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Rational Justice: Equal Protection Problems Amid Veterans Treatment Court Eligibility Categorizations

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Ten years ago, the United States offered only two diversion courts exclusively for defendants who had served in the Armed Forces: one in Anchorage, Alaska, and the other in Buffalo, New York.[1] In the intervening decade, however, such courts have emerged in more than 300 jurisdictions across the nation.[2] By immersing veterans in a climate that focuses on individualized treatment rather than mere punishment, these courts aim to accomplish perhaps the most fundamental objective of the American criminal justice system: to thoroughly and humanely rehabilitate offenders so that they turn away from their past criminality and improve their lives and the lives of others around them in a civil society.[3] According to virtually all published accounts, these judicial bodies—typically labeled "Veterans Treatment Courts"—have achieved resounding success in carrying out their prescribed mission.[4] More than 10,000 justice-involved veterans

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[1] *See* Jack W. Smith, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004–December 31, 2010*, 29 ALASKA L. REV. 93, 93–98, 100–02 (2012); Matthew Daneman, *N.Y. Court Gives Veterans Chance to Straighten Out*, USA TODAY (June 1, 2008, 9:03 PM), http://usatoday30.usatoday.com/news/nation/2008-06-01-veterans-court_N.htm; Neale Gulley, *Nation's First Veterans Court Counts Its Successes*, REUTERS (Jan. 9, 2011, 12:04 PM), http://www.reuters.com/article/us-court-veterans-idUSTRE7082U020110109; J.P. Lawrence, *Veterans Treatment Courts, Explained*, SAN ANTONIO EXPRESS-NEWS (Sept. 29, 2016), http://www.expressnews.com/militarycity/article/Veterans-treatment-courts-explained-9447254.php (last updated Oct. 3, 2016, 2:47 PM).

[2] Rachel Martin, *Hundreds of Veterans Treatment Courts See Success but More Are Needed*, NPR (Jan. 3, 2017, 5:09 AM), http://www.npr.org/2017/01/03/507983947/special-courts-for-military-veterans-gain-traction.

[3] *See* Tiffany Cartwright, *"To Care for Him Who Shall Have Borne the Battle": The Recent Development of Veterans Treatment Courts in America*, 22 STAN. L. & POL'Y REV. 295, 299–303 (2011); Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 573 (2010); Michael L. Perlin, *"John Brown Went Off to War": Considering Veterans Courts as Problem-Solving Courts*, 37 NOVA L. REV. 445, 456–64, 477 (2013); Kristina Shevory, *Why Veterans Should Get Their Own Courts*, ATLANTIC (Dec. 2011), http://www.theatlantic.com/magazine/archive/2011/12/why-veterans-should-get-their-own-courts/308716/.

[4] *See, e.g.*, Jillian M. Cavanaugh, *Helping Those Who Serve: Veterans Treatment Courts Foster Rehabilitation and Reduce Recidivism for Offending Combat Veterans*, 45 NEW ENG. L. REV. 463, 474–81 (2011); Daniel R. Devoy, *Unconventional Rehabilitation: Military Members' Right to Veterans Treatment Court*, 56 JUDGES J. 14, 14–16 (2017); Kraig J. Knudsen & Scott Wingenfeld, *A Specialized Treatment Court for Veterans with Trauma Exposure: Implications for the Field*, 52 COMMUNITY MENTAL HEALTH J. 127 (2016); Robert T. Russell, *Veterans Treatment Courts: A Proactive Approach*, 35 NEW ENG. J. CRIM. L. & CIV. CONFINEMENT 357, 370–72 (2009); Jennifer McDermott, *5 Years Later, Veterans Treatment Court Is a Success Story*, WASH. TIMES (May 22, 2016),

have passed through Veterans Treatment Courts in the past ten years, with the majority of them returning to their communities committed to living their lives in a positive, productive, and law-abiding manner.[5]

Amid this rapid proliferation of Veterans Treatment Courts, however, some growing problems have emerged below the surface of this well-intended and seemingly effective model of rehabilitative justice.[6] As more jurisdictions develop Veterans Treatment Courts, the miscellany of individual court practices, procedures, standards, and objectives increases as well.[7] A minority of states has statutorily established at least a baseline mandate of the mission and scope of Veterans Treatment Courts.[8] All other jurisdictions leave the critical decisions about the maintenance and operations of these courts solely in the hands of judicial and administrative bodies, generally providing expansive room for each Veterans Treatment Court to essentially govern itself.[9] Even in states that have enacted laws regulating aspects

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https://www.washingtontimes.com/news/2016/may/22/5-years-later-veterans-treatment-court-is-a-succes/; Martin, *supra* note 2.

5 *See* LAURIE A. DRAPELA, CLARK COUNTY VETERANS TREATMENT COURT: FINAL REPORT AND PROGRAM RECOMMENDATIONS 16–18 (Oct. 2014), https://www.clark.wa.gov/sites/all/files/district-court/Specialty%20Courts/2014VTCFinal.pdf; Robert T. Russell, *Veterans Treatment Courts*, 31 TOURO L. REV. 385, 397 (2015); Heath Druzin, *Having Veterans as Mentors Is Key to Treatment Court Success Stories*, STARS & STRIPES (July 29, 2015), https://www.stripes.com/having-veterans-as-mentors-is-key-to-treatment-court-success-stories-1.360274; Melissa Fitzgerald, *A Tale of Two Brothers*, HUFFINGTON POST (Nov. 11, 2014, 9:45 AM), http://www.huffingtonpost.com/melissa-fitzgerald/a-tale-of-two-brothers_b_6135760.html; Ines Novacic, *For Veterans in Legal Trouble, Special Courts Can Help*, CBS NEWS (Nov. 10, 2014), http://www.cbsnews.com/news/for-veterans-legal-trouble-special-courts-can-help/ (updated Nov. 16, 2015, 10:12 AM). Typically, Veterans Treatment Courts use the phrase "justice-involved veteran" to describe any veteran accepted into the court's treatment program, preferring this term over the more traditional criminal court designation of "defendant." *See generally* Sean Clark & Jim McGuire, *PTSD and the Law: An Update*, PTSD RES. Q. (2011), https://www.ptsd.va.gov/publications/rq_docs/v22n1.pdf (using this phrase in sentences where a description of a conventional criminal court would use the word "defendant"). This Article honors this preference, using the phrase "justice-involved veteran" rather than "defendant" when referring to veterans in the criminal justice system.

6 *See* Sohil Shah, Comment, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 S. CAL. INTERDISC. L.J. 67, 67–68, 105–06 (2014).

7 Benjamin Pomerance, *The Best-Fitting Uniform: Balancing Legislative Standards and Judicial Processes in Veterans Treatment Courts*, 18 WYO. L. REV. 179, 182, 192–93 (2018).

8 *See* Claudia Arno, Comment, *Proportional Response: The Need for More—and More Standardized—Veterans' Courts*, 48 U. MICH. J.L. REFORM 1039, 1040–42 (2015); Shah, *supra* note 6.

9 Pomerance, *supra* note 7, at 182.

of the conduct of Veterans Treatment Courts, there typically exists plenty of leeway for an individual court to render high-impact decisions about its own operations.[10]

To an important extent, this level of freedom that each Veterans Treatment Court enjoys is necessary for the proper functioning of a therapeutic plan of justice.[11] Individualized action plans stand at the center of a Veterans Treatment Court's success.[12] Rather than attempting to employ cookie-cutter, one-size-fits-all approaches to rehabilitation, Veterans Treatment Courts first recognize each justice-involved veteran as a unique person who has confronted unique experiences before, during, and after military service, and then tailor a treatment strategy based on that veteran's specific needs.[13] To keep this vital individualization alive, Veterans Treatment Courts must never become overregulated and homogenized.[14]

A complete lack of standardization, however, poses substantial legal and practical concerns.[15] Currently, basic criteria often vary significantly among Veterans Treatment Courts within the same state.[16] The components of a Veterans Treatment Court in any given county can be quite different from the components of a Veterans Treatment Court situated in an adjoining county.[17] For example, a justice-involved veteran who would be eligible for admission into a Veterans Treatment Court in County A might not be eligible for

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10 *See id.*; Arno, *supra* note 8.

11 *See* Shah, *supra* note 6, at 81–82. *But see* William E. Raferty, *Despite Being Vetoed Three Times, California Legislature Debates Bill Regarding Creation of Veterans Courts*, GAVEL TO GAVEL (Mar. 5, 2015), http://gaveltogavel.us/2015/03/05/despite-being-vetoed-3-times-california-legislature-debates-bill-regarding-creation-of-veterans-courts/ (Nat'l Ctr. for State Courts, Williamsburg, Va.).

12 *See* Cartwright, *supra* note 3, at 303–07.

13 *See* Julie Marie Baldwin, *Investigating the Programmatic Attack: A National Survey of Veterans Treatment Courts*, 105 J. CRIM. L. & CRIMINOLOGY 705, 714–15 (2015).

14 For example, in November 2015, a seventeen-member committee from the Uniform Law Commission began drafting a model Veterans Treatment Court Act. VETERANS COURT ACT (VETERANS AND SERVICEMEMBERS TREATMENT COURT ACT) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, Draft 2015) (later renamed Model Veterans Treatment Court Act). Although this model established a definite framework within which a Veterans Treatment Court judge needed to operate, the drafters of this model act ensured that the judges presiding over Veterans Treatment Courts maintained an appropriate level of discretion over their courtroom. *See* Pomerance, *supra* note 7, at 224–27.

15 Allison L. Jones, Comment, *Veterans Treatment Courts: Do Status-Based Problem-Solving Courts Create an Improper Privileged Class of Criminal Defendants?*, 43 WASH. U. J.L. & POL'Y 307, 310 (2013).

16 *See id.*

17 *See id.*; *see also* Arno, *supra* note 8.

admission into a Veterans Treatment Court in County B.[18] From a practical viewpoint, these wide-ranging variances lead to problematic confusion among the general public about what the "Veterans Treatment Court" label truly means, as justice-involved veterans who are eligible to use the services of certain Veterans Treatment Courts are unequivocally barred from entering others.[19]

From a legal standpoint, these elemental distinctions from one court to another are even more troubling. Through these classification-based variances, states risk breaching the command of the Fourteenth Amendment of the United States Constitution, which orders that no state shall deny "equal protection of the laws" to any person within its jurisdiction.[20] When an individual Veterans Treatment Court decides that a certain class of justice-involved veterans is ineligible for the services and advantages the court affords, questions inherently emerge about whether this particular Veterans Treatment Court is engaging in the type of classification-based discrimination that the Equal Protection Clause forbids.[21] The same queries persist when states enact statutes that openly ban particular classes of veterans from gaining access to these courts.[22] When it becomes difficult to comprehend what legitimate interest(s) the government may advance by drawing these lines, the questions about the presence of potential Equal Protection Clause violations naturally grow louder.[23]

Already, commentators have successfully demonstrated that the most basic classification distinction that Veterans Treatment Courts institute—accepting veterans, excluding nonveterans—passes constitutional muster.[24] Tribunals have also firmly declared that admission into a Veterans Treatment Court is a privilege, not a legal

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18 *See* Arno, *supra* note 8.

19 Pomerance, *supra* note 7, at 202–05.

20 U.S. CONST. amend. XIV, § 1.

21 *See* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987) ("Today scholars understand the equal protection clause of the fourteenth amendment to require that the government treat all persons similarly situated in a similar manner.").

22 *See* Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2771–72 (2005).

23 *See infra* Part IV.

24 *E.g.*, Eric Merriam, *Non-Uniform Justice: An Equal Protection Analysis of Veterans Treatment Courts' Exclusionary Qualification Requirements*, 84 MISS. L.J. 685, 717 (2015).

right.[25] Nevertheless, government actors cannot impose arbitrary, classification-based distinctions, even when eligibility for the program at issue is implicitly limited to only a particular subset of the total population.[26] Therefore, as the Veterans Treatment Court movement in the United States continues to grow from coast to coast, it is crucial to scrutinize the categorizations established by many of these courts through the lens of the Equal Protection Clause.[27]

This Article fills a gap in the existing legal scholarship by conducting this Equal Protection Clause examination. Part I provides an overview of the basic Veterans Treatment Court model and describes classification-based eligibility criteria that frequently differ among various courts. Part II discusses the appropriate legal framework for evaluating classification-based distinctions that Veterans Treatment Courts often use when determining eligibility and ultimately concludes that rational basis review is the proper standard to apply in such instances. Part III summarizes the history of rational basis review, points out the practical uncertainties of this court-made test, and addresses some of the ways that the judiciary has historically resolved these ambiguities. Lastly, Part IV applies the rational basis test to several classification-based distinctions that Veterans Treatment Courts commonly draw when determining which veterans are eligible for their services, which proves that some of these classifications cannot satisfy even this low-level standard of review. In doing so, this Article does not diminish the important role that Veterans Treatment Courts have played for the past decade in positively transforming the lives of justice-involved veterans throughout this nation. Instead, this Article aims to strengthen the work and the impact of current and future Veterans Treatment Courts and ensure that all these unique judicial entities adhere fully to the standards of "equal protection of the laws" that the Constitution guarantees.

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25 *Id.* at 714; *see also Veterans Court*, LAW FOR VETERANS, http://www.lawforveterans.org/veterans-courts (last visited Jan. 9, 2019) ("It is important to remember, no veteran has a 'right' to have their case assigned to Veterans Court. Once in Veterans Court, the veteran must continuously 'earn' the privilege of remaining in Veterans Court by complying with all the Court's requirements.").

26 *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 669 (3d ed. 2006).

27 *See* Merriam, *supra* note 24, at 698 ("Given the potential significant advantages of participation in [Veterans Treatment Courts] over the normal criminal process, equal protection challenges from those excluded from participation are inevitable.").

I
A VARIED LANDSCAPE: GLARING CONTRASTS AMONG VETERANS TREATMENT COURTS

Veterans Treatment Courts throughout the nation use a model that seems quite familiar on the surface.[28] For a couple of decades before the first Veterans Treatment Courts began, jurisdictions across the United States had operated drug treatment courts using the same basic principles: identify strong candidates for rehabilitation and offer an opportunity for them to complete an individualized, multistep treatment program developed by a team of experts as an alternative to incarceration.[29] In most Veterans Treatment Courts, as with most Drug Treatment Courts, the court assigns each participant a mentor to help guide him or her through the entire treatment process and further provides support from alcohol and substance abuse specialists, social workers, employment counselors, and other professionals.[30] Unlike a conventional criminal court setting, the prosecutor and defense counsel do not function as adversaries but rather as co-advocates working together for the defendant's ultimate success.[31] Sobriety throughout the duration of the treatment process is expected, which is evidenced by the defendant receiving randomly administered tests for detecting drug and alcohol use.[32] Court appearances occur often, with each treatment team member updating the presiding judge about the defendant's progress through the steps of the defendant's individualized treatment

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28 *See* Diana Moga, *9 Questions with a Veterans Treatment Court Judge*, TASK & PURPOSE (July 11, 2016, 5:00 AM), http://taskandpurpose.com/9-questions-veteran-treatment-court-judge.

29 *See* Ryan S. King & Jill Pasquarella, *Drug Courts: A Review of the Evidence*, THE SENTENCING PROJECT 1–2 (Apr. 2009), https://www.sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf.

30 *See* Hawkins, *supra* note 3, at 565; Arno, *supra* note 8, at 1048; *see also* Baldwin, *supra* note 13, at 714.

31 *See* Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Delivers Remarks at the Roanoke Veterans Treatment Court Program (Jan. 23, 2014), https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-roanoke-veterans-treatment-court-program [hereinafter Holder Remarks].

32 *What Is a Veterans Treatment Court?*, JUSTICE FOR VETS, http://www.justiceforvets.org/what-is-a-veterans-treatment-court (last visited Jan. 13, 2019). Not every Veterans Treatment Court, however, demands randomly administered drug and alcohol tests, and a significant number of Veterans Treatment Courts do not require any testing at all. Baldwin, *supra* note 13, at 743.

plan.[33] Successful completion of the entire treatment plan permits that defendant to receive a lesser punishment and, in some circumstances, no further punishment at all.[34] On the other hand, failure to meet the treatment plan's requirements to the satisfaction of the presiding judge and the treatment team can lead to the defendant's return to the traditional criminal court system and the imposition of more severe sanctions, including incarceration.[35]

Yet Veterans Treatment Courts differ from Drug Treatment Courts in their emphasis on symbols, phrases, structures, and cultural norms that are emblematic of military life.[36] In doing so, these courts hope to temporarily return justice-involved veterans to the military culture where they previously achieved some level of stability, regimentation, and success.[37] In the words of one commentator, "The Veterans Treatment Court is the military unit: the judge becomes the Commanding Officer, the Veteran Mentors become fire team leaders, the court team becomes the company staff, and the veteran defendants become the troops."[38]

Customarily, all the mentors in Veterans Treatment Courts are veterans themselves, and judges typically try to connect justice-involved veterans with mentors who served in the same branch and era of service.[39] Additionally, the other members of the treatment team possess a higher-than-average level of military cultural competency.[40]

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33 *Veterans Treatment Court Resources*, NAT'L INST. CORRECTIONS 51, http://nicic.gov/library/026733 (last visited Jan. 13, 2019) (stating that best practices require biweekly court appearances for a justice-involved veteran beginning his or her treatment program).

34 Baldwin, *supra* note 13, at 745; Pomerance, *supra* note 7, at 191–92.

35 Jones, *supra* note 15, at 314; Hawkins, *supra* note 3, at 566.

36 *See* Arno, *supra* note 8, at 1048. Veterans Treatment Courts were born when a Drug Treatment Court judge in Buffalo, New York, discovered that an emphasis on these aspects could dramatically alter outcomes for justice-involved veterans who seemed otherwise unchangeable by the justice system. *See* Pomerance, *supra* note 7, at 183–85.

37 *See* Mark A. McCormick-Goodhart, Note, *Leaving No Veteran Behind: Policies and Perspectives on Combat Trauma, Veterans Courts, and the Rehabilitative Approach to Criminal Behavior*, 117 PA. ST. L. REV. 895, 906–25 (2013); Tabatha Renz, Note, *Veterans Treatment Court: A Hand Up Rather than Lock Up*, 17 RICHLAND J.L. & PUB. INT. 697, 698–700, 704–05 (2013); Dahlia Lithwick, *Why Veterans Deserve Special Courts*, NEWSWEEK (Feb. 10, 2010, 7:00 PM), http://www.newsweek.com/why-veterans-deserve-special-courts-75257; Shevory, *supra* note 3.

38 *Veterans Court*, OWASSO FOUNDATION, https://www.owassofoundation.org/veterans-court/ (last visited Mar. 3, 3019).

39 *See* Arno, *supra* note 8, at 1048–49.

40 *See* Jones, *supra* note 15, at 314–15 (describing this enhanced military cultural competency as one of the most important policy rationales for establishing a Veterans Treatment Court).

The treatment team recognizes military-related conditions that could contribute to a veteran committing a crime—including, but certainly not limited to, service-connected post-traumatic stress disorder, traumatic brain injury, or military sexual trauma—and knows how to effectively treat such conditions for veterans.[41] Additionally, Veterans Treatment Courts customarily serve as "one-stop shops" for connecting justice-involved veterans with the benefits, programs, and services available to them because of their military service.[42] Since a surprisingly high percentage of veterans are unaware of the full range of benefits, programs, and services for which they are eligible, these revelations can produce life-changing outcomes for veterans and their families in vital areas, including financial compensation, healthcare services, educational opportunities, and employment preferences.[43]

However, although the basic framework of Veterans Treatment Courts typically remains constant from jurisdiction to jurisdiction,

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41 *See id.*; Shah, *supra* note 6, at 71–80 (discussing the unique challenges that many veterans confront and summarizing the ways that Veterans Treatment Courts successfully address these challenges).

42 *See* KIERRA ZOELLICK, AM. U. SCH. PUB. AFF., THE ROLE OF VETERANS JUSTICE OUTREACH SPECIALISTS IN VETERANS TREATMENT COURTS (2016), http://www.american.edu/spa/jpo/videos/upload/The-Role-of-Veterans-Justice-Outreach-Specialists-in-VTCs-Fact-Sheet.pdf; Matt Stiner, *Veterans Service Organizations in Veterans Treatment Courts: Coming to the Aid of Their Fellow Veterans*, JUSTICE FOR VETS (July 2012), https://justiceforvets.org/wp-content/uploads/2017/03/Dispatch-VSOs-in-VTCs.pdf.

43 *See, e.g.*, Chris Adams, *VA Outreach Lags as Many Veterans Unaware of Benefits*, MCCLATCHY (Nov. 19, 2012, 3:14 PM), http://www.mcclatchydc.com/news/nation-world/national/article24740527.html (updated June 17, 2015, 11:33 AM); Mary Kane, *Vets, Don't Miss Out on "Hidden Benefits,"* KIPLINGER (June 2017), https://www.kiplinger.com/article/retirement/T020-C000-S004-vets-don-t-miss-out-on-hidden-benefits.html. Title 38 of the United States Code is filled with statutes governing benefits, programs, and services for which veterans who provided active duty military service and were discharged under conditions other than dishonorable may be eligible. 38 U.S.C. § 101 *et seq.* (2012). For example, veterans with a disability that was incurred in military service or exacerbated by such service are eligible for tax-free disability compensation payments from the VA. *See* 38 U.S.C. § 1110 (2012); 38 C.F.R. § 4.19 (2018). Low-income veterans who served during a wartime period may be eligible for a monthly tax-free VA pension. *See* Benjamin Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 26–31 (2014). Veterans seeking to pursue education at a college, university, or vocational program can receive substantial financial assistance to defray the costs of tuition, books and supplies, and housing through the G.I. Bill. CASSANDRIA DORTCH, CONG. RES. SERV., THE POST-9/11 GI BILL: A PRIMER 2–3 (July 28, 2014), https://fas.org/sgp/crs/misc/R42755.pdf (updated Aug. 1, 2018). This is just the very tip of the iceberg of possible benefits, programs, and services that could be available to a veteran.

many crucial distinctions exist among these courts.[44] Some of the most critical distinctions focus on which veterans may be eligible for the services that these courts provide.[45] For instance, a substantial number of Veterans Treatment Courts will accept only justice-involved veterans who received an honorable discharge from the armed forces.[46] Other Veterans Treatment Courts, however, will accept justice-involved veterans regardless of the character of service listed upon their discharge paperwork.[47] Certain courts demand that the veteran demonstrate a nexus between his or her criminal offense and his or her experiences in the military, while other courts impose no such requirement.[48] In some jurisdictions, Veterans Treatment Courts will accept only veterans who served on active duty in a combat zone, yet in other jurisdictions Veterans Treatment Courts are willing to accept noncombat veterans.[49]

Another area of contention focuses on what cases a Veterans Treatment Court may consider hearing.[50] Most jurisdictions maintain a list of criminal offenses that unequivocally prohibit the transfer of a case from a traditional criminal court into a Veterans Treatment Court.[51] In some locations, domestic violence charges automatically ban a veteran from Veterans Treatment Court eligibility, but other Veterans Treatment Courts will consider admitting these cases.[52] In certain jurisdictions, Veterans Treatment Courts will not hear a case involving any offense in which a firearm was involved, including nonviolent weapons possession crimes.[53] Furthermore, so-called simple assault offenses, such as a bar fight in which the veteran never

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44 *See, e.g.*, Baldwin, *supra* note 13, at 738–50 (showing Veterans Treatment Court statistics).

45 *See infra* notes 46–56.

46 Baldwin, *supra* note 13, at 742.

47 *Id.*

48 *See* Jones, *supra* note 15, at 318.

49 William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Those Who Served to Help Troubled Vets Regain Discipline, Camaraderie*, A.B.A. J., Nov. 2011, at 47.

50 *See* Devoy, *supra* note 4, at 15 (unlike many Veterans Treatment Courts, Santa Clara County does not exclude veterans due to seriousness of the crime and accepts both misdemeanor and felony cases).

51 *See id.*

52 Linda J. Fresneda, Note, *The Aftermath of International Conflicts: Veterans Domestic Violence Cases and Veterans Treatment Courts*, 37 NOVA L. REV. 631, 647–48 (2013); Pamela Kravetz, Note, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162, 204–05 (2012).

53 *See* Cartwright, *supra* note 3, at 312.

used a weapon to attack the victim, are permitted in certain Veterans Treatment Courts but excluded from others.[54] Certain Veterans Treatment Courts exclude any veteran facing a traffic offense charge.[55] Finally, some Veterans Treatment Courts refuse all cases that concern a crime involving any form of violence or threat of violence, while others frequently accept cases that concern a crime involving violence.[56]

All these distinctions segregate justice-involved veterans into two distinct classes: those veterans who may receive the benefits of Veterans Treatment Courts and those veterans who are barred from receiving such benefits.[57] With the establishment of so many government-imposed classification-based schemes comes the potential for violations of the Equal Protection Clause, as each of these classifications provides distinct advantages to certain justice-involved veterans while automatically excluding others.[58] The question concerning this Article, and the question that should concern all policymakers involved with the formation and operation of Veterans Treatment Courts, is whether a court may find that any of these categorical segregations run afoul of the constitutional pledge to provide "equal protection of the laws."[59] To make this determination, one must first examine what legal standard of review applies to a classification-based scheme affecting justice-involved veterans' access to Veterans Treatment Court.[60]

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54 *See* Arno, *supra* note 8, at 1061; Perlin, *supra* note 3, at 458.

55 Baldwin, *supra* note 13, at 742.

56 *See* Megan McCloskey, *Veterans Court Takes a Chance on Violent Offenders*, STARS & STRIPES (Sept. 14, 2010), https://www.stripes.com/veterans-court-takes-a-chance-on-violent-offenders-1.118182.

57 *See* Merriam, *supra* note 24, at 698. Importantly, these are not the only potentially problematic disparities. Significant differences also exist regarding the requirements to remain in and graduate from a Veterans Treatment Court's program. Baldwin, *supra* note 13, at 743–44. Additional considerations emerge when considering the legal impact of a veteran's graduation from a Veterans Treatment Court's assigned program. *Id.* at 745. These disparities, while beyond the scope of the examination conducted in this Article, could also raise significant Fourteenth Amendment concerns. *See* Merriam, *supra* note 24, at 698–99.

58 Merriam, *supra* note 24, at 698–99.

59 U.S. CONST. amend. XIV, § 1, cl. 4.

60 *Infra* Part II.

II
SETTING THE STANDARD: THE IMMENSE LIKELIHOOD OF RATIONAL BASIS REVIEW

Originally, American lawmakers enacted the Fourteenth Amendment for one primary purpose: to abolish discrimination in the immediate post–Civil War era against African Americans who formerly were slaves.[61] Approximately eighty years later, however, the United States Supreme Court articulated that the protections of this amendment, including the equal protection safeguard, extended to all the nation's citizens, not just to racial and ethnic minorities.[62] Since that time, the judiciary's interpretations of the Equal Protection Clause have evolved to consider a broader variety of government-imposed classification plans as questionable.[63] If a party brings a legal challenge against the government's classification-based scheme, this broader interpretation of the Equal Protection Clause permits a review of the rationale and the impact of the classification.[64]

Many of these challenges, however, ultimately prove to be unsuccessful.[65] Merely enacting a classification-based statute does not automatically mean that the government has violated the letter or the spirit of the Equal Protection Clause.[66] As former United States Supreme Court Chief Justice William Rehnquist accurately observed, "All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the

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61 The extent to which the drafters of the Fourteenth Amendment intended this text to apply to any individuals other than the freed slaves has been, and may always be, the object of significant debate. *Compare* Slaughter-House Cases, 83 U.S. 36, 71 (1872) (limiting the scope of the Fourteenth Amendment to former slaves), *and* Minor v. Happersett, 88 U.S. 162, 165, 174–78 (1875) (refusing to extend the Fourteenth Amendment to guard against discriminatory actions on the basis of gender), *with* Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, 303 (2006) ("It is very clear that the Equal Protection Clause was designed to protect 'all persons.'"), *and* Garrett Epps, *Interpreting the Fourteenth Amendment: Two* Don'ts *and Three* Dos, 16 WM. & MARY BILL RTS. J. 433, 441–44 (2007) (providing historical evidence indicating that the drafters never intended the Fourteenth Amendment to affect only the former slaves).

62 Pettinga, *supra* note 21, at 780–81.

63 *Id.* at 781.

64 *See id.*

65 *See* Smith, *supra* note 22, at 2773–74.

66 Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 135 (2011) (footnotes omitted) ("Despite the promise of the Fourteenth Amendment's Equal Protection Clause, the state rarely treats people equally, and the Clause does not require it to do so. The government must simply justify any legal distinction between individuals with a sufficient rationale.").

legislators responsible for the enactment."[67] More than a century of case law clarifies that the government is indeed permitted to engage in lawmaking that discriminates against certain classes of people as long as the government's intentions in doing so are for the good of the people overall.[68]

Consider, for instance, a law that forbids individuals under the age of twenty-one from purchasing and consuming alcoholic beverages. On its face, this statute is discriminatory.[69] Using a particular classification—age—this law prevents certain people from enjoying an activity in which other people are able to engage freely.[70] Nevertheless, laws establishing a minimum drinking age are not deemed to violate the Equal Protection Clause.[71] The government's interest in regulating the health and safety of young people and the overall societal benefit of newer drivers not having legal access to intoxicating drinks are deemed to outweigh the discriminatory impact of preventing younger people from buying and consuming alcoholic beverages.[72]

Thus, the equal protection analysis of any classification-based statute does not cease with the mere presence of discrimination.[73] Instead, the legal question is far more nuanced and case specific,

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67 Toll v. Moreno, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting); *see also* Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1068 (1979) ("Every time an agency of government formulates a rule—in particular, every time it enacts a law—it classifies.").

68 *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes."); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344–53 (1949).

69 *See* Ronen Avraham, Kyle D. Logue & Daniel Schwarcz, *Understanding Insurance Antidiscrimination Laws*, 87 S. CAL. L. REV. 195, 197 (2014) ("We discriminate when we draw distinctions between things and people. Individuals, corporations, and governments draw distinctions all the time, and in ways that are widely considered unobjectionable.").

70 *See* Kenneth W. Simons, Response, *Discrimination Is a Comparative Injustice: A Reply to Hellman*, 102 VA. L. REV. ONLINE 85, 88 (2006) (describing that the core principle of discrimination is the existence of some sort of classification-based distinction between persons, and that such discrimination becomes illegal when this distinction is unjustifiable).

71 For several real-life examples of this rationale in Equal Protection Clause challenges to underage drinking statutes, see Thomas L. Hafemeister & Shelly L. Jackson, *Effectiveness of Sanctions and Law Enforcement Practices Targeted at Underage Drinking Not Involving Operation of a Motor Vehicle*, *in* REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY 532–34 (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004).

72 *See id.*

73 *See supra* notes 66–70 and accompanying text.

requiring a balancing test between the discriminatory impact of the law's categorization scheme and the government's motivation in enacting it.[74] If the government can achieve the law's purported goals without engaging in discriminatory conduct toward the members of a particular class, then the law probably will not satisfy the equal protection requirement.[75] On the other hand, if the government can accomplish a vital objective only by instituting some form of classification-based discrimination, then the law in question is extremely likely to withstand review under the Equal Protection Clause.[76]

Further complications arise from the fact that not all forms of discrimination are treated equally under the Equal Protection Clause.[77] Although the text of the Equal Protection Clause itself does not call for a multilayered evaluation process, judges have developed three tiers of classification-based statutory discrimination, each of which receives a different standard of review.[78] If a law introduces a classification scheme based on a "suspect class"—race, national origin, or certain forms of alien status (e.g., discrimination against documented aliens living within the United States)—or if the discrimination at issue impinges upon a "fundamental right" (such as the right to marry, the right to raise a family, or the right to interstate travel), then the statute must be "narrowly tailored" to achieve "a compelling governmental interest" to satisfy the Equal Protection Clause.[79] If the law burdens a "quasi-suspect class"—gender and legitimacy of birth (e.g., discrimination against children who are born out of wedlock)—then the classification scheme must be "substantially related" to an "important

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74 *See* Pettinga, *supra* note 21, at 782–83.

75 *Id.*

76 *Id.*

77 *Id.* at 784.

78 *See* Smith, *supra* note 22, at 2772–77; *see also* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 222 (1976) (addressing the fact that nothing in the text of the Constitution provides for, or even alludes to, the creation of this three-tiered method of review).

79 Smith, *supra* note 22, at 2772–73; *see* Pettinga, *supra* note 21, at 782. Most commentators trace the creation of a more exacting review for government actions burdening a "suspect class" to the now-famous Footnote Four of *United States v. Carolene Products Co.*, a 1938 decision concerning a federal statute banning filled milk. 304 U.S. 144 (1938). The footnote, authored by Justice Harlan Fiske Stone, recommended a "more searching judicial inquiry" in any case or controversy where discrimination against "discrete and insular minorities" undermines "those political processes ordinarily to be relied upon to protect minorities." *Id.* at 152 n.4.

government purpose," a less rigorous standard of review than the evaluation of discrimination against a suspect class.[80]

If the statutory categorization does not affect a suspect class or a quasi-suspect class, then the classification scheme needs only to be "rationally related to any conceivable, legitimate government interest" to pass constitutional muster under the Equal Protection Clause.[81] This level of review, known as the "rational basis test," is far easier for the government to pass than the evaluations performed for suspect and quasi-suspect classes.[82] Under the two heightened forms of legal scrutiny, the government bears the burden of demonstrating that the statutory classification plan satisfies the conditions of the applicable test.[83] Rational basis review, on the other hand, places the burden on the petitioner to prove that a classification-based statute bears no rational relation to any legitimate governmental aim.[84] Given the United States Supreme Court's insistence that the government "has no obligation to produce evidence to sustain the rationality of a statutory classification,"[85] it is not surprising that the government typically

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80 Strauss, *supra* note 66, at 137. The hallmark United States Supreme Court case establishing intermediate scrutiny as the appropriate level of review for government actions discriminating on the basis of gender was *Craig v. Boren*, 429 U.S. 190 (1976).

81 Smith, *supra* note 22, at 2773; *see* Pettinga, *supra* note 21, at 783.

82 Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 493 (2011) ("The rational basis test as it currently stands is too weak. By allowing any plausible reason for the legislation to suffice, whether or not it was a true reason for the legislation, and by asking only whether lawmakers could have thought that it was reasonably related to the subject it purported to advance, the Court has essentially made the rational basis test equivalent to no test at all.").

83 Smith, *supra* note 22, at 2772–73.

84 Pettinga, *supra* note 21, at 783–84.

85 Heller v. Doe, 509 U.S. 312, 320 (1993). In fact, cases exist in which the Court blatantly recharacterized the stated purpose of the legislature to reach a finding of rationality. *See, e.g.*, Ry. Express Agency v. New York, 336 U.S. 106 (1949) (converting the legislature's purpose from eliminating advertising to merely limiting advertising). Class-based schemes that discriminate far more than necessary to rationally accomplish the legislature's stated objectives also typically satisfy the Court's application of the rational basis test. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (stating that a class-based scheme must withstand rational basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification," and further declaring that this review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices"); New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("[R]ational distinctions [by a government entity] may be made with substantially less than mathematical exactitude [without failing the rational basis test]."); McGowan v. Maryland, 366 U.S. 420, 425–26 (1961) (calling the legislation in question unartfully drawn but refusing to overturn it on Fourteenth Amendment grounds).

prevails in Equal Protection Clause challenges when the deciding tribunal applies rational basis review.[86]

In theory, the judiciary could add new members to the existing list of suspect and quasi-suspect classes at any time, as these standards of review and the categories to which they apply are entirely judicially constructed.[87] For decades, however, the United States Supreme Court has refused all opportunities to make this move.[88] During this same time period, the Court has likewise rejected all requests to define new fundamental rights that would trigger the highest level of Equal Protection Clause scrutiny.[89] The probability of the Court reversing course now for military veterans seems slim to none, especially when statutory-based classifications on the basis of so many other categories (such as age, socioeconomic status, sexual orientation, presence of physical or mental disabilities, and many others) have ample historical evidence of widespread discrimination but still receive only rational basis review.[90] Similarly, the Court arguably once viewed access to the court system as a fundamental right in the Equal Protection Clause context. However, such a determination now appears to be a relic of the past, especially when considering a party's access to a discretionary diversion court such as a Veterans Treatment Court.[91] Although states may grant their citizens Equal Protection Clause safeguards beyond the protections of the federal government—such as California, Connecticut, and Iowa recognizing sexual orientation as a suspect class

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86 Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) (calling traditional rational basis review a "free pass" for the government).

87 Linde, *supra* note 78; *see* Strauss, *supra* note 66, at 147.

88 Yoshino, *supra* note 86, at 748. The last case to add a member to the classes that formally receive a more rigorous review was *Trimble v. Gordon*, in which the Court determined that class-based schemes burdening nonmarital children received heightened scrutiny. 430 U.S. 762, 766–76 (1977).

89 Yoshino, *supra* note 86, at 748.

90 *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631–32 (1996) (applying the rational basis test to a class-based scheme involving sexual orientation); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985) (refusing to apply a heightened form of scrutiny to a class-based scheme focusing on intellectual disabilities); Mass Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976) (applying the rational basis test to a categorical structure involving age); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 20–29 (1973) (subjecting certain class-based distinctions focusing on economic status to rational basis review).

91 Merriam, *supra* note 24, at 713–16.

requiring the most stringent level of constitutional review—states that do so are still scarce in number.[92]

Therefore, the evaluation of any challenge to a classification-based denial of access to a Veterans Treatment Court will almost certainly receive only rational basis review.[93] Any justice-involved veteran bringing forth such a case will have to climb a perilously steep legal hill to receive a favorable outcome.[94] Despite the pronounced deference that the rational basis test affords to the government, victory for an Equal Protection Clause petitioner remains possible.[95] We now turn to an overview of the history of rational basis analysis to show that courts may still find a law violates the Equal Protection Clause even when applying this deferential standard of review.

III
DEFERENCE AND DEFIANCE: OVERCOMING THE ODDS IN RATIONAL BASIS ANALYSIS

Between 1971 and 2014, the United States Supreme Court applied rational basis review in more than one hundred Equal Protection Clause challenges.[96] In only seventeen of those cases, the Court found that the law in question failed the rational basis test and was thus held to be unconstitutional.[97] Confronted with such odds, a petitioner could easily assume that his or her Equal Protection Clause claim is lost as soon as a judicial body decides to apply rational basis as the applicable standard of review.[98]

Underscoring this conventional assumption is the Court's insistence that "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" and that the petitioner must negate "every conceivable basis which might support" a classification-based scheme before the Court will consider invalidating the scheme

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92 Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 387 n.18 (2010).

93 *See supra* notes 84–90 and accompanying text.

94 *See supra* notes 78–84 and accompanying text.

95 *See infra* Part III.

96 Raphael Holoszyc-Pimentel, Note, *Reconciling Rational Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2071–72 (2015).

97 *Id.*

98 *See* Yoshino, *supra* note 86, at 747; Jackson, *supra* note 82.

under rational basis review.[99] As long as the creators of the categorical discrimination "*could rationally have decided* that [the classification] might foster" a legitimate governmental aim, the Court will determine that the classification-based discrimination satisfies the Equal Protection Clause's mandate.[100] Surprisingly, a poor fit between the classification scheme and the government's reasons for putting it forth may still survive this test, as the Court has determined that it can accept a discriminatory statute or policy "even when there is an imperfect fit between means and ends."[101] Perhaps even more shocking is the Court's willingness under rational basis review to uphold statutes or policies even if the evidentiary materials supporting the government's rationale for the discriminatory statute or policy were fundamentally flawed.[102] In the face of this longstanding tradition of deference to the government, one can see why so many laws and other government actions remain unscathed after easily clearing this lowest of hurdles.[103]

A. "Rational Basis with Bite"

Still, the Supreme Court and other judicial entities sometimes produce unexpected results even when applying this usually deferential test.[104] Intermittently, and without any clear or consistent reasons why, courts will require the government to meet a more stringent threshold in practice despite applying rational basis as the legal standard of review.[105] In these cases, the judiciary has refused to speculate about the government's possible interests in enacting a classification-based statute or policy, instead letting the government explain what objectives it supposedly intended to accomplish.[106] Additionally, the

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99 FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)).

100 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981).

101 Heller v. Doe, 509 U.S. 312, 321 (1993).

102 *See, e.g.*, Holoszyc-Pimentel, *supra* note 96, at 2075.

103 *See* Andrew Ward, Note, *The Rational-Basis Test Violates Due Process*, 8 N.Y.U. J.L. & LIBERTY 714, 721–24 (2014). *See generally* Aaron Belzer, Note, *Putting the "Review" Back in Rational Basis Review*, 41 W. ST. U. L. REV. 339, 355–68 (2014); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 359 (1999); Jackson, *supra* note 82.

104 *See* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1356–69 (2018); Nan D. Hunter, *Twenty-First Century Equal Protection: Making Law in an Interregnum*, 7 GEO. J. GENDER & L. 141, 148–53 (2006); Thomas B. Nachbar, *Rational Basis "Plus*,*"* 32 CONST. COMMENT. 449, 458–59, 463–64 (2017); Holoszyc-Pimentel, *supra* note 96, at 2075.

105 *See* Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 165 (2016).

106 *See supra* notes 103–05 and accompanying text.

types of after-the-fact governmental rationalizations that satisfied the Supreme Court in plenty of conventional rational basis cases receive far less credibility by courts in these outlier cases.[107] Situations where the government is unable to clearly articulate a close fit between the alleged objective of the law and the actual provisions and impacts of the statute also receive increased skepticism in these outlier decisions.[108]

Commentators often refer to these unexpected and unexplained departures from the norm as "rational basis with bite."[109] To this day, the Supreme Court has never formally acknowledged the existence of rational basis with bite as a separate tier of Equal Protection Clause scrutiny, and the late Justice Antonin Scalia angrily rejected the notion that such a concept existed.[110] However, the evidence of the Court's occasional application of a noticeably more rigorous version of the rational basis test is indisputable.[111]

Problematically, the Court's use of rational basis with bite in Equal Protection Clause cases is erratic and unpredictable.[112] Since the Court refuses to formally recognize the presence or the exact criteria of this test, neither the government nor the individual petitioners can know exactly when rational basis with bite will be or should be applied.[113] Without this sorely needed judicial guidance, all parties in an Equal Protection Clause dispute that does not implicate a fundamental right, suspect class, or quasi-suspect class, are left guessing whether the Court will go beyond the rigid deference of traditional rational basis analysis.[114] While the need for this heightened level of examination of the government in certain cases is apparent, the vagueness that presently shrouds the Court's application of rational basis with bite helps no one.[115]

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107 *See* Pettinga, *supra* note 21, at 779–80.

108 *See id.*

109 Brian L. Frye, Eldred *& the New Rationality*, 104 KY. L. REV. ONLINE (July 17, 2015), http://www.kentuckylawjournal.org/index.php/2015/07/17/eldred-new-rationality/.

110 Nachbar, *supra* note 104, at 450. Notably, however, Justice Scalia eventually retreated from this position, determining that the Court truly did apply a different level of rational basis review in certain cases. *See id.*

111 *See id.*

112 Farrell, *supra* note 103, at 415.

113 Nachbar, *supra* note 104, at 450.

114 Pettinga, *supra* note 21, at 779–80.

115 *See* Farrell, *supra* note 103, at 415 ("This search for an underlying principle that would explain the results in the heightened rationality cases appears to be unsuccessful. . . .

B. Trends Regarding Rational Basis with Bite

Thankfully, commentators have devoted considerable time to trying to draw conclusions about what types of cases typically inspire rational basis with bite review.[116] For instance, Raphael Holoszyc-Pimentel's survey of Supreme Court decisions identified nine factors that appeared to recur often—although not uniformly—in cases where the Court applied some level of rational basis with bite: (1) the presence of a history of discrimination for the group(s) disadvantaged by the government action under review, (2) political powerlessness for the group(s) to challenge the law or policy in question, (3) the adversely affected group's capacity to contribute to society, (4) classification on the basis of an immutable characteristic, (5) burden on a person's significant right, (6) clear government animus toward the affected group(s), (7) federalism concerns, (8) discrimination of an unusual character, and (9) the government action's ability to inhibit personal relationships.[117] Of these nine factors, Holoszyc-Pimentel found that two—classification on the basis of an immutable characteristic and burdening a significant right—were particularly common in cases where the Court applied a form of rational basis with bite.[118] Although some of the decisions that Holoszyc-Pimentel evaluated did not use either of these factors as a reason for employing more rigorous review, this study nevertheless indicates that achieving this less deferential analysis is more likely if the case involves classification based on a trait beyond the individual's control or if the classification scheme burdens a significant right.[119]

Delving deeper into these two most prevalent factors, Holoszyc-Pimentel concluded that both discrimination on the basis of immutable traits and the risk of abridging significant rights ran contrary to the original reasons for enacting the Fourteenth Amendment.[120] Initially, the amendment's drafters purportedly sought to avoid misconduct targeting recently freed African Americans, a group that had long been legally disadvantaged due to a characteristic over which they had no control: the color of their skin.[121] By extension, it was logical that

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Is it too much to ask that the Court decide cases consistently and predictably? Apparently the answer to this question is yes.").

116 *See infra* notes 117–34 and accompanying text.

117 Holoszyc-Pimentel, *supra* note 96, at 2078–99 (explaining the nine factors).

118 *Id.* at 2102.

119 *See id.*

120 *See id.* at 2103–05.

121 *See supra* note 60.

"[l]egislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[122]

In a separate study, Miranda Oshige McGowan concluded that the Court typically implemented rational basis with bite in cases where a majority of the Justices determined that the group bringing the Equal Protection Clause challenge had "been the *target* of discrimination."[123] If the petitioner could demonstrate that the government exhibited a "bare . . . desire to harm" the group in question, then the Court would be more likely to hold the government to a considerably more stringent standard of review.[124] This proposition was reinforced when the Court applied rational basis with bite to children who were undocumented aliens seeking to be educated in public schools, to hippies living in communes who were seeking food stamps, and to people with mental disabilities who were adversely affected by a city building code.[125]

Other commentators have agreed with Professor McGowan's conclusion, using these decisions and others to determine that a petitioner's ability to prove "animus" against the adversely affected class is the critical threshold for predicting when the Court will apply rational basis with bite rather than traditional rational basis review.[126] Gerald Kerska goes as far as identifying two criteria that the Court typically examines when deciding whether a government action was an animus-based measure: (1) whether the classification scheme involved "the targeting of a distinct and disfavored social group and a break down in the democratic process," and (2) whether the targeted group is one that is "suffering from longstanding or existing social stigma."[127]

Some writers argue that the Court conducts this more rigorous review whenever a majority of the Justices consider the discriminated

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122 Holoszyc-Pimentel, *supra* note 96, at 2102 (quoting Plyler v. Doe, 457 U.S. 202, 217 n.14 (1982)).

123 Miranda Oshige McGowan, *Lifting the Veil on Rigorous Rational Basis Scrutiny*, 96 MARQ. L. REV. 377, 387–94 (2012) (emphasis added).

124 *Id.* at 389–90 (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

125 *Id.* at 389–94.

126 *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 148 (2001); Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 205–06, 208 (2013); Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331, 336 (2013); Robinson, *supra* note 105.

127 Gerald S. Kerska, Note, *Economic Protectionism and Occupational Licensing Reform*, 101 MINN. L. REV. 1703, 1720–21 (2017).

group to be worthy of "quasi-suspect class" status.[128] To these observers, rational basis with bite is a covert way for the Court to provide a form of heightened scrutiny without opening up the supposed Pandora's box of adding new members to the quasi-suspect class list.[129] Notably, not every rational basis with bite decision uses the same standards of review that members of a quasi-suspect class are guaranteed to receive.[130] Still, the existence of a heightened analysis of rationality indicates that the Court may consider it a method of evaluating Equal Protection Clause challenges by groups lacking substantial political authority without deeming the groups part of a quasi-suspect class.[131]

Perhaps the most optimistic view of rational basis with bite—and rational basis analysis overall—comes from Professor Katie Eyer, who viewed the Court's sporadic application of a more meticulous rationality review as the possible signal of a new canon of rational basis review.[132] Citing a growing variety of cases where the Court applied rational basis with bite, Professor Eyer determined that a surprisingly "robust history" exists of the Supreme Court "applying more than *de minimis* rational basis review, even outside of the formally heightened tiers" if the classification-based government action implicates "group or rights-based concerns."[133] In the face of this trend, Professor Eyer speculated that the Court may at last be gradually moving away from the rigid three-tiered approach of evaluating Equal Protection Clause cases and moving toward a more nuanced assessment that places a higher burden upon the government when necessary.[134] Although "rational basis with bite" decisions still are not abundant, leading to the conventional wisdom that the application of this test is the exception rather than the norm, Professor Eyer stated that "one could argue instead that a different account should prevail: one in which the Court's failure to afford a meaningful assessment where group and rights-based concerns are implicated is viewed as aberrational."[135]

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128 Smith, *supra* note 22, at 2770. *See generally* Pettinga, *supra* note 21.

129 *See* Smith, *supra* note 22, at 2770. *See generally* Pettinga, *supra* note 21.

130 *See* Smith, *supra* note 22, at 2770. *See generally* Pettinga, *supra* note 21.

131 Pettinga, *supra* note 21, at 802–03.

132 Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 580–81 (2014).

133 *Id.* at 576 (emphasis added).

134 *Id.* at 567–80.

135 *Id.* at 575.

C. Rational Basis with Bite for Veterans

On at least one occasion, the United States Supreme Court has applied a form of rational basis with bite to a case directly concerning veterans.[136] In 1981, an honorably discharged army veteran who had served on active duty during the Vietnam War established residence in New Mexico.[137] Two years later, the veteran applied for a real property tax exemption that New Mexico offered to honorably discharged "Vietnam Era" veterans.[138] The state denied the veteran's application, pointing out that the governing statute allowed for Vietnam Era veterans to receive this exemption only if the veteran became a New Mexico resident prior to May 8, 1975.[139] Upon receiving this denial, the veteran and his wife sued the state, arguing that New Mexico's property tax exemption law violated the Equal Protection Clause by granting the exemption to certain honorably discharged Vietnam Era veterans and refusing to provide the exemptions to others.[140]

Applying the traditional rational basis test, New Mexico's highest court ruled in favor of the state.[141] According to the New Mexico Court of Appeals, the state's legislature was "entitled to limit the period of time within which [veterans] may choose to establish residency" for tax exemption purposes.[142] The United States Supreme Court, however, viewed the statute much differently.[143] Though the Court began by declaring that the law in question would receive only rational basis review, it proceeded to subject the New Mexico government to a legal examination that was far more rigorous than anyone expected.[144]

Reviewing the decision of the New Mexico Court of Appeals, the United States Supreme Court noted that New Mexico had put forward two rationales for enacting this statute: to demonstrate appreciation toward its "own citizens for honorable military service" and to assist "veterans who, as [New Mexico] citizens, were dependent on [the State

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136 *See* Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985).

137 *Id.* at 615.

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.* at 615–16.

142 *Id.* at 616 (alteration in original) (quoting Hooper v. Bernalillo Cty. Assessor, 679 P.2d 840, 844 (N.M. Ct. App. 1984)).

143 *Id.* at 623–24.

144 *See id.* at 617–24; *see also* Farrell, *supra* note 103, at 390–92.

of New Mexico] during a time of upheaval in their lives."[145] To the Supreme Court, neither of these reasons bore any rational relation to awarding the property tax exemption to only certain honorably discharged Vietnam Era veterans.[146] "Those who serve in the military during wartime inevitably have their lives disrupted," wrote Chief Justice Warren Burger for the Court's majority, "but it is difficult to grasp how New Mexico residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service."[147] A few paragraphs later, the Chief Justice offered similar disdain for the law's segregation of veterans into separate classes.[148]

> The New Mexico statute creates two tiers of resident Vietnam veterans, identifying resident veterans who settled in the State after May 8, 1976, as in a sense "second-class citizens." This discrimination on the basis of residence is not supported by any identifiable state interest; the statute is not written to benefit only those residents who suffered dislocation within the State's borders by reason of military service.[149]

Such a painstaking analysis represented a clear departure from the typical deference shown to the government in rational basis review—a fact that the Court's three dissenting Justices emphasized.[150] "What is the justification for placing any limit on the class of eligible veterans?" Justice John Paul Stevens rhetorically asked.[151] "The most obvious answer is that the State's resources are not infinite. The need to budget for the future is itself a valid reason for concluding that a limit should be placed on the size of the class of potential beneficiaries."[152] Although Justice Stevens conceded that New Mexico's limitations regarding this tax exemption were not directly linked to the government's purported goals in enacting the statute, he noted that the Court previously had not demanded such exacting standards for laws undergoing rational basis review.[153] "[S]ince exclusion from the favored class merely places the ineligible veteran in the same class as the majority of the citizenry, there is no constitutional objection to the

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145 *Hooper*, 472 U.S. at 619.

146 *Id.* at 623–24.

147 *Id.* at 621.

148 *Id.* at 622–23.

149 *Id.* at 623.

150 *Id.* at 624–33 (Stevens, J., dissenting).

151 *Id.* at 627.

152 *Id.*

153 *Id.* at 627–28.

use of a simple, easily administered standard," he wrote.[154] "The statutory requirement of residence before May 8, 1976, is not a perfect proxy for identifying those Vietnam veterans seeking admission or readmission into New Mexican society, but 'rational distinctions may be made with substantially less than mathematical exactitude.'"[155]

As Justice Stevens correctly noted, the Court's majority had gone above and beyond the conventional rational basis standard of review to find that this statute violated the Equal Protection Clause.[156] Thus, the Court had demonstrated a willingness to apply rational basis with bite to a government action that separated veterans into distinct classes, granting a benefit to some and denying this benefit to others.[157] Now, more than thirty years later, this decision remains valid law, unblemished by any subsequent United States Supreme Court opinions.[158]

Chief Justice Burger reinforced this readiness to apply rational basis with bite to statutes creating separate classes among veterans in *Attorney General of New York v. Soto-Lopez*, a case concerning civil-service employment preferences that New York State offered to only certain veterans.[159] New York's preference scheme offered additional points on civil-service examinations for veterans who were residents of New York when they entered military service, served on active duty during a period of war, and received an honorable discharge.[160] While the majority of the Justices declared that the residency requirement abridged the fundamental right to travel freely among states, thus triggering a heightened form of scrutiny, the Chief Justice and Justice Byron White declared that this statute could not even survive rational basis review.[161]

To Chief Justice Burger, the classification-based restrictions imposed by this law were unnecessary to meet the state's alleged

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154 *Id.* at 627.

155 *Id.* (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

156 *Id.* at 624–33.

157 *Id.* at 615–24.

158 In fact, a search on the LexisNexis database revealed eleven subsequent decisions that apply "positive treatment" to *Hooper*. Positive Citing Decisions to *Hooper*, Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 1985 U.S. LEXIS 97 (1985), https://advance.lexis.com/api/permalink/0c44ab02-938f-46c1-996e-ee1165843891/?context=1000516 (last visited Jan. 13, 2019) (follow "Citing Decisions" hyperlink; then select "Positive" analysis).

159 476 U.S. 898, 900 (1986) (Burger, C.J., concurring).

160 *Id.*

161 *Id.* at 912–13.

interest in targeting "a very special group of veterans who have both knowledge of local affairs and valuable skills learned in the military" to become civil servants because "these 'special attributes' are undeniably possessed by *all* veterans who are currently residents of New York."[162] As with the New Mexico case, it was "difficult to grasp how [New York] residents serving in the military suffered more than residents of other States who served, so that the latter would not deserve the benefits a State bestows for national military service."[163] The statute's categorical distinctions of residency at the time of entering military service and serving during a wartime period were therefore needless to accomplish the government's professed goals.[164]

Similarly, the Chief Justice objected to the law's favorable treatment for veterans who served on active duty somewhere in the world—not necessarily in an area where combat was taking place—during a period of war.[165] New York State argued that this preference system encouraged residents to enlist in the armed forces "during times of war."[166] However, Chief Justice Burger pointed out that the determination of the dates that constituted "wartime" typically involved a retrospective legislative act.[167] For instance, legislation establishing the commencement date of the Vietnam era was enacted three years after hostilities in Southeast Asia began.[168] Lawmakers later decided that March 29, 1973, represented the ending date of the Vietnam era, but then subsequently moved the concluding date of this wartime period to May 7, 1975.[169] Equivalent legislative confusion existed regarding setting the precise dates of the "Korean Conflict."[170] Based on this pattern of determining the exact dates of wartime after the war had started (and, at times, changing the dates after the war had ended), Chief Justice Burger concluded that "[i]n many cases a New York resident entering military service will have no idea whether he or she will be entitled to the preference following a successful tour of duty and honorable discharge."[171] Without clear and consistent parameters regarding the beginning and ending dates of wartime service, the

162 *Id.* at 915.
163 *Id.* at 914.
164 *Id.* at 912–16.
165 *Id.* at 913–14.
166 *Id.* at 913.
167 *Id.* at 913–14.
168 *Id.* at 913.
169 *Id.*
170 *Id.* at 913–14.
171 *Id.* at 913.

government could not rationally connect this preference-based program with statewide wartime recruiting efforts.[172]

In dissent, Justice O'Connor and Justice Stevens insisted that their colleagues in the Court's majority had gone out of their way to invalidate this statute as a violation of the Equal Protection Clause.[173] Justice Stevens asked,

> If a State should grant a special bonus to fighter pilots who are residents at the time of enlistment, to those who fought in the Battle of Midway, or perhaps just to the few who received the Congressional Medal of Honor—would it violate the Equal Protection Clause to deny bonuses to comparable veterans who moved into the State after the end of the war? I think not, even though the reasoning in the opinions supporting the judgment would apply to each of those cases as well as it does to [the New Mexico property tax exemption decision] and to this case.[174]

The implications of the dissenters' statements were blunt: the Court had engaged in far deeper scrutiny than what was legally necessary.[175] Rational links existed between the state's aims and the classifications established within the civil-service preference law, but the Court's majority had rejected the conventionally deferential form of rational basis review that would have recognized these connections and upheld the statute.[176]

Thus, while the sample size of such decisions is small, the door remains undoubtedly ajar for the United States Supreme Court (and other courts) to apply rational basis with bite to Equal Protection Clause cases involving classifications of veterans.[177] Between the precedents established by these veterans-specific opinions and the trends identified within the broader array of cases in which the Supreme Court has used rational basis with bite, the chance of a state action that discriminates among various classes of veterans running afoul of the Equal Protection Clause is greater than one might initially expect.[178] Against this backdrop, we now examine the potential Equal Protection Clause implications of the categorizations that commonly occur in the context of Veterans Treatment Courts, evaluating whether these classification-

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172 *Id.* at 913–14.

173 *See id.* at 916–25 (Stevens, J., and O'Connor, J., dissenting).

174 *Id.* at 918 (Stevens, J., dissenting).

175 *See id.* at 918, 920–25 (Stevens, J., and O'Connor, J., dissenting).

176 *See supra* note 173.

177 *See supra* notes 143–49, 158–72, and accompanying text.

178 *See id.*

based distinctions for justice-involved veterans may fail to satisfy rational basis review.

IV
POTENTIAL EQUAL PROTECTION VIOLATIONS IN VETERANS TREATMENT COURTS

As noted earlier, the most obvious classification scheme that Veterans Treatment Courts employ—separating veterans from nonveterans within the criminal justice system—seems to pass the rational basis test with ease.[179] As Veterans Treatment Courts engage in the process of categorically accepting certain justice-involved veterans and rejecting others, however, Equal Protection Clause violations could emerge, particularly if a court were to review the classification-based distinctions using rational basis with bite.[180] This section explores some of the more commonplace classification lines that Veterans Treatment Courts draw and evaluates their potential to withstand an Equal Protection Clause–based attack.

A. Combat Veterans vs. Noncombat Veterans

Some Veterans Treatment Courts accept only veterans who can prove that they served on active duty in a combat theater.[181] Typically, the rationale for such a distinction is simple: the belief that combat veterans experience more difficult conditions of service than noncombat veterans and therefore encounter greater physical and mental barriers when readjusting from military life to civilian life.[182] For example, given the enhanced daily strain that combat imposes upon a service member's life, one could argue that combat veterans are more likely to suffer from post-traumatic stress disorder (PTSD) than noncombat veterans.[183] Considering the physical challenges of combat

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179 Merriam, *supra* note 24.

180 *See supra* Part III.

181 *See, e.g.*, Robert T. Russell, *Veterans Treatment Courts*, *in* ATTORNEY'S GUIDE TO DEFENDING VETERANS IN CRIMINAL COURT 515, 522 (Brockton D. Hunter & Ryan C. Else eds., 2014).

182 Jeffrey Lewis Wieand, Jr., Note, *Continuing Combat at Home: How Judges and Attorneys Can Improve Their Handling of Combat Veterans with PTSD in Criminal Courts*, 19 WASH. & LEE J. CIV. RTS. & SOC. JUST. 227, 228–35, 256–61 (2012); McMichael, *supra* note 49.

183 *See* McMichael, *supra* note 49 ("I think that if they've been damaged as a result of their service . . . in a combat zone, that ethically and morally we need to respond by offering them special services to restore them to who they were."); Lisa K. Richardson, B. Christopher Frueh & Ronald Acierno, *Prevalence Estimates of Combat-Related PTSD: A*

service, one could also assert that combat veterans are more likely to sustain a traumatic brain injury (TBI).[184] The list of these beliefs is long, but each of these arguments ultimately reaches the same conclusion: combat veterans represent a special segment of the overall veteran population who deserve particularly careful attention and care from the state.[185]

Certainly, no one can reasonably deny that combat service by its very nature is strenuous and perilous.[186] No one can reasonably argue about whether a combat veteran faces the constant potential of severe injury or death simply by virtue of spending every day inside a war zone.[187] Plenty of highly credible studies demonstrate the physical and mental cost of combat on veterans' lives, leaving no doubt that veterans who have served in combat merit attention and care from the government.[188]

It is difficult, however, to discern a rational reason why a noncombat veteran should never be eligible for entry into a Veterans Treatment Court. As Chief Justice Burger pointed out when describing Equal Protection Clause violations that required "wartime" service within the New York State civil service preference, a military member does not know whether he or she will serve in combat at the time of enlistment.[189] On the contrary, a service member takes the oath to protect and defend the Constitution of the United States against all enemies, foreign and domestic, without knowing what his or her future entails.[190] Even during a period when the United States is at war, the military may choose not to send a particular service member into a

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Critical Review, 44 AUSTL. N.Z. J. PSYCHIATRY 1, 4–12 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2891773/.

184 Charles W. Hoge et al., *Mild Traumatic Brain Injury in U.S. Soldiers Returning from Iraq*, 358 NEW ENG. J. MED. 453, 453–63 (2008).

185 *See, e.g.*, McMichael, *supra* note 49.

186 Carl A. Castro, Sara Kintzle & Anthony M. Hassan, *The Combat Veteran Paradox: Paradoxes and Dilemmas Encountered with Reintegrating Combat Veterans and the Agencies That Support Them*, 21 TRAUMATOLOGY 299, 299–301 (2015).

187 *See id.*

188 *See id.*

189 Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 913–14 (1986) (Burger, C.J., concurring).

190 Rich Galen, *Enemies Foreign and Domestic*, CNS NEWS (May 6, 2013, 4:54 AM), https://www.cnsnews.com/blog/rich-galen/enemies-foreign-and-domestic ("Every . . . commissioned officer (civilian and military) in federal service as well as every enlisted service member takes an oath that requires they promise to 'support and defend the Constitution of the United States against all enemies, foreign and domestic . . . .'").

combat theater—even if the service member asks for a combat assignment.[191] A military member is wholly subject to the orders of his or her superior officers, and these decisions from a service member's commanders—decisions that are presumably made for the good of the military overall—may keep that service member from ever setting foot within the perimeter of a combat zone.[192]

Nevertheless, a lack of combat service does not inherently signify that a particular veteran enjoyed an easy military career.[193] A service member stationed at Dover Air Force Base, tasked with unloading the flag-covered caskets of his or her deceased comrades from planes and wheeling them to the hanger where the grieving family members are waiting for their loved one's coffin to arrive, could be a prime candidate for suffering from PTSD based on repeated traumatic experiences.[194] A military member conducting unmanned drone strikes on targets in Afghanistan may be physically sitting at a base in the Nevada desert but, knowing that any wrong move at any time could potentially kill or maim an innocent bystander, he or she may be sustaining as much cumulative stress as a service member stationed in Afghanistan.[195] A mission such as Operation Unified Response, the humanitarian effort in the aftermath of the 2010 earthquake that devastated Haiti, involved no entry into an officially designated combat theater, but the military members involved in the operation performed plenty of jobs that

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191 *See, e.g.*, Nathan Eckman, *What It Means to Be a Veteran Without the Experience of War*, TASK & PURPOSE (Aug. 12, 2016, 5:15 AM), https://taskandpurpose.com/means-veteran-without-experience-war/.

192 *See, e.g.*, *id.* ("But the idea that only warriors or those directly affected by war in obvious ways can speak to war's effects with authority isn't true. In many respects the difference between those who served like I did was a matter of luck. We signed the same contract, shipped off to the same training grounds and entered similar units.").

193 *See supra* notes 190–93 and accompanying text.

194 Rachel Martin, *At Dover Air Force Base, Bringing Home the Fallen with Grief and Joy*, NPR (May 24, 2015), https://www.npr.org/2015/05/24/408531645/at-dover-air-force-base-bringing-home-the-fallen-with-grief-and-joy. *See* Robert J. Ursano et al., *Post-traumatic Stress Disorder and Identification in Disaster Workers*, 156 AM. J. PSYCHIATRY 353, 354 (1999); Mark Thompson, *PTSD Also Happens Far from the Front*, TIME (Mar. 30, 2011), http://nation.time.com/2011/03/30/ptsd-also-happens-far-from-the-front/.

195 Pratap Chatterjee, *A Chilling New Post-Traumatic Stress Disorder: Why Drone Pilots Are Quitting in Record Numbers*, SALON (Mar. 6, 2015, 12:30 AM), https://www.salon.com/2015/03/06/a_chilling_new_post_traumatic_stress_disorder_why_drone_pilots_are_quitting_in_record_numbers_partner/; James Dao, *Drone Pilots Are Found to Get Stress Disorders Much as Those in Combat Do*, N.Y. TIMES (Feb. 22, 2013), https://www.nytimes.com/2013/02/23/us/drone-pilots-found-to-get-stress-disorders-much-as-those-in-combat-do.html; Sarah McCammon, *The Warfare May Be Remote but the Trauma Is Real*, NPR (Apr. 24, 2017, 2:40 PM), https://www.npr.org/2017/04/24/525413427/for-drone-pilots-warfare-may-be-remote-but-the-trauma-is-real.

involved significant physical risk and exposure to the type of extensive devastation that could leave a veteran struggling to readjust to civilian life after returning home.[196] A noncombat service member who is physically assaulted by a fellow noncombat service member could face as many difficulties as a combat military member in reacclimating to a "normal" life after the assault occurs.[197]

Thus, it is erroneous to assume that combat veterans are the only class of veterans who deserve a heightened level of attention and care.[198] As the examples listed in the preceding paragraph illustrate, plenty of noncombat veterans have experienced traumas that are every bit as severe—and, at times, even more severe—than the traumas that combat veterans have sustained.[199] Every veteran's experience in the military is unique.[200] To paint all combat veterans and all noncombat veterans with such a broadly homogenizing brush is therefore a contradictory act.[201]

This segregation favoring combat veterans and excluding noncombat veterans might still satisfy the traditional rational basis test, given the extreme deference that this test gives to the government.[202] A more thorough inquiry under "rational basis with bite," however, could leave the state vulnerable to defeat by the Equal Protection Clause.[203] As demonstrated above, plenty of fault lines run through the generalization that combat veterans experience greater hardships and stresses during their military service and thus are the only class of

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196 Bennett Gore, *Can I Have PTSD if I Was Never in Combat?*, BLUESTEIN ATTORNEYS: BLOG (Nov. 3, 2016, 7:52 AM), http://info.bluesteinattorneys.com/can-i-have-ptsd-if-i-was-never-in-combat.

197 *See, e.g.*, Jon Corra, *4 Examples of Non-Combat PTSD*, VETERANS DISABILITY BLOG (Oct. 9, 2014), https://www.veterandisabilityblog.com/blog/4-examples-of-non-combat-ptsd/; Brian Adam Jones, *The Military's Problem with Sexual Assault Is Not a Data Problem*, TASK & PURPOSE (Dec. 9, 2014, 4:20 PM), https://taskandpurpose.com/militarys-problem-sexual-assault-not-data-problem/; *Non-Combat Women Military Veterans Describe How They Got PTSD*, USMC LIFE (Aug. 24, 2017), https://www.usmclife.com/2017/08/non-combat-women-military-veterans-describe-got-ptsd/.

198 *See supra* notes 190–97 and accompanying text.

199 *Supra* notes 190–93 and accompanying text.

200 Eckman, *supra* note 191.

201 *See id.*; *see also* Daniel M. Gade, *A Better Way to Help Veterans*, NAT'L AFF. (2013), https://www.nationalaffairs.com/publications/detail/a-better-way-to-help-veterans; Sebastian Junger, *How PTSD Became a Problem Far Beyond the Battlefield*, VANITY FAIR (June 2015), https://www.vanityfair.com/news/2015/05/ptsd-war-home-sebastian-junger.

202 *See supra* notes 93–95 and accompanying text.

203 *See supra* Part III.

veterans worthy to receive access to Veterans Treatment Courts.[204] Consequently, the government will have a difficult time articulating a rational basis for categorically excluding all noncombat veterans from the services that Veterans Treatment Courts provide, given that these courts are designed to provide a sustainable mechanism to assist veterans in their complete return to civilian life.[205]

Already, one Chief Justice of the United States Supreme Court has employed rational basis with bite when evaluating a government program that segregated "peacetime veterans" from veterans who served during a wartime period.[206] One could easily imagine other justices and judges following Chief Justice Burger's lead, especially as researchers devote an increasing level of long-overdue attention to the challenges that noncombat veterans confront.[207] In addition, discrimination against noncombat veterans is one of the factors that has historically increased the probability of the Supreme Court employing some form of rational basis with bite.[208] For example, this classification-based distinction is one of the factors that Holoszyc-Pimentel identified as triggering a more rigorous form of rational basis review.[209] Noncombat status is a type of immutable characteristic, as a service member is unable to control the decisions of his or her commanding officers.[210] Plenty of military members who want to serve in combat are never granted a combat assignment.[211] Given the overall lack of authority that service members possess in the decision of where they are stationed, discriminating against noncombat veterans in the context of access to Veterans Treatment Courts "suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[212] The fundamental nature of the right that is abridged by this discrimination—an absolute denial of access to a form of justice

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204 *See supra* notes 190–97 and accompanying text.

205 *See supra* Part I.

206 Att'y Gen. of New York v. Soto-Lopez, 476 U.S. 898, 913–14 (1986) (Burger, C.J., concurring).

207 *See supra* notes 190–200 and accompanying text.

208 *See supra* Part III; *infra* notes 214–17 and accompanying text.

209 Holoszyc-Pimentel, *supra* note 96, at 2078–99, 2102.

210 Eckman, *supra* note 191.

211 *Id.*

212 Holoszyc-Pimentel, *supra* note 96, at 2102 (quoting Plyer v. Doe, 457 U.S. 202, 217 n.14 (1982)).

that combat veterans are able to enjoy—further enhances the likelihood of a court applying rational basis with bite in these circumstances.[213]

Therefore, a reasonable probability exists that a court would employ rational basis with bite when evaluating an Equal Protection Clause–based challenge to this classification-based scheme. If a court engaged in a meaningful analysis of this policy, the court could plausibly make a determination that a ban on noncombat veterans entering Veterans Treatment Courts is not rationally related to a legitimate state interest. A Veterans Treatment Court that refuses to admit noncombat veterans thus risks having this divisive classification overturned on Equal Protection Clause grounds.

B. Honorable Discharges vs. Other Characters of Discharge

Many Veterans Treatment Courts accept only veterans who have received an honorable discharge from the Armed Forces.[214] The United States Department of Veterans Affairs (VA) excludes former military members possessing lower characters of discharge from many of their benefits, programs, and services.[215] As a result, Veterans Treatment Courts often determine that they cannot accept the cases of these individuals, as it will be harder to link them with medical care and other forms of assistance.[216] Furthermore, a state could also argue that given the limited resources available to operate a Veterans Treatment Court, certain exclusionary lines must be drawn.[217] Under this rationale, the government could assert that it makes sense to focus only on assisting the women and men who served honorably in the military, rather than

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213 *See id.*; *see also supra* Part I (describing the potential benefits of a justice-involved veteran entering Veterans Treatment Court rather than navigating the traditional criminal court process).

214 Baldwin, *supra* note 13, at 742.

215 *See* 38 U.S.C. § 101 (2012) (defining "veteran" as an individual who was discharged from active duty military service under conditions "other than dishonorable"). Therefore, individuals whose character of discharge does not match this definition are ineligible to receive disability compensation, nonservice-connected pension, education benefits under the G.I. Bill, vocational rehabilitation services, and other benefits and programs administered by the United States Department of Veterans Affairs.

216 Martin Kuz, *VA Policy Hinders Veterans Courts in Aiding Thousands of Vets with "Bad Paper*,*"* SAN ANTONIO EXPRESS-NEWS (Sept. 1, 2017), https://www.expressnews.com/news/local/article/VA-policy-hinders-veterans-courts-in-aiding-12167681.php (updated Sept. 14, 2017, 10:59 AM).

217 *See* Moga, *supra* note 28 ("See, many [Veterans Treatment Courts] exclude you if you have a less than honorable discharge and you're not entitled to VA treatment. There's always reasons to exclude people, and that's not for me to say; that's up to every court.").

offering an alternative to incarceration to someone who received a lower form of discharge.[218] The state could even allege that a veteran who previously caused some form of trouble while serving in the military, thus leading to the less-than-honorable discharge, is more likely to commit another criminal offense. In the state's view, this propensity to commit crime removes the need for the judicial system to grant that individual a chance to complete a Veterans Treatment Court program in lieu of incarceration.[219]

Both of these rationales for accepting only honorably discharged veterans are flimsy.[220] Plenty of Veterans Treatment Courts across the nation accept veterans with less-than-honorable characters of discharge.[221] None of these courts were bankrupted by accepting veterans for whom the VA will not provide certain benefits and services.[222] Importantly, the VA has recently relaxed its historic rigidity regarding discharge classification and has begun offering some benefits, programs, and services to veterans who hold lower characters of discharge.[223] Beginning in July 2018, veterans with characters of service other than honorable—the most severe form of administrative discharge from the armed forces—were able to receive mental health care at all VA medical facilities for a minimum of ninety days.[224] If the VA determines that the veteran's mental health condition was caused or exacerbated by his or her active duty military service, then the VA may continue the treatment beyond the ninety-day window.[225] Regarding financial compensation for veterans who were injured while serving in the military or who currently receive an extremely low income, the VA holds the discretion to grant financial benefits to an

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218 Kuz, *supra* note 216.

219 Baldwin, *supra* note 13, at 730.

220 *See infra* notes 224–51 and accompanying text.

221 Baldwin, *supra* note 13, at 742 (showing that approximately half the nation's Veterans Treatment Courts do not automatically bar justice-involved veterans with a character of service that is lower than honorable).

222 Indeed, some of the leaders of these courts demonstrate an impressive level of stability. *See, e.g.*, Russell, *supra* note 181; Moga, *supra* note 28; *Veterans Treatment Courts Are a "Game Changer" and Easy to Implement, Judges Say*, A.B.A. (Aug. 15, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/08/veterans_treatmentc.html.

223 *See supra* notes 219–22 and accompanying text.

224 Jonathan Kaupanger, *Veterans with Other-than-Honorable Discharge Now Able to Get VA Mental Health Help*, CONNECTING VETS (Jan. 17, 2018 1:26 PM), http://connectingvets.com/articles/veterans-other-honorable-discharge-now-able-get-va-mental-health-help.

225 *Id.*

individual with a lower character of discharge, as long as the VA determines that the specific circumstances leading to that veteran's discharge were "other than dishonorable."[226] If the VA determines that such a veteran suffers from disabilities that are connected to that veteran's military service, the veteran will receive free medical care from the VA for those medical conditions.[227] Veterans Service Officers on the court's treatment team can assist veterans in navigating these systems to obtain all the VA benefits, programs, and services that they are eligible to receive.[228]

Additionally, community providers frequently can fill any gaps of treatment and care that a veteran with a less-than-honorable discharge cannot receive from the VA.[229] Successful Veterans Treatment Courts cultivate strong relationships with community-based organizations that can assist justice-involved veterans in various areas.[230] A determination that a veteran is ineligible for any VA services does not inherently make that veteran ineligible from other service providers.[231] As a result, the government cannot justify an absolute ban on accepting veterans with discharges that are less than honorable into a Veterans Treatment Court by claiming that none of these veterans have any

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226 *See* 38 U.S.C. § 101(2) (2012); 38 C.F.R. § 3.12 (2012). The phrasing of these provisions allows a veteran with a character of discharge that is lower than honorable to still remain eligible for compensatory benefits from the VA. For instance, a veteran with a general discharge under honorable conditions is still eligible for disability compensation benefits or pension benefits from the VA, even though that veteran's character of discharge is lower than an honorable discharge. A veteran with a discharge other than honorable may remain eligible for these financial benefits, too, as long as the VA's adjudicators find that the reasons for the veteran's discharge were not dishonorable in nature.

227 Alex Horton, *Busting Myths About VA Health Care Eligibility*, VANTAGE POINT: OFFICIAL BLOG U.S. DEP'T VETERANS AFF. (Nov. 18, 2010, 4:56 PM), https://www.blogs.va.gov/VAntage/586/busting-myths-about-va-health-care/.

228 *See supra* notes 41–42 and accompanying text (discussing the Veterans Treatment Court's role as a "one-stop shop" for veterans to work with subject-matter experts in obtaining the benefits that they earned by virtue of their military service).

229 Moga, *supra* note 28.

230 Notably, one of the ten key components of Veterans Treatment Courts published by the National Clearinghouse for Veterans Treatment Courts at the National Association of Drug Court Professionals calls on Veterans Treatment Courts to establish "partnerships among Veterans Treatment Court, Veterans Administration, public agencies, and community-based organizations [which] generates local support and enhances Veteran Treatment Court effectiveness." *The Ten Key Components of Veterans Treatment Courts*, NAT'L DRUG CT. RESOURCE CTR. (2012), https://ndcrc.org/resource/10-key-components-for-veterans-treatment-courts/. This underscores the fact that a successful Veterans Treatment Court should never rely upon the VA alone when developing a network of services to assist justice-involved veterans. *See id.*

231 Moga, *supra* note 28.

reasonable hope of receiving the medical treatment and other forms of care that they need.[232]

Similarly, the government would have a difficult time justifying an assertion that only veterans with honorable discharges deserve the second chance that Veterans Treatment Courts provide.[233] Abundant evidence demonstrates that not all less-than-honorable discharges are created equal.[234] Some veterans carry a lower character of discharge solely because they are gay or lesbian, a sexual orientation that the Department of Defense deemed to be "incompatible with military service" for many years.[235] Others received a less-than-honorable discharge due to an act of retaliation by their commanding officer(s).[236] Still others were discharged with a less-than-honorable characterization after the military caught them using illegal drugs or drinking in excess—steps that these service members were taking solely to alleviate severe stresses that they were encountering as a result of their military service.[237] On some occasions, military recruiters enlist men and women with medical conditions that threaten their ability to succeed in the Armed Forces, only to result in that service member receiving a less-than-honorable discharge when that preexisting condition manifests in a negative way during military service.[238] Another all-too-common set of circumstances involves

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232 *Id.*

233 *See infra* notes 235–41 and accompanying text.

234 *See, e.g.*, Marcy L. Karin, *"Other than Honorable" Discrimination*, 67 CASE W. RES. L. REV. 135, 158–73 (2016).

235 Brian Turner, *The End of "Don't Ask Don't Tell" Edited by J. Ford Huffman and Tammy S. Schultz*, WASH. POST (Aug. 17, 2002), https://www.washingtonpost.com/opiniion/the-end-of-dont-ask-dont-tell-edited-by-j-ford-huffman-and-tammy-s-schultz/2012/08/17/6e9adc08-dbd5-11e1-9974-5c975ae4810f_story.html?noredirect=on&utm_term=.6c104d1f3a6f; *see* Jennifer McDermott, *Few Veterans Expelled Under "Don't Ask" Policy Seek Remedy*, MILITARY TIMES (June 24, 2016), https://www.militarytimes.com/veterans/2016/06/24/few-vets-expelled-under-don-t-ask-seek-remedy/.

236 *See, e.g.*, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors*, HUMAN RIGHTS WATCH (May 19, 2016), https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors.

237 Christine Stuart, *PTSD Vets Say Navy Dropped Ball on Boards Meant to Help Them*, COURTHOUSE NEWS SERV. (Mar. 2, 2018), https://www.courthousenews.com/ptsd-vets-say-navy-dropped-ball-on-boards-meant-to-help-them/; *see* Karin, *supra* note 234, at 165–66.

238 *See Troop Discharges High for "Pre-Existing" Psychiatric Disorders*, FOX NEWS (Dec. 16, 2010), http://www.foxnews.com/politics/2010/12/16/troop-discharges-high-pre-existing-psychiatric-disorders.html (last updated Dec. 24, 2015). The author of this Article has personally represented veterans in cases where recruiters urged individuals to conceal the existence of diagnosed mental health conditions in order to gain entry into a branch of the Armed Forces.

veterans who received a discharge that was less than honorable because of medical conditions caused or exacerbated by that veteran's military service.[239] Between 2011 and 2015 alone, more than 57,000 service members suffering from PTSD or from a traumatic brain injury received less-than-honorable discharges when the symptoms of these conditions caused them to act in a manner deemed insubordinate or otherwise detrimental to the good of the military.[240]

In such circumstances, it makes little sense to punish the veteran by denying him or her access to a Veterans Treatment Court.[241] Doing so is tantamount to penalizing the affected service member for his or her sexual orientation, or perpetuating the retaliatory act committed by the commanding officer, or preventing the veteran from obtaining assistance because of the nature of his or her disability—even if that disability were caused or worsened by military service itself.[242] Such a policy of discrimination does not appear to advance any legitimate state interest.[243]

Furthermore, a uniform ban on accepting veterans with less-than-honorable discharges undermines the government's original interest in establishing Veterans Treatment Courts.[244] These courts exist because

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239 Dan Lamothe, *Thousands of U.S. Troops Suffering from Trauma Were Separated from the Military for Misconduct, Report Finds*, WASH. POST (May 17, 2017), https://www.washingtonpost.com/news/checkpoint/wp/2017/05/17/thousands-of-u-s-troops-suffering-from-trauma-were-separated-from-the-military-for-misconduct-report-finds/?noredirect=on&utm_term=.5e6b60d82a79.

240 Dave Philipps, *Wounded Troops Discharged for Misconduct Often Had PTSD or T.B.I.*, N.Y. TIMES (May 16, 2017), https://www.nytimes.com/2017/05/16/us/military-misconduct-ptsd.html.

241 Merriam, *supra* note 24, at 740–43.

242 *Cf.* Karin, *supra* note 234 (providing a similarly compelling argument for permitting veterans with other-than-honorable discharges to receive the same legal protections regarding their rights to reemployment in their civilian jobs as honorable discharged veterans).

243 *See Booted*, *supra* note 236 ("Sexual assault survivors who seek a record change through the service Boards face various hurdles that severely limit their due process rights. . . . Though service members with bad discharges have their benefits and reputations at stake, their cases are afforded very limited review."); Dave Philipps, *Pattern of Misconduct: Psychological Screenings Prompt Call for More Reforms*, GAZETTE (Oct. 7, 2013), https://cdn.csgazette.biz/soldiers/day4.html ("Tossing people out for minor infractions without care for the very issues that might have caused them to act up? It's really disturbing.").

244 Merriam, *supra* note 24, at 740 ("Beneath the pronouncements by VTC [Veterans Treatment Court] creators and proponents that VTCs should be open only for those who served honorably lies the reality that many veterans with other than honorable conditions characterizations need the assistance offered by VTCs as much as veterans with honorable characterizations who find themselves accused of criminal misconduct. Indeed, such

the government recognized the unique hardships that an individual can encounter during military service and throughout the transition back to civilian life.[245] These challenges are not eradicated simply because a person's discharge paperwork does not contain the word "honorable."[246] On the contrary, a veteran who receives such a discharge often faces even greater obstacles in returning to civilian life due to legal barriers and widespread social stigmatization associated with a "bad paper" separation.[247] If the government legitimately wishes to use Veterans Treatment Courts as a vehicle for rehabilitating justice-involved veterans so they can live stable and productive lives as civilians, then the government should not automatically reject any veteran with a less-than-honorable discharge.[248]

Again, the government's insubstantial reasons for banning all veterans with a less-than-honorable discharge from Veterans Treatment Courts still might prevail under the deferential, traditional rational basis test.[249] However, a government action that discriminates against all veterans with less-than-honorable discharges may be another area in which a court decides to apply rational basis with bite.[250] Gerald Kerska determined that the United States Supreme Court was more likely to use some form of rational basis with bite when the government policy under review involved "the targeting of a distinct and disfavored social group."[251] Here, the decision to ban all veterans with less-than-honorable discharges targets a particular group of individuals who are well-known to be socially stigmatized.[252] Eyer found that the Court uses rational basis with bite most frequently in cases that blatantly implicate "group or rights-based concerns."[253] This rationale can apply to a situation where all veterans with less-than-honorable discharges are banned without any further review from a

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veterans may need it more, because their spiral of decline from injury to substance abuse to minor offenses to significant crime may be further along.").

245 *See supra* Part I.

246 Moga, *supra* note 28.

247 Karin, *supra* note 234; *Booted*, *supra* note 236; McDermott, *supra* note 235; Philipps, *supra* note 243.

248 *See supra* notes 220–47 and accompanying text.

249 *See supra* Part II.

250 *See supra* Part III.

251 Kerska, *supra* note 127, at 1720.

252 Karin, *supra* note 234; *Booted*, *supra* note 236; Lamothe, *supra* note 239; McDermott, *supra* note 235; Philipps, *supra* note 243.

253 Eyer, *supra* note 132, at 576.

Veterans Treatment Court.[254] Holoszyc-Pimentel's survey pointed out that the Court tends to employ rational basis with bite to categorical distinctions based largely upon immutable characteristics.[255] As demonstrated above, ample evidence shows that immutable characteristics can cause a veteran's less-than-honorable discharge, including that individual's sexual orientation and the symptoms of that veteran's disabilities.[256]

This Article does not argue that Veterans Treatment Courts should simply ignore a justice-involved veteran's military record when deciding whether to accept that individual into the court's treatment program. Indeed, plenty of veterans receive less-than-honorable discharges for reasons that could rationally demonstrate that they are not an appropriate fit for a Veterans Treatment Court, such as a lengthy history of criminal offenses committed while in military service. However, Veterans Treatment Courts should make such determinations on a case-by-case basis, assessing the true reasons why the veteran received a lower character of discharge. If a court were to thoroughly examine the government's reasons for rejecting all such veterans from a Veterans Treatment Court, it could reasonably determine that this absolute ban is not rationally related to any legitimate state interest and therefore find that this classification-based exclusion violates the Equal Protection Clause.

C. Nexus Requirements

Some Veterans Treatment Courts require a justice-involved veteran to demonstrate a specific link between military service and the charged offense before the court will even consider admitting that veteran into the court's treatment program.[257] At first glance, the reason for this prerequisite seems quite sensible: an individual wishing to use a Veterans Treatment Court's special benefits must prove that some

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254 *Id.*

255 Holoszyc-Pimentel, *supra* note 96, at 2078–99, 2102.

256 *See supra* notes 233–40 and accompanying text.

257 BUREAU OF JUSTICE ASSISTANCE, VETERANS TREATMENT COURTS: 2015 SURVEY RESULTS 14 (2015), https://www.american.edu/spa/jpo/initiatives/drug-court/upload/Veterans-Treatment-Courts-2015-Survey-Results.pdf (stating that approximately one-fifth of the Veterans Treatment Courts responding to the survey required a nexus between the justice-involved veteran's charged offense(s) and his or her military experiences); Eleanor C. Sinnott, *Boston Veterans Treatment Court: A Team Dynamic*, BOS. B.J. (Oct. 25, 2016), https://bostonbarjournal.com/2016/10/25/boston-veterans-treatment-court-a-team-dynamic/; *see* Cartwright, *supra* note 3, at 308; Jones, *supra* note 15, at 318.

experience unique to the military led to that individual committing a crime.[258] Proponents of such mandates argue that without this causal nexus requirement, no rational reasons exist for offering justice-involved veterans any services that are not also provided to other similarly situated criminal defendants.[259]

Causal nexus requirements for veterans run into trouble when exploring the logistics of determining that such a causal link exists.[260] In theory, the court could demand that the veteran prove that he or she has a disability that the VA declared to be caused or aggravated by military service, and the court could further insist that the veteran link this service-connected disability to the charged offense(s).[261] In reality, though, such a method is not plausible given the lengthy waiting periods that many veterans endure to receive a disability rating from the VA and the high rate of inaccurate initial decisions that the VA renders in service-connected disability compensation claims.[262] Veterans who could benefit greatly from a Veterans Treatment Court's assistance should not face denial of its services solely because another government agency has yet to issue an accurate assessment of the links between the veteran's wounds and his or her service in the armed forces.[263]

Taking off the table exclusive reliance upon the VA's determination of service-connected disabilities, the picture of how to screen for a

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258 Jones, *supra* note 15, at 317–18 (warning that failing to establish a causal nexus requirement could turn justice-involved veterans into an unwarranted "special legal class" of defendants in criminal proceedings).

259 *Id.* at 318 (discussing multiple state-level American Civil Liberties Union reports about Veterans Treatment Court eligibility that raised this same concern); *see also* Cartwright, *supra* note 3, at 316 ("[T]he ideal program would allow diversion for a broader range of crimes, but require a tighter nexus between the criminal behavior and the defendant's combat experience.").

260 *See infra* notes 258–64 and accompanying text.

261 Thankfully, this does not appear to be the route that most Veterans Treatment Courts are taking when establishing causal nexus requirements for justice-involved veterans. BUREAU OF JUSTICE ASSISTANCE, *supra* note 257 (describing several forms of proof other than a VA award letter that most Veterans Treatment Courts will accept as evidence of a nexus between military service and the charged offense(s)).

262 *See, e.g.*, Leo Shane III, *Once a Fixed Issue, the VA Disability Claims Backlog Is on the Rise Again*, MILITARY TIMES (Mar. 24, 2017), https://www.militarytimes.com/news/pentagon-congress/2017/03/24/once-a-fixed-issue-the-va-disability-claims-backlog-is-on-the-rise-again/.

263 *See* Alan Zarembo, *VA Is Buried in a Backlog of Never-Ending Veterans Disability Appeals*, L.A. TIMES (Nov. 23, 2015), http://www.latimes.com/nation/la-na-veterans-appeals-backlog-20151123-story.html (demonstrating the multifaceted problems that the VA's backlog of unresolved disability compensation claims is already causing for veterans across the nation).

nexus between military service and the charged offense(s) becomes even murkier.[264] Courts could conceivably open their evidentiary doors to any forms of medical proof linking the veteran's criminal action with a disability caused or worsened by that veteran's military experiences.[265] Yet with recent studies demonstrating that private-sector medical care providers commonly lack any familiarity with military culture and service-connected health conditions, this method ultimately suffers from the same flaws as relying entirely upon the VA for service-connection determinations.[266] Given the high likelihood of a medical professional with little-to-no military cultural competency providing an inaccurate assessment regarding a nexus between a veteran's disability and that veteran's military service, a Veterans Treatment Court cannot rationally rely upon such an assessment as a reason to automatically bar certain justice-involved veterans from its courtrooms.[267]

As with the other classification-based schemes discussed in this section, a court applying the traditional, deferential rational basis test will probably leave these causal nexus requirements unscathed.[268] Plenty of case law assures the government that a method of state-imposed classification does not need to fit neatly—or, at times, even accurately—with the government's purpose for establishing the discriminatory standard.[269] If a court engaged in the more rigorous scrutiny of rational basis with bite, however, the above examples show that a court could sensibly find that a Veterans Treatment Court's causal nexus requirement is not rationally related to the state's interest of finding only "worthy" candidates for the court's treatment program.[270]

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264 *See infra* notes 266–67 and accompanying text.

265 BUREAU OF JUSTICE ASSISTANCE, *supra* note 257 (showing the disparate forms of proof that various Veterans Treatment Courts deem acceptable for proving a nexus between the charged offense and military service).

266 *See, e.g.*, TERRI TANIELIAN ET AL., READY OR NOT? ASSESSING THE CAPACITY OF NEW YORK STATE HEALTH CARE PROVIDERS TO MEET THE NEEDS OF VETERANS (2018), https://nyshealthfoundation.org/wp-content/uploads/2018/02/RAND-Ready-or-Not-Veterans-Care-March-2018.pdf.

267 *See id.* at 46 ("[W]e discovered that most [healthcare providers] also know little about the military or veterans, are not routinely screening for conditions common among veterans, and are unfamiliar with VA and initiatives to expand access to community-based care for VA-enrolled veterans.").

268 *Supra* Part II.

269 *See supra* notes 79–83, 96–100, and accompanying text.

270 *Supra* Part III.

Regarding the probability of a court using rational basis with bite, one can return again to the seemingly enhanced likelihood of courts applying this heightened scrutiny when the classification is based on something entirely beyond the adversely affected group's control.[271] A child seeking to attend a public school is powerless to control the citizenship of his or her parents.[272] A person with disabilities cannot stop municipal leaders from amending the city's housing code.[273] By the same token, a veteran seeking a medical opinion or a determination from the VA holds no control whatsoever over the doctor's competency in stating that a nexus exists between that veteran's disability and that veteran's military service.[274] No veteran possesses power over a medical professional's awareness of the most current research about the connections between certain medical conditions and certain military experiences.[275] Likewise, no veteran can control the final determination of a VA ratings team employee—an individual who likely possesses no medical training—regarding whether that veteran's disabilities were caused or exacerbated by his or her military service.[276] Therefore, it logically follows that a veteran should not become disadvantaged within the criminal justice system simply because his or her doctor failed to provide an accurate assessment of the potential cause of the veteran's disabling conditions or because the veteran received a poor-quality review from a VA employee. Furthermore, gross injustices would result if justice-involved veterans who legitimately could not afford to receive a medical examination were penalized by being barred from a Veterans Treatment Court's assistance—including services that would obtain the medical treatment and care that those veterans need.

Of course, a Veterans Treatment Court may use the presence or absence of a service-connected disability as one of several criteria for determining a justice-involved veteran's eligibility. Yet these courts go too far when they establish an absolute ban on all veterans who cannot prove that they have a service-connected disability that caused them to commit the crime(s) that brought them into contact with the criminal justice system. This automatic rejection of any veteran who cannot satisfy a causal nexus requirement is not rationally related to a

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271 Holoszyc-Pimentel, *supra* note 96, at 2102.

272 McGowan, *supra* note 123, at 389–94.

273 *Id.*

274 *See supra* notes 256–61.

275 *See* TANIELIAN ET AL., *supra* note 266, at 46.

276 Zarembo, *supra* note 263; Shane III, *supra* note 262.

legitimate government interest and thus could be found in violation of the Equal Protection Clause by a court applying rational basis with bite.

D. Offense-Specific Classifications

Virtually all Veterans Treatment Courts refuse to permit veterans charged with certain crimes to participate in their treatment programs.[277] Depending on the jurisdiction, the list of barred crimes ranges broadly, potentially encompassing everything from homicide and rape to lower-level assault crimes, weapons possession cases, and drunken driving offenses.[278] The rationales behind these offense-specific classifications focus on the societal determination that certain types of crimes do not warrant a second chance for the perpetrator, regardless of any other underlying circumstances.[279]

In many instances, these crime-specific automatic bans will easily satisfy any Equal Protection Clause review.[280] Public safety justifications should suffice for the majority of offenses that Veterans Treatment Courts customarily reject.[281] One can reasonably see little chance of a successful Equal Protection Clause challenge to a government action that prevents justice-involved veterans who are charged with homicide, kidnapping, rape, acts of terrorism, and other similarly heinous crimes from accessing Veterans Treatment Court services.[282] Likewise, rationales that focus on guarding against repeat

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277 Arno, *supra* note 8, at 1047–48; Baldwin, *supra* note 13, at 742; Cartwright, *supra* note 3, at 311–12; Adam Meyer, *Veterans Treatment Courts in Kentucky: Their Successes, Their Shortcomings, and What Kentucky Can Do to Further Rehabilitate Veterans*, 105 KY. L.J. ONLINE (Nov. 22, 2017), http://www.kentuckylawjournal.org/index.php/2017/11/22/veterans-treatment-courts-in-kentucky-their-success-their-shortcomings-and-what-kentucky-can-do-to-further-rehabilitate-veterans-2/; Bryant Jackson-Green, *Veterans Courts: How Illinois Can Help Its Incarcerated Vets*, ILL. POL'Y (Nov. 13, 2015), https://www.illinoispolicy.org/veterans-courts-how-illinois-can-help-its-incarcerated-veterans/.

278 Baldwin, *supra* note 13, at 742; Shah, *supra* note 6, at 86, 88, 95–96. Courts that do not accept violent offenders echo the original principles established by the Veterans Treatment Court in Buffalo in 2008. Meyer, *supra* note 277. Barring most or all justice-involved veterans charged with a violent crime also mirrors one of the bedrock principles of many Drug Treatment Courts. Arno, *supra* note 8, at 1055–56.

279 *See, e.g.*, Kravetz, *supra* note 52.

280 *See supra* notes 277–79.

281 *See, e.g.*, Belzer, *supra* note 103, at 345, 350–51 (discussing the enhanced likelihood of success for the government in Equal Protection Clause cases where objective matters of public safety are at issue).

282 Already, plenty of Veterans Treatment Courts exclude justice-involved veterans who are charged with such crimes without facing any notable Equal Protection Clause

offenders who can pose a danger to society will probably also defeat Equal Protection Clause arguments regarding Veterans Treatment Courts that refuse to accept cases of justice-involved veterans with multiple prior convictions.[283]

Under some circumstances, however, these absolute barriers become considerably harder to rationally justify. One of the most problematic areas involves Veterans Treatment Courts that refuse to accept cases involving the illegal possession of a firearm, even when there is no violence or threat of violence involved.[284] Certainly, the illegal possession of a weapon is not a matter that anyone should ever take lightly, but special circumstances related to military service might make a veteran facing a simple weapons possession charge an ideal candidate for a Veterans Treatment Court.[285] In the military, carrying a loaded firearm is often a mandatory condition of daily readiness.[286] For women and men who serve in a combat zone, the presence of a weapon on their person is a particularly crucial act of survival.[287] Requiring a veteran to immediately snap back to civilian life where possessing a weapon on a daily basis is no longer needed—or, in some cases, no longer allowed at all—may not be a reasonable expectation for all veterans.[288] In the words of one New York attorney who

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challenges. *See* Baldwin, *supra* note 13, at 742; Meyer, *supra* note 277; Shah, *supra* note 6, at 88; Jackson-Green, *supra* note 277.

283 *See* Nicole Richter, *A Standard for "Class of One" Claims Under the Equal Protection Clause of the Fourteenth Amendment: Protecting Victims of Non-Class Based Discrimination from Vindictive State Action*, 35 VAL. U. L. REV. 197, 209 n.86 (2000) (demonstrating the high historical likelihood of success for the government when employing public safety as a rationale for unequal treatment of individuals).

284 *See* U.S. DEP'T OF VETERANS AFF., VETERANS COURT INVENTORY 2016 UPDATE 4 (2017), https://www.va.gov/HOMELESS/docs/VJO/2016-Veterans-Court-Inventory-Update-VJO-Fact-Sheet.pdf (stating that one-fifth of the Veterans Treatment Courts in the United States currently accept only justice-involved veterans charged with misdemeanor offenses, a category that will likely exclude some, if not all, veterans facing illegal possession of firearms charges); Amy Fairweather, Guy Gambill & Glenna Tinney, *Veterans in the Justice System: Treatment of Violent Offenders*, DAILY J. (Aug. 17, 2010), https://www.bwjp.org/assets/documents/pdfs/veterans_in_the_justice_system_treatment_of_violent_offenders.pdf (discussing the ongoing debate among justice system professionals and veterans' advocates regarding whether to prohibit veterans charged with illegal possession of firearms from Veterans Treatment Courts).

285 *See* Cartwright, *supra* note 3, at 309.

286 *See id.* at 300 (listing "carrying weapons at all times" as one of the behaviors which, while often necessary on active duty, can lead a veteran into trouble after discharge).

287 *See id.*

288 *See* Arno, *supra* note 8, at 1061 (quoting Joel Warner, *Can a Veterans Court Help Former GIs Find Justice Here at Home?*, WESTWORD (Feb. 4, 2010), http://westword.com/2010-02-04/news/can-a-veterans-court-help-former-gis-find-justice-here-at-hom/

previously served in combat, "Yesterday, when I was in uniform, not carrying my weapon with me meant disobeying my commanding officer. Today, as a newly discharged veteran, carrying my weapon with me can mean a Class C felony."[289]

Adding to the equation is the fact that hypervigilance and fear against unseen enemies are among the most common symptoms of PTSD.[290] Therefore, a veteran illegally possessing a weapon may not be willfully seeking to disobey the law and inflict violence, but rather might be using the "security blanket" of that weapon as a mechanism for coping with his or her PTSD-induced fears.[291] A veteran confronting these circumstances could benefit tremendously from the services and supports that the treatment team of a Veterans Treatment Court can provide.[292] Yet, this veteran would never receive the chance to access these services and supports if the Veterans Treatment Courts in his or her county automatically close their gates to all justice-involved veterans facing a weapons possession charge.[293] By imposing this absolute ban, these Veterans Treatment Courts would therefore contradict their own objectives of helping at-risk veterans successfully return to civilian society.[294]

A similar challenge appears when examining Veterans Treatment Courts that categorically bar any justice-involved veteran whose criminal offense involved some level of violence.[295] Without a doubt,

("The very skills these people are taught to follow in combat are the skills that are a risk at home.").

289 Art Cody, Deputy Dir., Veterans Def. Program, New York State Defenders Association, Continuing Legal Education Presentation for the New York State Bar Association (Nov. 7, 2016).

290 Reem Shaddad, *The Battle Within: Treating PTSD in Military Veterans*, AL-JAZEERA (Nov. 12, 2017), https://www.aljazeera.com/indepth/features/2017/11/battle-treating-ptsd-military-veterans-171111124254535.html.

291 Adrienne J. Heinz et al., *Firearm Ownership Among Military Veterans with PTSD: A Profile of Demographic and Psychosocial Correlates*, 181 MIL. MED. 1207, 1207–11 (2016).

292 Meyer, *supra* note 277 ("But it is precisely the defendants barred by this eligibility requirement that are often in desperate need of rehabilitation.").

293 *See id.*; *see also* Arno, *supra* note 8, at 1061.

294 Cartwright, *supra* note 3, at 312 ("[T]hat requirement [excluding justice-involved veterans for illegal possession of a firearm] might exclude a large number of veterans who are suffering from serious combat trauma."); Fairweather, Gambill & Tinney, *supra* note 284.

295 *Compare* Kravetz, *supra* note 52 (asserting that cases involving intimate partner violence are never appropriate matters for Veterans Treatment Courts), *with* Cavanaugh, *supra* note 4, at 486 (arguing that Veterans Treatment Courts should consider hearing a

the criminal justice system owes a societal obligation to never act flippantly toward any individual who inflicts a violent injury upon someone else.[296] Still, certain additional factors warrant consideration when the individual charged with a violent crime is a veteran.[297] In the words of one author,

> Military personnel train for and conduct violent missions to kill the enemy and achieve victory in support of national interests. The American military provides sophisticated training for combat that influences and shapes the psychology of the young warfighter from the moments of first entering active service. The impact and consequences of training and engagement in combat profoundly influence the attitudes and behavior of servicemembers, raise unique risk factors toward violence, and broadly affect military institutions and the services.[298]

Therefore, beginning in basic training and continuing throughout their entire military career, every veteran has received an extraordinarily emphatic indoctrination into the methods and necessities of using violence to accomplish finite objectives.[299] Without such intensive training methods, military members would not gain the high level of preparation necessary to survive and succeed in a hazardous environment.[300] In other words, the military's ability to defend this nation depends upon complete immersion into methods that train service members how to effectively fight and, when necessary, how to kill.[301] When a service member has to use the violent tactics that he or she learned during training to carry out an assigned mission in the real world, his or her level of comfort with using violence to achieve immediate objectives increases even more.[302]

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greater number of cases for justice-involved veterans charged with crimes involving violence).

296 U.S. DEP'T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 2 (2013) (listing the prevention of violence as one of the paramount goals of the American criminal justice system).

297 *See infra* notes 300–09 and accompanying text.

298 Stephen N. Xenakis, *At Risk for Violence in the Military*, 39 PSYCHIATRIC CLINICS NORTH AM. 623, 623–24 (2016).

299 *Id.*

300 Jason M. Callahan, *Why Civilians Don't Relate to Veterans*, TASK & PURPOSE (Nov. 12, 2015, 5:00 AM), https://taskandpurpose.com/why-civilians-dont-relate-to-veterans/.

301 *Id.*; Cartwright, *supra* note 3, at 309; Xenakis, *supra* note 298, at 623.

302 Cartwright, *supra* note 3, at 309 ("[M]any soldiers [and service members from all branches of the Armed Forces] learned in combat to remain hypervigilant and to respond to threats with violence. When a veteran returns home, these behaviors can escalate an everyday conflict into a violent confrontation.").

The lessons learned during these immersive trainings, and the eventual adoption of these violent tactics as a way to survive, do not automatically end on the date of a service member's discharge from the armed forces.[303] Instead, many veterans require significant time and treatment before they are able to reacclimate to a civilian society where the violent methods learned and used in the military now constitute crimes.[304] Therefore, it should come as no surprise that a veteran who is still struggling with this transition will respond violently when confronted with someone who is or appears to be acting in a threatening manner.[305] Ironically, when a veteran uses these skills taught by one arm of the government and responds violently, another arm of the government imposes a punishment that may haunt that veteran for the remainder of his or her life.[306]

Veterans Treatment Courts can serve as a lifeline for these justice-involved veterans, holding them accountable for their wrongful acts while simultaneously ensuring that they receive the individualized treatment and assistance that they need to complete that often arduous journey from military member to civilian.[307] Taking certain cases involving low-level violent offenses is consistent with Veterans Treatment Courts' pledges to employ veteran-specific strategies as a way to help rehabilitate the men and women who are still struggling to complete their return home to civilian life.[308] On the other hand, immediately barring all such cases without conducting any further

303 *See, e.g.*, Nicholas Kristof, *When War Comes Home*, N.Y. TIMES (Nov. 9, 2012), https://www.nytimes.com/2012/11/11/opinion/sunday/kristof-when-war-comes-home.html.

304 *Id.*

305 *Id.*; McCloskey, *supra* note 56; Cavanaugh, *supra* note 4, at 486.

306 Cartwright, *supra* note 3, at 300 ("Behaviors that promote survival within the combat zone may cause difficulties during the transition back to civilian life. Hypervigilance, aggressive driving, carrying weapons at all times, and command and control interactions, all of which may be beneficial in theater, can result in negative and potentially criminal behavior back home."). One could reasonably argue that this paradoxical situation is an extension of an overall disconnect between veterans and civilians in American society today. *See* Gary J. Schmitt & Rebecca Burgess, *What We Don't Know About Veterans*, WALL ST. J. (June 12, 2017, 6:42 PM), https://www.wsj.com/articles/what-we-dont-know-about-veterans-1497307334.

307 McCloskey, *supra* note 56 ("These [veterans] went off to war and as a result of their service were damaged, and our job is to restore them to who they were.").

308 *See supra* Part I.

inquiry into their specific circumstances flies in the face of the purported governmental objective.[309]

Under the traditional rational basis test, public safety rationales typically produce victorious results for the government.[310] For certain categories of offenses, however, a statute or other government action that automatically bans these justice-involved veterans from Veterans Treatment Courts could fall under rational basis with bite.[311] When contemplating whether a court might employ rational basis with bite here, one can again think of Holoszyc-Pimentel's finding that courts are more likely to use some form of rational basis with bite if the characteristic of the disadvantaged class is something beyond its control.[312] Individuals who join the armed forces cannot control the intensity of the military indoctrination they receive, nor can they control any disabilities or other lingering effects they incur as a consequence of this immersive experience.[313] Similarly, one can look to Professor Eyer's conclusions regarding the increased likelihood of courts applying heightened forms of scrutiny when a classification scheme implicates "group or rights-based concerns."[314] If Professor Eyer's determinations are correct, a court could reasonably choose to apply rational basis with bite and strike down a law or policy that barred an entire group of veterans from Veterans Treatment Court for doing precisely what the military trained them to do.[315]

Of course, plenty of veterans who committed crimes involving violence will not prove to be good candidates for success in a Veterans Treatment Court. The same holds true for plenty of veterans whose crime involved possession of a weapon. Yet refusing entry to every veteran whose offense involved some level of violence or some form of possession of a weapon paints these categories of veterans with a brush that is far too broad. By lacking a more nuanced, case-by-case approach that examines each justice-involved veteran individually, these total bans on certain types of offenses can pose significant Equal Protection Clause concerns.

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309 Meyer, *supra* note 277; McCloskey, *supra* note 56; McMichael, *supra* note 49; Cartwright, *supra* note 3, at 312; Cavanaugh, *supra* note 4, at 486.

310 Belzer, *supra* note 103, at 345, 350–51.

311 *See supra* notes 308–10 and accompanying text.

312 Holoszyc-Pimentel, *supra* note 96, at 2102.

313 *See supra* notes 295–303 and accompanying text.

314 Eyer, *supra* note 132, at 576–80.

315 *See supra* notes 295–303 and accompanying text.

CONCLUSION

As Veterans Treatment Courts continue to emerge and develop across the United States, these unique tribunals will gain further visibility among the general public. In doing so, these courts will likely receive an enhanced level of examination from those concerned that these courts are not fulfilling their fundamental mission. Most of the time, these criticisms will likely prove to be baseless; the track record of Veterans Treatment Courts thus far appears to demonstrate consistent substantial success in rehabilitating rather than incarcerating justice-involved veterans. These courts save taxpayer dollars and, more importantly, save lives by providing individualized treatment and mentorship for the men and women who served in the armed forces, instead of merely confining them in a jail or prison.

However, the classification-based distinctions that a significant number of Veterans Treatment Courts impose are problematic. Some of these classifications risk breaching the Equal Protection Clause by irrationally denying certain classes of justice-involved veterans access to the services and opportunities that Veterans Treatment Courts provide. Given the stark contrasts between entering a Veterans Treatment Court and remaining in a traditional criminal court, justice-involved veterans who are categorically barred from entering a Veterans Treatment Court are likely to seek legal avenues to remove this barrier.

The legal hurdles that these challengers must surmount could be substantial. Already, courts and commentators have established that no justice-involved veteran has an inherent right to enter a Veterans Treatment Court program.[316] Furthermore, veterans are neither a suspect class nor a quasi-suspect class. Consequently, the formally heightened levels of scrutiny probably will not apply to Equal Protection Clause challenges regarding access to Veterans Treatment Courts. Petitioners therefore will be left to face the rational basis test, in which the challenger bears the burden of proving that the government's classification-based scheme is not rationally related to a legitimate state interest. Historically, courts applying this analysis acutely defer to the state, virtually guaranteeing victory for the government in any case where courts employ this form of review.

A more recent trend, however, shows the willingness of the United States Supreme Court and other courts to apply a more rigorous rational

316 Merriam, *supra* note 24, at 714.

basis test in certain cases, a phenomenon that commentators have labeled "rational basis with bite." Researchers have shown that the Supreme Court is more likely to use some form of rational basis with bite in Equal Protection Clause cases bearing certain characteristics. For instance, the probability of the Court using rational basis with bite increases when the case involves discrimination on the basis of an immutable characteristic or when the classification scheme burdens a significant right. A showing of some sort of governmental animus or malice toward the burdened class also increases the likelihood of the Court applying rational basis with bite, as does a "break down in the democratic process" for a group that is "suffering from longstanding or existing social stigma."[317]

This Article demonstrated that these common triggers for applying rational basis with bite apply to certain classification-based schemes that some Veterans Treatment Courts enforce. In particular, this Article showed that categorizations based upon combat service or honorable discharge from the military could reasonably inspire a court to use rational basis with bite rather than the traditional rational basis test. Based on the trends that researchers have previously observed, two scenarios seem to be worthy candidates for rational basis with bite: 1) absolute bans on justice-involved veterans who cannot conclusively prove a nexus between their military service and the charged offense and 2) instant barriers for justice-involved veterans who commit certain types of crimes. If a court decided to use rational basis with bite when reviewing any of the four classifications discussed in Part IV, this Article illustrated the likelihood of that court finding that these discriminatory policies are not rationally related to a legitimate state interest and striking down these categorizations as Equal Protection Clause violations.

Ultimately, the deciding factor in these cases would be the purported purpose of the rational basis test itself. Veterans Treatment Courts certainly can utilize use evidence-based screening procedures to determine which justice-involved veterans possess the greatest likelihood of successfully completing the court-assigned treatment program. These nuanced individualized reviews are an essential part of a Veterans Treatment Court's survival, limiting the docket and preventing these courts with limited resources from becoming overwhelmed with more cases than they can properly process. Such

317 Kerska, *supra* note 127.

case-by-case exclusions, provided that they are free of animus, should not face any problems under the Equal Protection Clause.

Automatic and absolute barriers to these courts, however, are typically unwarranted and overbroad. These instantaneous bans commonly contradict the stated mission of Veterans Treatment Courts by rejecting justice-involved veterans who may actually be ideal candidates for the services that these courts provide. Mechanically barring the doors of Veterans Treatment Courts to certain veterans based solely upon careworn and inaccurate stereotypes regarding noncombat service, less-than-honorable discharges, service-connected disabilities, or the relationships between certain medical conditions and criminal offenses simply does not represent a rational application of justice. When such categorical forms of discrimination emerge within Veterans Treatment Courts, courts reviewing the classification-based schemes should overturn these irrational government actions, ensuring that the laudable mission of Veterans Treatment Courts is never undermined by a failure to institute equal justice under the law.