personnel are entitled to express their opinions on this issue. However, appreciation of the self-interested and biased nature of these views, a product of current military culture, ought to temper reliance on servicemembers' input. Harassment of and physical attacks on openly gay and lesbian members of the military should be met with the harsh punishment appropriate to such undisciplined, abusive, and illegal use of military force.

Despite the extensive attention recently paid to the ban on gay men and lesbians in the military, media reports and commentary rarely discuss the issue in systemic or constitutional terms. I hope that this article will shed light on the broader implications of the current debate. The dynamics of this conflict offer important lessons about maintaining a working democracy and insuring civilian control of the military in a diverse society.