NON-UNIFORM JUSTICE: AN EQUAL PROTECTION ANALYSIS OF VETERANS TREATMENT COURTS' EXCLUSIONARY QUALIFICATION REQUIREMENTS

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INTRODUCTION

When a military veteran commits a crime, should he be afforded a separate criminal justice system—one that allows the veteran to avoid incarceration and possibly conviction altogether—simply because he is a veteran? In an increasing number of jurisdictions in the United States, the answer to that question is *yes*.

In just six years, the number of Veterans Treatment Courts (VTCs) in the United States has exploded from zero to over 180.[1] Like previous versions of problem-solving courts, such as mental

[1] *Veterans Treatment Court Locations*, JUSTICE FOR VETS, http://justiceforvets.org/veterans-treatment-court-locations (last visited Mar. 10, 2015). In 2007, there were no VTCs in the United States. An early informal method of adjudicating low-level offenses did exist in Anchorage, Alaska, at the time, but the first VTC, as that term is understood today, was created in 2008. *The History*, JUSTICE FOR VETS, http://justiceforvets.org/vtc-history (last visited Mar. 10, 2015); Jack W. Smith, Comment, *The Anchorage, Alaska Veterans Court and Recidivism: July 6, 2004 – December 31, 2010*, 29 ALASKA L. REV. 93 (2012).

health and drug courts, VTCs offer criminal defendants the opportunity to avoid imprisonment, receive meaningful and supervised rehabilitative medical, mental, and substance abuse treatment, and possibly avoid conviction. Unlike most of their problem-solving forebears, VTCs limit participation based on identity: VTCs exclude all non-veterans, and even some veterans, from participation based on *who they are*. In equal protection terms, these exclusionary qualification requirements constitute classifications where one group is benefitted and another is not.

Because they are so attractive and yet exclusive, VTCs have been challenged. One chapter of the ACLU protested that VTCs provide "an automatic free pass based on military status to certain criminal defense rights that others don't have"[2] and "the idea of an entirely different court system based on status doesn't make sense."[3] Voicing concern over VTCs' exclusivity, another objector argued the criminal justice system should not take into account veterans' service-related Post-Traumatic Stress Disorder (PTSD) but disregard it when related to civilians' horrific, but non-military-related, life experiences.[4] Though problem-solving courts present a number of constitutional questions,[5] this Article focuses

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[2] Dahlia Lithwick, *A Separate Peace*, SLATE (Feb. 11, 2010, 1:33 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2010/02/a_separate_peace.html.

[3] Kristina Shevory, *Why Veterans Should Get Their Own Courts*, ATLANTIC (Oct. 26, 2011, 3:59 PM), http://www.theatlantic.com/magazine/archive/2011/12/why-veterans-should-get-their-own-courts/308716/. The author has not uncovered legal challenges to VTCs that have resulted in published opinions.

[4] Lithwick, *supra* note 2 (citing the legal director of the Colorado ACLU). Some district attorneys have objected to the creation of VTCs. Shevory, *supra* note 3.

[5] For example, First Amendment concerns are implicated when drug or veterans' courts require participation in a twelve-step program that includes acknowledgment of a Supreme Being. *See, e.g.*, Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 426 (8th Cir. 2007) (state supported non-coercive, non-rewarding faith based program violated the Establishment Clause of the U.S. Constitution because an alternative was not available). Fourth Amendment concerns include the frequent requirement of drug courts that participants execute search waivers as a condition of pre-trial release or post-trial probation or parole. *See* United States v. Jordan, 485 F.3d 982, 984 (7th Cir. 2007) (alcohol use restrictions as part of supervised release must be based upon need); United States v. Scott, 424 F.3d 888, 897 (9th Cir. 2005) (drawing distinction between pre-trial release and probation). The Fifth and Fourteenth Amendments' guarantee of procedural due process is implicated when plea bargaining and entering pleas, revocation of probation, termination from the problem-solving court program, and imposition of sanctions for temporary or final failure in the program are considered. *See, e.g.*, State v. Bellville,

on the equal protection issues associated with VTCs' exclusionary qualifications, under which some veterans receive preferential treatment.[6]

Part I of the Article describes problem-solving courts generally, and VTCs specifically, demonstrating the significant advantages criminal defendants who successfully participate in such courts enjoy over those who are excluded.

Part II addresses the preference VTCs extend to some veterans, to the exclusion of all others. Equal protection analysis requires first determining the appropriate level of analysis. Because the Supreme Court and some commentators have suggested a possible "fundamental right to equal access to the courts," discriminatory impingements of which would require strict scrutiny, Part II begins with an analysis of "equal access to courts" jurisprudence, demonstrating there is no equal protection-based "equal access to courts." First, the Supreme Court has never articulated such a right. Second, the Court's "equal access" cases

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No. 04-1634, 2005 WL 2086000, at *2 (Iowa Ct. App. Aug. 31, 2005) (defendant must knowingly and intelligently enter a plea); Hopper v. State, 546 N.E.2d 106, 109 (Ind. Ct. App. 1989) (addressing whether Due Process Clause grants offender opportunity to be heard prior to termination from treatment program). The Sixth Amendment right to counsel is implicated, both as it relates to the right to counsel at "critical stages" in criminal proceedings and as it relates to the non-adversarial role of criminal defense counsel participating in problem-solving courts' collaborative approach with prosecutors and the judge. *See, e.g.*, Brewer v. Williams, 430 U.S. 387, 401 (1977) (right to counsel attaches at every critical stage of the proceedings, after initiation of adversarial judicial proceedings). When prosecutors later attempt to prosecute problem-solving court participants for misconduct that occurred during participation in the problem-solving court process (for example, drug use while participating in a drug court program), the Constitution's double jeopardy prohibition is implicated. *See, e.g.*, Witte v. United States, 515 U.S. 389, 405 (1995); People v. Lopez, 97 P.3d 223 (Colo. App. 2004), *aff'd on other grounds*, 113 P.3d 713 (Colo. 2005) (sentencing for deferred judgment violations, including positive urine tests, does not violate double jeopardy). Separate constitutional concerns exist with juvenile courts, many of which stemmed from juvenile courts' characterization as civil rather than criminal, a designation one commentator labeled "a convenient but highly misleading sophistry." Paul W. Tappan, *Unofficial Delinquency*, 29 NEB. L. REV. 547, 548 (1950). Not until 1967 did the Supreme Court firmly state that children enjoyed constitutional protection. *In re* Gault, 387 U.S. 1 (1967) (Court held that due process in juvenile court context provided right to: notice of charges; counsel; confrontation of witnesses; and privilege against self-incrimination.).

[6] Though Fourteenth Amendment considerations exist with all problem-solving courts, this Article primarily examines VTCs, in part because they are the most recent and popular iteration of problem-solving courts.

relate to only one method of exclusion: indigency. Third, the Court does not explicitly apply the heightened scrutiny one would expect if there was a "fundamental right" to equal access to the courts. Fourth, when the Court *has* expressly articulated the level of scrutiny it is applying to laws that impinge equal access to courts, it has been rational basis review, which is inconsistent with the idea that equal access to courts is a "fundamental right." Finally, the Court has routinely confused due process and equal protection analysis in its fundamental rights cases. This section concludes that there is no "fundamental right to equal access to the courts" that applies to the exclusions VTCs employ.

Part II then turns to application of rational basis review, assessing various government interests ostensibly furthered by VTCs. I argue several legitimate government interests are furthered by VTCs, including: (1) expressing gratitude for and recognizing military service and sacrifice; (2) easing the transition from military to civilian life; and (3) fulfilling a societal obligation to "fix those who were broken" in service to that society. The Article then examines the relationship between those interests and three common exclusionary classifications VTCs employ: (1) complete exclusion of non-veterans; (2) exclusion of veterans without combat experience; and (3) exclusion of veterans without honorable discharges. This part concludes that none of these classifications violates the Equal Protection Clause[7] as it has been interpreted by the United States Supreme Court.

After demonstrating the critical government interests VTCs advance and the obvious rationality of the classifications they employ, the Article concludes with a brief argument that VTCs illustrate a flaw of fundamental rights jurisprudence: declaring broad fundamental rights based on equal protection can have the unintended consequence of prohibiting non-invidious state efforts the Equal Protection Clause has never been understood to address.

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[7] U.S. CONST. amend. XIV, § 1.

I. PROBLEM-SOLVING COURTS DESCRIBED

A. VTCs' Problem-Solving Ancestors

Problem-solving courts attempt to solve social and legal problems through alternative procedures and methods focused more on diagnosis and treatment of underlying causes of criminal activity than on punishment of offenders. Their foundational principle is "therapeutic jurisprudence," which focuses on law as an agent for therapy.[8] In contrast with typical criminal courts, these courts focus on offender rehabilitation as the primary—and sometimes exclusive—goal of the process. While traditional courts tend to look backward at the crime, with little emphasis on the future, problem-solving courts tend to focus on the future for individuals, relationships, and the community.[9]

VTCs are the problem-solving court offspring of a triad of ancestors: juvenile courts, drug treatment courts, and mental health courts. Each of these VTC forebears shares similarities regarding the circumstances of their creation. First, each was a response to an increasing caseload in traditional criminal courts.[10]

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[8] Andrea M. Odegaard, Note, *Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System*, 83 N.D. L. REV. 225, 226 (2007). An accepted definition of "therapeutic justice" is "the use of social science to study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects." Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, *in* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 767 (David B. Wexler & Bruce J. Winick eds., 1996).

[9] Risdon N. Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQUENCY 6, 15 (2003).

[10] GREG BERMAN & JOHN FEINBLATT, CTR. FOR COURT INNOVATION, PROBLEM-SOLVING COURTS: A BRIEF PRIMER 6 (2001), *available at* http://www.courtinnovation.org/pdf/prob_solv_courts.pdf. Juvenile courts followed increased numbers of children in jails and other detention homes. David S. Tanenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, *in* A CENTURY OF JUVENILE JUSTICE 42 (Margaret K. Rosenheim et al. eds., 2002). Drug courts were also designed to handle the dramatically increased criminal case load that resulted from increased drug proliferation and the corresponding law enforcement "war on drugs." *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS AND CRIME FACTS, 1988, at 9 (1989), *available at* http://www.bjs.gov/content/pub/pdf/dcf88.pdf (Between 1980 and 1986, the percentage of new admissions to federal prisons for drug crimes increased from twenty-two percent to thirty-four percent.); Tamar M. Meekins, *"Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK

Second, shifts in social attitude, jurisprudence, and sociological understanding accompanied the advent of each problem-solving court.[11] Third, problem-solving courts have shared a common belief, sometimes accompanied by benevolence, that certain classes of offenders can and should be rehabilitated.[12]

Focusing on rehabilitation as the primary goal of the criminal process has many second-order effects. The primary legal question changes from guilt to successful treatment.[13] Using a collaborative rather than adversarial approach, judges, prosecutors, defense counsel, social workers, and treatment providers work together

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U. L. REV. 1, 2 n. 4 (2006) (noting nineteen percent increase in number of people arrested for drug abuse between 1985 and 1995) (citing FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, 1985-1995). The nation's first "drug court" was created in 1989 in what was an epicenter of drug activity, Miami, Florida. BERMAN & FEINBLATT, *supra*, at 4. Mental health courts were established to combat the trend of "criminalization of the mentally ill" that followed decades of deinstitutionalization. Ginger Lerner Wren, *Mental Health Courts: Serving Justice and Promoting Recovery*, 19 ANNALS HEALTH L. 577, 586 (2010).

[11] Juvenile courts accompanied criminology advances in the understanding of the causes of crime and acceptance of societal responsibility for children. This was not merely societal and judicial benevolence; juvenile courts were preceded and accompanied by jurisprudence establishing the state's position as parens patriae, under which society and the child would "benefit" from the state's involvement. *See, e.g.*, Cinque v. Boyd, 121 A. 678, 682 (Conn. 1923); *In re* Ferrier, 103 Ill. 367, 372 (Ill. 1882). This paternalistic approach to juvenile courts has been credited with ultimately leading to juvenile courts' abuses of children's constitutional rights. *See, e.g.*, Karen L. Atkinson, Note, *Constitutional Rights of Juveniles:* Gault *and Its Application*, 9 WM. & MARY L. REV. 492 (1967). Drug courts were instituted during a period in which Americans largely believed drug use was a significant problem. BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 11 (By 1986, seventy-eight percent of Americans believed drug use had become a central problem in American society.). Similarly, mental health courts were developed with the support of rising therapeutic justice scholarship and jurisprudence. *See* John E. Cummings, Comment, *The Cost of Crazy: How Therapeutic Jurisprudence and Mental Health Courts Lower Incarceration Costs, Reduce Recidivism, and Improve Public Safety*, 56 LOY. L. REV. 279, 290-93 (2010).

[12] A belief that certain classes of offenders were capable of rehabilitation or worthy of the rehabilitative attempt has also been a consistent presence in nascent problem-solving court movements. This attitude was very clear from early in the juvenile court movement, where some believed children were basically good, and could be rescued from a downward spiral. "The 'sick' child was to be cured." Atkinson, *supra* note 11, at 493. In the drug court context, in 1986, a surprising eighty-five percent of Americans believed "[t]he best place for most drug users is a drug treatment program and not jail." BUREAU OF JUSTICE STATISTICS, *supra* note 10, at 11.

[13] This was seen in even the earliest problem-solving courts—juvenile courts—where the emphasis changed from "[h]as he committed this crime?" to "[w]hat is the best thing to do for this lad?" *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909).

toward the common goal of rehabilitation. Traditional roles are modified in problem-solving courts, and some roles that are well defined and straightforward in the usual criminal court context are confused. For example, judges continue to wield primary authority but share decision making with other members of the problem-solving court team and heavily rely on medical and mental health experts. Defense attorneys' roles move from "adversarial defender" to "best interests" teammate.[14] And some social workers and case managers consider themselves "double agents," because of their dual focus on rehabilitation and accountability.[15] Not surprisingly, relationships between actors also change. These role and relationship modifications have caused some to question whether problem-solving courts are really courts at all.[16]

The way in which problem-solving courts work is fairly described by the commonly accepted "10 Key Components of Drug Courts":

> Key Component #1: Drug courts integrate alcohol and other drug treatment services with justice system case processing
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> Key Component #2: Using a nonadversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights
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> Key Component #3: Eligible participants are identified early and promptly placed in the drug court program
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> Key Component #4: Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services
>
> Key Component #5: Abstinence is monitored by frequent alcohol and other drug testing

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[14] Meekins, *supra* note 10, at 3 (objecting to "the emasculation of the traditional role of the criminal defender as a zealous advocate fighting against the system") (footnote omitted).

[15] Ursula Castellano, *Courting Compliance: Case Managers as "Double Agents" in the Mental Health Court*, 36 LAW & SOC. INQUIRY 484 (2011).

[16] Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 948 (2003).

> Key Component #6: A coordinated strategy governs drug court responses to participants' compliance
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> Key Component #7: Ongoing judicial interaction with each drug court participant is essential
>
> Key Component #8: Monitoring and evaluation measure the achievement of program goals and gauge effectiveness
>
> Key Component #9: Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations
>
> Key Component #10: Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness[17]

The "10 Key Components" have been modified for VTCs and in some cases codified.[18]

B. VTCs

Because criminal conduct potentially associated with a veteran's military service can manifest itself in multiple ways, VTCs are frequently combinations of more traditional problem-solving court models, incorporating significant elements of drug courts and mental health courts.[19] While the crimes VTCs will

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[17] BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS iii (2004), *available at* https://www.ncjrs.gov/pdffiles1/bja/205621.pdf.

[18] Robert T. Russell, *Veterans Treatment Courts Developing Throughout the Nation*, *in* NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS, 2009, at 130, 131 (Carol R. Flango et al. eds., 2009), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/spcts/id/204 ("The veterans treatment court adheres to the basic principles of treatment courts as defined in the 'Ten Key Components' by the National Association of Drug Court Professionals . . . ."); BUFFALO VETERAN'S COURT: MENTORING AND VETERANS HOSPITAL PROGRAM POLICY AND PROCEDURE MANUAL 3-5 (2008), *available at* http://www.nadcp.org/sites/default/files/nadcp/Buffalo%20policy%20and%20procedure%20manual.pdf. Indeed, Judge Russell's "key components" have been codified elsewhere. *See, e.g.*, MICH. COMP. LAWS § 600.1201(1) (2012) ("A veterans court shall comply with the modified version of the 10 key components of drug treatment courts as promulgated by the Buffalo veterans treatment court . . . .").

[19] As discussed below, the first VTC was created by a judge using the drug court and mental health court model and many jurisdictions utilize nearly the same

consider varies by jurisdiction, the four most common are, in order: drug-related crimes, DUI/DWI, theft or fraud, and violent crimes (domestic and otherwise).[20]

1. Context of VTC Creation

VTCs have arisen throughout the country in response to the perceived need to address criminal conduct committed by veterans where such conduct is potentially related to their military service. VTC creation has been in response to several significant developments since the beginning of the United States' post-9/11 wars in Afghanistan and Iraq: an increased understanding of the long-term manifestation of PTSD and traumatic brain injuries (TBIs);[21] increasing incidences and diagnosis of those conditions among veterans;[22] and a perception of increased criminal activity by combat veterans, many of whom use PTSD as a defense in criminal cases.[23] In short, many of the factors that led to the

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personnel in their VTCs as in their drug and mental health court model. Russell, *supra* note 18, at 131. Moreover, the federal government views VTCs as a subset of drug and mental health courts, providing grant money to some VTCs through a program designed to support drug courts. *See Drug Court Discretionary Grant Program*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=58 (last visited Mar. 10, 2015) (BJA "will maximize the number of grants awarded under the Adult Drug Court Discretionary Grant Program solicitation to support veteran treatment courts" and announcing the addition of a veterans court training module to the National Drug Court Online Learning System).

[20] JULIE MARIE BALDWIN, EXECUTIVE SUMMARY: NATIONAL SURVEY OF VETERANS TREATMENT COURTS 11 (2012), *available at* http://www.pacenterofexcellence.pitt.edu/documents/vet_court_paper.pdf. It should be noted that many VTCs do not consider violent crimes of any kind. *Id.* at 12-14.

[21] Nat'l Ctr. for PTSD, *Criminal Behavior and PTSD*, U.S. DEP'T OF VETERANS AFFAIRS (Aug. 24, 2010), http://www.equalaccessadvocates.com/wp-content/uploads/2012/11/PTSD-Criminal-Behavior-and-PTSD-National-Center-for-PTSD.html (originally available at http://www.ptsd.va.gov/public/pages/ptsd-criminal-behavior.asp, but removed) ("Symptoms of PTSD can sometimes lead to a lifestyle that makes aggressive or criminal behavior or sudden outbursts of violence more likely to occur.").

[22] A 2008 RAND Corp. study reported that almost "20 percent of military service members who have returned from Iraq and Afghanistan—300,000 in all—report symptoms of post traumatic stress disorder or major depression." *One In Five Iraq and Afghanistan Veterans Suffer from PTSD or Major Depression*, RAND CORP. (Apr. 17, 2008), http://www.rand.org/news/press/2008/04/17.html. A more recent estimate places the number at over 500,000. Dave Philipps, *Disposable*, GAZETTE (May 19, 2013), http://cdn.csgazette.biz/soldiers/day1.html.

[23] "Nearly one in 10 inmates [in the United States] have served in the military." Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, DAILY BEAST

formation of earlier problem-solving courts have contributed to VTC creation.

The existence of problem-solving courts like drug and mental health courts naturally led judges to consider similar models to address crime, substance abuse, and mental health issues associated with combat veterans' PTSD and TBIs. In fact, the creator of what is widely regarded as the first VTC, Judge Robert Russell of Buffalo, New York, had previously created a drug court for Buffalo and drew from it and the county's mental health court when creating the Buffalo VTC.[24]

2. VTC Structure and Method

Judge Russell's VTC would become the model for most VTCs.[25] Veterans eligible for the court are identified using screening and assessments to determine suitability and are then given the *option* to participate in the program. VTCs typically accept "veterans who have a clinical diagnosis of serious and persistent mental-health disease and those with a primary diagnosis of substance dependency."[26] These veterans, who are typically charged with committing nonviolent felony or misdemeanor offenses, are then diverted from the traditional criminal court to the specialized VTC.[27] *When* this diversion to the

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(Jul. 28, 2013), http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html (referring to a 2004 Dep't of Justice study); *see also* David Zucchino, *More Veterans Are Using PTSD as Defense in Criminal Cases*, L.A. TIMES (Sept. 14, 2011), http://articles.latimes.com/2011/sep/14/nation/la-na-ptsd-20110915.

[24] 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; Lynne Marek, *Courts for Veterans Spreading Across U.S.*, NAT'L L.J., Dec. 22, 2008, at 1. A similar, but less formal and distinct veterans treatment "track" began operating in Anchorage, Alaska, in 2004. Amanda Ruggeri, *New Courts Give Troubled Veterans a Second Chance*, U.S. NEWS & WORLD REP. (Apr. 3, 2009, 2:57 PM), http://www.usnews.com/news/national/articles/2009/04/03/new-courts-give-troubled-veterans-a-second-chance.

[25] William H. McMichael, *The Battle on the Home Front: Special Courts Turn to Vets to Help Other Vets*, A.B.A. J. (Nov. 1, 2011, 10:10 AM), http://www.abajournal.com/magazine/article/the_battle_on_the_home_front_special_courts_turn_to_vets_to_help_other_vets/. As noted above, at least one state has *codified* Judge Russell's "10 Key Components of VTCs." *See supra* note 18.

[26] Russell, *supra* note 18, at 131.

[27] *Id.*

VTC occurs varies among jurisdictions, with diversions occurring pre-plea, post-plea pre-adjudication, and post-adjudication.[28]

Ultimately, the treatment court program provides participant veterans with tools to manage their psychological, substance abuse and dependency, and social issues and to lead productive, law-abiding lives. VTC "staff and volunteer veteran mentors assist the veteran [offender] with an array of stabilization services, such as emergency financial assistance, mental-health/trauma counseling, employment and skills training, safe housing, advocacy, and other supportive services."[29] The vast majority of VTCs rely on the Department of Veterans Affairs (VA) to provide mental health or substance abuse treatment.[30] Virtually all VTCs require treatment as part of participation, and a significant majority requires frequent court appearances, a signed contract, regular check-ins with someone outside of court appearances and treatment, and a guilty plea.[31]

In addition to a problem-solving court's typical participants (the offender, judge, prosecutor, defense attorney, case managers, and mental health or substance abuse experts), VTC participants also include a representative from the VA, representatives from local veterans associations, and in many jurisdictions, a veteran mentor.[32]

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[28] A survey conducted by the John Marshall Law School Veterans Legal Support Center & Clinic is also instructive, demonstrating that some courts are pre-plea, some post-plea, and some post-adjudication. *See* VETERANS LEGAL SUPPORT CTR. & CLINIC, JOHN MARSHALL LAW SCH., DESCRIPTION OF PROGRAM STRUCTURE AS IT FUNCTIONS WITHIN THE COURT SYSTEM (2013), *available at* http://www.jmls.edu/veterans/pdf/vtc-survey/q3.pdf (copy on file with author). There are disadvantages to each approach. In the pre-adjudication model, there is no "stick" of a suspended punishment hanging over the participant's head while going through rehabilitation and treatment, and there is no opportunity for continued supervision through probation after the program is completed. By contrast, in the post-adjudication model, participants are faced with the lasting consequences of actual convictions, even if they are never incarcerated.

[29] Russell, *supra* note 18, at 131.

[30] BALDWIN, *supra* note 20, at 18-19; JIM MCGUIRE ET AL., AN INVENTORY OF VA INVOLVEMENT IN VETERANS COURTS, DOCKETS AND TRACKS 3 (2013), *available at* http://www.justiceforvets.org/sites/default/files/files/An%20Inventory%20of%20VA%20involvement%20in%20Veterans%20Courts.pdf ("[W]ithout VA it is unlikely that these courts would continue to function and proliferate as Veteran courts.").

[31] BALDWIN, *supra* note 20, at 20.

[32] Russell, *supra* note 18, at 131-32.

3. Advantages to VTC Participation

Through VTCs, states provide significant benefits to, and reduce burdens on, participating veteran defendants. The primary advantage is the ability to participate in a program entirely separate from the usual adversarial criminal justice system. Benefits of this separate program include the provision of substance abuse rehabilitation and medical and mental health treatment for PTSD and TBI. These services are often provided by the federal government through the VA, rather than by the states directly, but *access* to the services can be improved through the formal participation of VA representatives in VTCs. An institutional actor—the VA representative to the VTC—ensures the veteran is cared for by the VA, rather than the veteran joining an anonymous queue of veterans seeking services or failing to seek services at all. A less direct benefit, but significant to rehabilitation success, is that VTC participants' rehabilitation and treatment programs are reinforced and monitored by the VTC team, which importantly includes a judge wielding the authority to incarcerate non-complying participants. This external reinforcement serves as added incentive to succeed that does not exist for most veterans whose continued participation in rehabilitation and treatment may depend solely on internal motivation. Finally, many VTCs provide a veteran mentor who is able to identify with the veteran's concerns and some of the causes of the veteran's misconduct, a factor believed to be significant by VTC judges because the mentors understand the veteran offenders' experiences and can serve as aspirational models.[33]

In addition to providing the *benefits* of rehabilitative treatment, VTCs reduce or eliminate significant *burdens* on participating veterans. Most tangibly, successful participants are able to avoid incarceration completely. Also, under several states' models, the successful participant is able to avoid conviction or have the conviction expunged.

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[33] *See, e.g.*, *id.*; Eileen C. Moore, *A Mentor in Combat Veterans Court: Observations and Challenges*, *in* NAT'L CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS, 2012, at 39, 41 (Carol R. Flango et al. eds., 2012), *available at* http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/233.

Given the potential significant advantages of participation in VTCs over the normal criminal process, equal protection challenges from those excluded from participation are inevitable. It is to the equal protection issues associated with exclusionary qualification requirements to which we now turn.[34]

II. EQUAL PROTECTION AND VTCS' INDIVIDUAL QUALIFICATION EXCLUSIONS

By their nature, problem-solving courts all limit participation. Most limitations relate to the nature of the charged *offense*. For example, drug courts handle drug-related offenses while others allow only non-violent or non-felony-related crimes. Other limitations may relate to *condition*, such as mental health disease or substance addiction. While VTCs have these kinds of limitations, they also exclude people from participation based on the *identity of the offender*. First, VTCs are available to veterans only. Second, some VTCs allow only *combat* veterans to participate, excluding vast numbers of veterans whose military service did not include combat action. In fact, some VTCs require that offenders' misconduct be directly attributable to combat-related PTSD or similar injury or illness. Finally, many VTCs require veterans have honorable discharge characterizations, thus excluding a substantial class of persons potentially engaging in misconduct and sorely needing rehabilitation: veteran offenders whose misconduct predated their discharge from the military.

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[34] This Article focuses on equal protection issues associated with offenders' identity and participation in VTCs; perhaps the other most debated issue regarding VTCs is which *crimes* should be eligible for VTCs. *Compare* 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, 486 (2011) ("Veterans Treatment Courts Should Consider Expanding Eligibility to Include Violent Veteran Offenders"), *and* Lithwick, *supra* note 2 ("'The violent offenders need help more than anybody. . . . [T]he very skills these people are taught to follow in combat are the skills that are a risk at home.'" (quoting Robert Alvarez, a psychotherapist with National Organization on Disability's *Wounded Warrior* Program)), *with* Pamela Kravetz, Note, *Way Off Base: An Argument Against Intimate Partner Violence Cases in Veterans Treatment Courts*, 4 VETERANS L. REV. 162 (2012) (arguing VTCs should not be available for domestic violence offenses).

Each of these exclusionary requirements constitutes a classification that must withstand equal protection scrutiny.[35]

A. Level of Scrutiny

While the Fourteenth Amendment's Equal Protection Clause guarantees "equal protection of the law" to *all* persons within a state's jurisdiction, under modern orthodox equal protection jurisprudence, the government may classify among individuals or groups of citizens, so long as the classification is rationally related to a legitimate government purpose.[36] Rational basis review, as the test is known, has the effect of permitting almost all government classifications that treat people unequally, because the challenger must disprove the rationality of every possible government rationale for the classification, whether or not it actually motivated the classification when made. This low bar is raised only when "heightened scrutiny" must be applied because the law involves one of a few specific types of classifications. When the governmental act infringes on a "fundamental right" or involves a "suspect classification" such as race, strict scrutiny is applied to the classifying law or regulation.[37]

Strict scrutiny requires that the classification serve a compelling state interest and be narrowly tailored to meet that interest.[38] When a state action classifies based on "quasi-suspect" classifications such as gender or legitimacy, intermediate scrutiny is applied, which requires that the classification further an important government interest and be substantially related to accomplishing that interest.[39] If the classification does not involve a fundamental right, suspect class, or quasi-suspect class, rational basis review is applied, whereby "legislation is presumed to be

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[35] Bearden v. Georgia, 461 U.S. 660, 665 (1983) ("[W]e approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.").

[36] City of Cleburne vs. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985).

[37] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17-18 (1973).

[38] Johnson v. California, 543 U.S. 499, 514 (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)).

[39] United States v. Virginia, 518 U.S. 515, 533 (1996) (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[40]

Modern courts mechanically apply this three-tiered model. After determining a suspect class is not implicated, a court can perform a token analysis in which it looks for *any* rational connection between ends and means.[41] Determining whether VTCs' classifications are consistent with the Equal Protection Clause thus first requires resolving which level of scrutiny is appropriate. This Article concludes that even though some have suggested there is an equal protection-based "fundamental right to equal access to the courts," no such broadly stated right exists, and thus heightened scrutiny does not apply. Further, the classifications VTCs employ withstand rational basis review.

1. Heightened Scrutiny?

Deciding which level of scrutiny applies to VTCs' exclusionary classifications includes examining whether any of the bases for heightened scrutiny apply. If not, the default scrutiny of rational basis review is appropriate. The three bases of exclusion from VTC participation analyzed in this Article—non-veteran status, non-*combat* veteran status, and a "dishonorable" service characterization—are clearly unrelated to race, national origin, gender, or legitimacy, and thus are not suspect or quasi-suspect classifications entitled to heightened scrutiny.[42] However, the

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[40] *Cleburne*, 473 U.S. at 440 (citing Schweiker v. Wilson, 450 U.S. 221, 230 (1981); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174-75 (1980); Vance v. Bradley, 440 U.S. 93, 97 (1979); New Orleans v. Dukes, 427 U.S. 297, 303 (1976)).

[41] The rigid three-tier model described here is not without detractors. Most notably, Justice Stevens once opined "[t]here is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring). Justice Marshall similarly objected to what was then a rigid two-tier analysis, arguing instead for a "spectrum of standards" approach. *Rodriquez*, 411 U.S. at 98-99 (Marshall, J., dissenting).

[42] VTCs' exclusions do not explicitly discriminate based on any suspect or quasi-suspect classifications. Without explicit discrimination based on such a classification, a challenger must show intent to discriminate; discriminatory *effect*, without intent or purpose, is insufficient to establish an equal protection claim. Washington v. Davis, 426 U.S. 229, 239-40 (1976); *see also* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 273-74 (1979); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977). No such intent to discriminate has been discovered with respect to VTCs. In fact, there is an "overrepresentation" of African American and Hispanic or Latino

question of whether exclusion from participation in a problem-solving court like a VTC constitutes impingement of a fundamental right requires further analysis. Unfortunately, equal protection fundamental rights jurisprudence is much like a scrub tree in Ireland's Burren, stunted and perpetually obscured by mist, its continued vitality constantly in doubt.

a. The Rise and Demise of Equal Protection Fundamental Rights Jurisprudence

The Supreme Court first announced that the Equal Protection Clause—as opposed to the Due Process Clause[43]—guaranteed certain fundamental rights in *Skinner v. Oklahoma*.[44] The Court struck down a law that authorized sterilization for three-time felons, announcing procreation was "fundamental [because it is essential] to the very existence and survival of the race."[45] Because the Oklahoma law impinged a fundamental right, the Court applied strict scrutiny.[46] Thus, as of *Skinner*, a right's *importance* was the basis for its fundamental status in equal protection jurisprudence.

After *Skinner*, several Warren Court decisions advanced the idea that the Equal Protection Clause could be the source of fundamental rights, but the list of such "fundamental rights" derived from the Equal Protection Clause is remarkably short: the

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servicemembers in the VTC participant population meaning racial minorities appear to be benefitting in greater percentage than white veterans. BALDWIN, *supra* note 20, at 9.

[43] U.S. CONST. amend. XIV, § 1.

[44] The Court made it clear its analysis was under the Equal Protection Clause, *not* the Due Process Clause. "It is argued that due process is lacking . . . . We pass [on that point] without intimating an opinion on [it], for there is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment." Skinner v. Oklahoma, 316 U.S. 535, 538 (1942). The Court's later failure to distinguish between fundamental rights jurisprudence in the equal protection context versus the due process context is beyond the scope of this Article. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 382-83 (1978), in which the Court used both the Equal Protection and Due Process Clauses to discuss the "fundamental right to marriage." Justice Stewart insisted the Equal Protection Clause was not relevant to the case, noting, "Like almost any law, the Wisconsin statute now before us affects some people and does not affect others. But to say that it thereby creates 'classifications' in the equal protection sense strikes me as little short of fantasy." *Id.* at 391 (Stewart, J., concurring).

[45] *Skinner*, 316 U.S. at 541.

[46] *Id.*

right to vote,[47] the right to interstate travel,[48] and, arguably, the right to equal access to the courts.[49] Before the list of equal protection-based fundamental rights grew further, the Equal Protection Clause was effectively foreclosed as a source of fundamental rights.[50]

After Chief Justice Burger replaced Chief Justice Warren, the Court initially nudged—and then slammed—the door on discovery of additional unenumerated fundamental rights based on the Equal Protection Clause. The Court's retreat began with *United States v. Kras*,[51] in which the Court rejected an equal protection challenge to bankruptcy filing fees and narrowly construed *Griffin v. Illinois*, discussed in detail below, which had purportedly established a right to equal access to the courts. *Kras* was followed by *Dandridge v. Williams*, in which the Court rejected an equal protection challenge to Maryland's welfare benefits for large families.[52] There, the Court accepted that Maryland's policy involved the "most basic economic needs of impoverished human beings," and yet did not follow *Skinner* to find that the right's importance meant it was fundamental.[53] The Court rejected that heightened scrutiny should apply, instead applying rational basis review to Maryland's ceiling on welfare benefits regardless of family size.[54]

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[47] In *Reynolds v. Sims*, the Supreme Court applied heightened scrutiny to Alabama's geographically inequitable method of electing the legislature because voting was "important," "basic," and "preservative of other basic civil and political rights." 377 U.S. 533, 561-62 (1964); *see also* Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down a one-year residency requirement to vote); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (invalidating a land ownership requirement as a voter qualification); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (invalidating a poll tax).

[48] Shapiro v. Thompson, 394 U.S. 618 (1969).

[49] Griffin v. Illinois, 351 U.S. 12 (1956).

[50] The Court's focus moved from the Equal Protection Clause back to the Due Process Clause as the source of "fundamental rights." *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164 (1973). In fact, the Court later recast *Skinner* as "implicit[ly]" relying on the right to privacy, a substantive due process right. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 n.76 (1973).

[51] 409 U.S. 434 (1973).

[52] 397 U.S. 471, 486 (1970).

[53] *Id.* at 485.

[54] *Id.* at 486.

Finally, in *San Antonio Independent School District v. Rodriguez*, the Court confirmed its unwillingness to recognize new fundamental rights based on the Equal Protection Clause, stating "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."[55] Writing for the majority, Justice Powell asserted that the importance of an infringed interest was irrelevant to the constitutional analysis, marking a clear departure from *Skinner*.[56] That the door to the identification of fundamental rights had been slammed shut by *Rodriguez* was perhaps not immediately apparent from the Court's language. The Court stated fundamental rights are those "explicitly or implicitly guaranteed by the Constitution,"[57] suggesting such rights could eventually be identified. Since *Rodriguez*, however, the Court has not identified any new such rights. And this should not be a surprise; if the Equal Protection Clause only protects those rights that are explicitly or implicitly guaranteed by the Constitution, the Equal Protection Clause is unnecessary surplusage—impingement of a constitutionally guaranteed right should receive scrutiny without the Equal Protection Clause's protection.[58] *Rodriguez*'s articulation of a new method of identifying fundamental rights protected by the Equal Protection Clause was the death knell for new fundamental rights protected by the Equal Protection Clause.

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[55] *Rodriguez*, 411 U.S. at 33.

[56] *Id.* at 30 ("[T]he importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."). Though *Skinner* has neither been extended nor overturned, and the Court has cited *Skinner* in cases of great constitutional significance, such as *Roe v. Wade*, 410 U.S. 113, 152 (1973); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), *Rodriguez* clearly rejected the standard *Skinner* articulated that rights are "fundamental" simply because of their importance. In fact, in later opinions, despite recognizing welfare grants as among "the most basic economic needs of impoverished human beings," and "the importance of decent, safe, and sanitary housing," the Court neither found a fundamental right nor even mentioned *Skinner*'s standard. *Dandridge*, 397 U.S. at 485 (welfare grants); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (tenant eviction process).

[57] *Rodriguez*, 411 U.S. at 33.

[58] For example, infringement of free speech merits heightened scrutiny under some circumstances, wholly apart from any claim that such infringement violates the Equal Protection Clause. *See, e.g.*, Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 655 (1990) (strict scrutiny required for content-based restrictions on speech protected by the First Amendment).

As of the early Burger Court, no new fundamental rights would be discovered and previously discovered fundamental rights were unlikely to be expanded.[59]

b. Equal Access to Courts a Fundamental Right Under Equal Protection Clause?

Though equal protection-based fundamental rights jurisprudence has been almost non-existent since *Rodriguez*, the Supreme Court has never announced its death. So, though there is little chance the Court will articulate a new fundamental right based on the Equal Protection Clause in the future, those rights the Court has already identified may still live. Of the limited number of fundamental rights the Supreme Court suggested as being based on the Equal Protection Clause, the only right potentially applicable to problem-solving courts like VTCs is the right to "equal access to the courts." Here, I will argue there is no surviving equal protection-based "fundamental right to equal access to the courts," and thus heightened scrutiny does not apply to classifications that exclude certain groups from participating in VTCs.

In *Griffin v. Illinois*, a plurality of the Supreme Court reversed the Illinois Supreme Court's opinion that the Constitution did not require providing indigent criminal appellants with a transcript for appeal.[60] The Court acknowledged

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[59] For an argument that the Burger Court's purpose in closing the door to equal protection fundamental rights analysis was not the conventional understanding that the Burger Court eschewed unenumerated rights, but rather due to its evolving understanding of political process theory and legislative inputs., see Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 283-318 (1991). While a few subsequent anomalous cases provide grounds for credible argument that the Court has stealthily expanded fundamental rights in the equal protection context, the Court has not since clearly articulated any new fundamental right. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102 (1996) (The Court struck down a Mississippi law that prevented an indigent mother from appealing a termination of parental rights, but did not articulate the right at issue as "fundamental" or utter the phrase "heightened scrutiny."). Also, the murkiness of Justice Kennedy's opinions in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), and *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013), could ostensibly suggest, though his opinions certainly did not say, that he found a fundamental right (to engage in private consensual conduct between adults in *Lawrence*, and to dignity in *Windsor*) was being impinged, and after applying heightened scrutiny, struck down the law at issue.

[60] 351 U.S. 12, 18 (1956).

that the Constitution did not provide a right to appeal but concluded that, because the appellate process was "an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant[,] . . . the Due Process and Equal Protection Clauses protect [indigent] petitioners from invidious discriminations."[61] *Griffin* has been cited as the first in a series of cases establishing an equal protection-based fundamental right to "access the courts,"[62] but, as this discussion will demonstrate, that characterization is overstated.

From a traditional equal protection jurisprudence perspective, the plurality opinion is somewhat unsatisfying. First, the law at issue—one that requires *all* appellants to pay the same fee—simply does not on its face classify between persons.[63] Moreover, *Griffin* stands for the counterintuitive proposition that the Equal Protection Clause does not allow states to treat all people equally by charging everyone the same transcript fee, but instead *requires* states to treat people *differently* by providing free transcripts or substitute means for appeal to some, but not all, appellants.[64]

Finally, the plurality's analysis is circular: the right to access the courts is based on equality, and because Illinois did not provide access to the courts equally, equality was violated.

Aside from its equal protection analysis, *Griffin*'s significance for fundamental rights jurisprudence is unclear. Though *Griffin* has been cited as establishing an equal protection-based fundamental right to access to the courts, whether it actually did so is far from certain. First, the plurality failed to distinguish

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[61] *Id.*

[62] *See, e.g.*, FRANCIS GRAHAM LEE, EQUAL PROTECTION: RIGHTS AND LIBERTIES UNDER THE LAW 174 (2003); JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 242 (2001); Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216 (2007).

[63] Of course, though the law may not facially classify, it has the *effect* of classifying between those who can pay and those who cannot.

[64] Justice Harlan noted this oddity in his dissent. *Griffin*, 351 U.S. at 34-35 (Harlan, J., dissenting) (observing that the majority holding "produces the anomalous result that a constitutional admonition to the States to treat all persons equally means . . . that Illinois must give to some what it requires others to pay for. . . . It may as accurately be said that the real issue in this case is not whether Illinois *has* discriminated but whether it has a duty *to* discriminate.").

whether it was deciding the case under the Equal Protection or Due Process Clause and failed to articulate exactly what the equal protection rationale was. Second, the plurality did not use the term "fundamental right" in its opinion, much less declare any specific right to be fundamental. Third, the Court did not explicitly apply the heightened scrutiny necessary when a fundamental right is impinged. In fact, the Court opined, "the ability to pay costs in advance bears no *rational relationship* to a defendant's guilt or innocence," suggesting rational basis was the test being employed.[65] Fourth, the Court failed to identify which interest (right) was really at issue in the case. On one hand, the Court's concern with the importance of "correct adjudication of guilt or innocence"[66] implied the right to correct adjudication had some sort of significant status. Alternatively, the Court's assertion that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," suggests poverty was the critical concern.[67] Indeed, as in some of the fundamental rights voting cases, the plurality seemed more concerned with wealth discrimination than the appeal right.[68] It is unclear which of these interests—poverty or access to courts—was the basis for the plurality's conclusion that a state's failure to provide transcripts to indigents violated the Constitution.

Griffin's suggestion that the Equal Protection Clause guaranteed a fundamental right to equal access to the courts would be further obfuscated in subsequent cases establishing the

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[65] *Id.* at 17-18 (majority opinion) (emphasis added). On the other hand, the fact that the Court ignored an obvious rational basis for requiring all persons to pay for a transcript—conserving fiscal resources—suggests it was applying some form of heightened scrutiny. This argument gains strength from the fact that *Griffin* was decided just one year after *Williamson v. Lee Optical of Okla.*, which seems to stand for the proposition that any conceivable rationale for a law is sufficient. 348 U.S. 483, 488, 491 (1955) (In applying rational basis review, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it," and "[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.").

[66] *Griffin*, 351 U.S. at 18.

[67] *Id.* at 19. A plausible explanation of *Griffin* is that the plurality was attempting to characterize poverty as a suspect classification without explicitly saying so.

[68] In *Harper v. Va. State Board of Elections*, the Supreme Court declared a poll tax unconstitutional saying, "Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored." 383 U.S. 663, 668 (1966) (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

right to counsel at state criminal trials[69] and on appeal.[70] In finding a fundamental right to counsel at trial in *Gideon v. Wainwright*, the Court relied only on the Due Process Clause of the Fourteenth Amendment, without reference to equal protection.[71] The *Gideon* Court noted the importance this nation has placed on "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."[72] At its core, *Gideon* shared *Griffin*'s apparent concern about wrongful conviction but did not cast that concern in equal protection terms or cite *Griffin*.[73]

By contrast, in *Douglas v. California*, decided the same day as *Gideon*, the majority relied heavily on *Griffin*.[74] The differences between *Gideon* and *Douglas* boil down to this: there is a due process right to a fair trial, but not to appeal. So, while *Gideon* was on firm due process footing, the *Douglas* majority had to grasp for whatever it could to reach its result, and clung to equal protection. Justice Douglas's majority opinion never uttered the phrase "equal protection," but the language of the opinion is the language of equality, strongly suggesting an equal protection basis for its conclusion.[75] And again, the Court neither referred to

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[69] Gideon v. Wainwright, 372 U.S. 335, 339, 341 (1963).

[70] Douglas v. California, 372 U.S. 353, 355 (1963).

[71] *Gideon*, 372 U.S. at 341 ("[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.").

[72] *Id.* at 344.

[73] *Id.* at 345 ("'[T]hough [a defendant] be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'" (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932))). *Griffin* was cited only by Justice Clark, who did not attempt to characterize the opinion other than saying "[p]ortents of today's decision may be found as well in *Griffin*." *Id.* at 348 n.2 (Clark, J., concurring).

[74] *Douglas*, 372 U.S. at 355.

[75] "[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.* at 357. "Absolute equality is not required; lines can be and are drawn and we often sustain them." *Id.* "There is lacking that equality demanded by the Fourteenth Amendment . . . ." *Id.* at 357-58. Justices Harlan and Stewart believed the majority was employing equal protection jurisprudence, as the non-applicability of equal protection to the question at issue was a central theme of the dissents. *Id.* at 360-61 (Harlan, J., dissenting) ("In holding that an indigent has an absolute right to appointed counsel on appeal of a state criminal conviction, the Court appears to rely

access to the courts as a "fundamental right" nor explicitly applied heightened scrutiny. In finding a constitutional right to counsel on appeal of a criminal conviction, the Court referred to *Griffin*, asserting "the evil is the same: discrimination against the indigent."[76] This focus on wealth obfuscates whether *Griffin* and *Douglas* are about access to courts or wealth discrimination.

In *Rinaldi v. Yeager*, a subsequent case addressing fees for appellate transcripts, the Court observed that though criminal appeals are not required, once established, they "must be kept free of *unreasoned distinctions* that can only impede open and equal access to the courts."[77] This language of "unreasoned distinctions" reveals that the Court was conducting a rational basis review of the New Jersey law that required imprisoned appellants, but not other convicted appellants, to pay for transcripts. Moreover, that *Rinaldi* cited *Griffin* for the idea that "unreasoned distinctions" cannot be permitted to impede access to the courts suggests *Griffin* was a rational basis review case, in turn signifying *Griffin* did not stand for the proposition that equal access to courts is a fundamental right under the Equal Protection Clause, infringements of which require heightened scrutiny.[78]

The Court's application of the "*Griffin* principle" that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has" continued in other criminal cases, all of which focused on indigency.[79] The "*Griffin* principle" was

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both on the Equal Protection Clause and on the guarantees of fair procedure inherent in the Due Process Clause of the Fourteenth Amendment, with obvious emphasis on 'equal protection.' In my view the Equal Protection Clause is not apposite . . . .").

[76] *Id.* at 355 (majority opinion).

[77] 384 U.S. 305, 310 (1966) (emphasis added) (citing Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963)).

[78] All four justices in the *Griffin* plurality (Warren, Douglas, Black, and Clark) were in the *Rinaldi* majority, lending weight to the *Rinaldi* majority's characterization of *Griffin*.

[79] *Griffin,* 351 U.S. at 19; *see, e.g.*, Mayer v. City of Chicago, 404 U.S. 189 (1971) (holding that an indigent cannot be denied an adequate record to appeal a conviction under a fine only statute); Roberts v. LaVallee, 389 U.S. 40 (1967) (per curiam) (holding that an indigent is entitled to a free transcript of a preliminary hearing for use at trial). *But cf.* United States v. MacCollom, 426 U.S. 317 (1976) (The Court rejected an equal protection challenge to a federal statute that provided indigents with free trial transcripts only if the district court certified the challenge to conviction was not frivolous and the transcript was necessary to appeal.); Ross v. Moffitt, 417 U.S. 600

also cited in later cases that focused on punishment, rather than access to judicial process, of indigents.[80] In all of these cases, the Court's focus was on "fairness" in relation to the defendant's ability to pay.

The idea of a right to equal access to the courts has not been limited to criminal proceedings, though the Court's assessment of such rights in civil cases sheds little additional light on whether an equal protection-based fundamental right to equal access to courts exists. In *Boddie v. Connecticut*, the Court found the right of indigent plaintiffs to have "access to the only avenue open for dissolving their . . . marriages" outweighed the government's interests in imposing a filing fee in divorce actions.[81] Employing a familiar due process analysis, the Court balanced the plaintiffs' interests and the government's.[82] Though it cited *Griffin* for the proposition that a "State's asserted interest in its fee and cost requirements as a mechanism of resource allocation or cost recoupment" was insufficient to outweigh the indigent litigant's interest in obtaining a divorce, the Court did not employ an equal protection analysis of the purported right.[83] Instead, it rested solely on due process.

Subsequently, in *Lindsey v. Normet*, the Court addressed an Oregon statute that required a double bond be posted when appealing an eviction.[84] The Court declined to find a fundamental right to "decent shelter" but struck down the law on a separate

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(1974) (holding that indigents have no constitutional right to appointed counsel for discretionary appeals).

[80] Bearden v. Georgia, 461 U.S. 660 (1983) (holding that courts may not automatically revoke probation for failure to pay a fine and make restitution; if failure to pay is outside indigent probationer's control, courts may impose revocation only if alternate measures are inadequate to meet state's punishment and deterrence interests); Tate v. Short, 401 U.S. 395 (1971) (holding that states cannot convert a fine imposed under a fine-only statute to a jail term because defendant is indigent and cannot immediately pay fine in full); Williams v. Illinois, 399 U.S. 235 (1970) (holding that a state cannot subject convicted defendants to a period of imprisonment beyond the statutory maximum because they are too poor to pay a fine).

[81] 401 U.S. 371, 381 (1971) (holding that the government's interests included the prevention of frivolous litigation and allocation of scarce resources was substantial and its use of court fees and process costs to allocate scarce resources rational).

[82] *Id.* at 380-82.

[83] *Id.* at 382 (citing Griffin v. Illinois, 351 U.S. 12 (1956)).

[84] 405 U.S. 56 (1972).

equal protection basis.[85] In holding that Oregon's double bond requirement for eviction appeals violated the Equal Protection Clause, the Court reiterated that a state is not required to provide an appeal, but if it does, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."[86] An "arbitrary and capricious" standard certainly strikes of minimal scrutiny. Again, the Court neither identified the right to appeal as "fundamental," nor stated it was applying heightened scrutiny. To the contrary, the Court found that the double bond requirement was unrelated to its purported purposes and held the double bond requirement unconstitutional because it was "irrational."[87]

The Court subsequently rejected the idea of employing heightened scrutiny, whether under the Due Process Clause or the Equal Protection Clause, in challenges based on "equal access to the courts" with respect to bankruptcy filings[88] and challenges to welfare benefits reductions,[89] instead holding rational basis analysis was all that was required.

More recently, the Court addressed indigent access to civil courts in *M.L.B. v. S.L.J.*[90] There, the Court struck down a Mississippi law that prevented an indigent mother from appealing a termination of parental rights because she could not afford a $2,000 transcript processing fee.[91] As in *Griffin*, the majority did not articulate the right at issue as "fundamental" or utter the phrase "heightened scrutiny." The majority acknowledged that the Court's prior decisions concerning "access to judicial processes" reflected both equal protection and due process concerns, but that because there was no due process right to appeal, "'[m]ost

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[85] *Id.* at 73-74.

[86] *Id.* at 77 (citing Griffin v. Illinois, 351 U.S. 12 (1956); Smith v. Bennett, 365 U.S. 708 (1961); Lane v. Brown, 372 U.S. 477 (1963); Long v. Dist. Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 393 U.S. 367 (1969)).

[87] *Id.* at 77-79. "The discrimination against the class of [double bond] appellants is arbitrary and irrational, and the double-bond requirement . . . violates the Equal Protection Clause." *Id.* at 79.

[88] United States v. Kras, 409 U.S. 434 (1973).

[89] Ortwein v. Schwab, 410 U.S. 656 (1973).

[90] 519 U.S. 102 (1996).

[91] *Id.* at 106-07.

decisions in this area . . . res[t] on an equal protection framework.'"[92]

Despite *saying* it was conducting an equal protection analysis, the majority subsequently seemed to apply a due process analysis. "In line with [past decisions in this area], we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other."[93] This approach smacks of a *Mathews v. Eldridge* due process analysis, in which, when determining the amount of process due, courts assess the nature of the individual's interest, the risk of error through the procedures used, the value of additional or substitute procedural safeguards, and the costs and administrative burden of the additional process.[94] In fact, the *M.L.B.* majority balanced the indigent mother's interest in preserving her familial bonds and avoiding characterization as an unfit parent, which the Court found "'irretrievabl[y] destructi[ve]' of the most fundamental family relationship," against the "countervailing government interest" in offsetting the costs of its court system.[95] So, the Court seemed to indicate that the primary interest at issue—the right that might be considered "fundamental," though the majority did not so state—was not "access to the courts," but rather the importance of the family bond.[96]

The majority distinguished prior cases in which the Court held states were not responsible to cover fees for indigents in certain civil actions, even when fundamental rights were implicated, by showing in those cases the indigent litigants were seeking assistance in "privately initiated action," rather than seeking to defend against state action, as was M.L.B.[97] Thus, not

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[92] *Id.* at 120 (alteration in original) (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)). This quote seems near an admission that "because we can look nowhere else, we will find that the Equal Protection Clause is violated."

[93] *Id.* at 120-21 (citing *Bearden*, 461 U.S. at 666-67).

[94] 424 U.S. 319, 334-35 (1976).

[95] *M.L.B.*, 519 U.S. at 121-22 (alteration in original) (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

[96] *Id.* at 116-17 ("[T]he State's authority to sever permanently a parent-child bond demands the close consideration the Court has long required when a family association so undeniably important is at stake.") (footnote omitted).

[97] *Id.* at 124-25 (distinguishing, inter alia, *Lyng v. UAW*, 485 U.S. 360, 363 n.2, 370-74 (1988)).

only did the majority apply an analysis akin to a traditional due process analysis, but it made clear that the state's affirmative *deprivation*—a due process concern—in conducting the parental status termination was critical to the case.[98]

Whether the Court was stealthily applying due process analysis sub nomine equal protection is not ultimately critical to *M.L.B.*'s answer to the question of whether there is an equal protection-based fundamental right to access to the courts requiring strict scrutiny. The *M.L.B.* majority explicitly stated that "we do not question the general rule . . . that fee requirements ordinarily are examined only for rationality,"[99] stating there are only two exceptions: (1) "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license" and (2) "access to judicial processes in cases criminal or 'quasi criminal in nature,' [may not] turn on ability to pay."[100] In fact, the only time the Court has applied something other than rational basis review when scrutinizing exclusion from court access has been when ability to pay is at issue.

In summary, several observations can be made regarding the so-called equal protection-based "fundamental right" to equal access to courts. First, the Court has never articulated a "fundamental right to equal access to the courts." Second, the Court's focus in every case where it has struck down a law that impinged equal access to courts has been inability to pay. Third, the Court has never expressly stated it is applying heightened scrutiny to laws that impinge equal access to courts. And this is not because the concept of heightened scrutiny was foreign; while some of the *Griffin* line of cases predates the modern understanding of three-tiered equal protection review, the concept of heightened scrutiny predates all the "access to courts" cases discussed here.[101] If the Court had intended in *Griffin* or some subsequent case to articulate that heightened scrutiny was

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[98] *Id.* at 127-28.

[99] *Id.* at 123.

[100] *Id.* at 124 (quoting Mayer v. City of Chicago, 404 U.S. 189, 196 (1971)).

[101] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that courts must subject laws that curtail the civil rights of a single racial group to "the most rigid scrutiny"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("[S]trict scrutiny of the classification which a State makes in a sterilization law is essential . . . .").

required, it could have. Fourth, when the Court *has* expressly articulated a level of scrutiny that it is applying to laws that impinged equal access to courts, it has been rational basis review.[102] Fifth, even in some instances where the Court has stated it is applying rational basis review, it has struck down laws that inhibit indigents' access to court processes. Finally, the Court has routinely confused due process and equal protection analysis in its fundamental rights cases generally, and in equal access to courts cases specifically, making discerning the actual basis for its opinions difficult. Indeed, many of the cases could have been decided as due process cases,[103] or perhaps really *were* due process cases.[104] On occasion, even when the Court said it was employing equal protection analysis, it appears to have been using due process.[105] It is with this murky background we wade into the question of whether there is an equal protection-based "fundamental right" to access to problem-solving courts like VTCs.

c. Equal Protection-Based Fundamental Rights and Problem-Solving Courts

Because the Court has not articulated a broad fundamental right to equal access to the courts, it is uncertain whether the Court would entertain bases other than indigency for claims that equal access to the courts had been infringed, such as the type of exclusionary individual qualification requirements VTCs employ. As is true in other constitutional questions, the level of abstraction used in articulating the right in question would likely be dispositive.[106] In one case where a criminal defendant argued

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[102] *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 660 (1973); United States v. Kras, 409 U.S. 434, 446 (1973); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

[103] *See, e.g.*, Douglas v. California, 372 U.S. 353, 360 (1963) (Harlan, J., dissenting); Griffin v. Illinois, 351 U.S. 12, 34-39 (1956) (Harlan, J., dissenting).

[104] *See* San Antonio Indep. Sch. Bd. v. Rodriguez, 411 U.S. 1, 59-62 (1973) (Stewart, J., concurring).

[105] *See, e.g.*, *supra* notes 88-94 and accompanying text.

[106] This is especially important in the substantive due process arena, where the level of abstraction at which the right is articulated determines whether the right is constitutionally protected. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (majority identifies right at issue as right to engage in homosexual sodomy rather than a broader right that might have been constitutionally protected); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (majority identifies the right involved as "marital privacy" rather than right to use

that the state's failure to provide a problem-solving court in her county violated the Equal Protection Clause because such courts were available elsewhere in the state, the Washington Supreme Court countered that the defendant had not shown that "a fundamental right exists to participate in a drug court program."[107] And of course, under the *Rodriguez* standard that a fundamental right must be "explicitly or implicitly guaranteed by the Constitution,"[108] the defendant never could. Likewise, no one could claim the Constitution explicitly or implicitly provides a "fundamental right to participate in a VTC." Though the benefits of participation in problem-solving courts vary, it is hard to conceive of a concrete right that would meet the *Rodriguez* standard. The Constitution certainly does not guarantee or protect a right to participate in a VTC, a right to not be convicted or have a conviction expunged, a right to rehabilitative treatment, a right to forego jail or other punishment (other than that which is cruel and unusual), or similar such benefits VTCs offer.

On the other hand, a challenger could articulate a more abstract right, such as the "fundamental right to access the courts" that is used to overbroadly characterize the *Griffin* line of cases. If accepted as the proper articulation of the right, any classification that excluded some people from the courts, for any reason, would be considered an impingement on a fundamental right. But, while "equal justice" or "access to the courts" sounds like a potentially successful basis for claiming a fundamental right

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contraception). Justice Scalia's plurality opinion in *Michael H.* asserts that when identifying whether there is a constitutionally protected right, one must articulate that right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." 491 U.S. at 127 n.6 (plurality opinion). Justices O'Connor and Kennedy disagreed, noting that "[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available." *Id.* at 132 (O'Connor, J., concurring in part).

[107] State v. Harner, 103 P.3d 738, 742 (Wash. 2004). The court further opined that the challenged law withstood rational basis review. *Id.* Other state appellate courts have similarly rejected equal protection challenges because "no one has the right to attend the drug court." Jim v. State, 911 So. 2d 658, 660 (Miss. Ct. App. 2005). In *Jim*, the court's perfunctory analysis rests solely on the fact that the legislation creating drug courts in Mississippi said there was no "right to participate in drug court." *Id.* (quoting MISS. CODE ANN. § 9-23-15(4) (2005)); *see also* Phillips v. State, 25 So. 3d 404, 409 (Miss. Ct. App. 2010).

[108] *Rodriguez*, 411 U.S. at 33.

is impinged when access to a problem-solving court is denied, there are at least three potential problems with this line of argument. First, as discussed above, the current existence of a "fundamental right to equal access to courts" is highly in doubt. The Court has had numerous opportunities to declare such a right at that level of abstraction and simply has not. And given that the Court has not articulated any new equal protection-based fundamental rights in the four decades since *Rodriguez*, it seems unlikely it will. Second, courts could easily distinguish the VTC challenger's claim from those in the *Griffin* line of cases based on those cases' singular focus on indigency, a key concern of the Warren Court at the time of the seminal opinions in the strand. Finally, though an esoteric argument could be made that the Constitution guarantees equal access to the courts, it likely would meet the same fate the argument that education is constitutionally protected met in *Rodriguez*: the right is not explicit and the evidence of implicit constitutional protection is insufficient.

Not only has the Court failed to articulate a general right to access the courts, it has often eschewed traditional equal protection analysis when it has invoked the Equal Protection Clause, in some cases failing to identify the level of scrutiny a particular classification should receive, and in others arguably applying a different level of scrutiny than it claimed. *M.L.B.*'s "clarification" that rational basis review applies to fee requirements except in cases of voting or access to courts in criminal or quasi-criminal cases sheds no light on what level of review should apply to non-fiscal bases for challenging exclusionary classifications in problem-solving criminal courts. This ambiguity casts a shadow on any prediction regarding whether the Court would entertain bases other than indigency for claims that equal access to the courts had been infringed, such as the type of exclusionary individual qualification requirements VTCs employ. In light of such ambiguity, the best understanding of the current state of the law is that the Court's only explicit discussion of scrutiny levels as it relates to access to the courts is binding: rational basis review applies unless indigent persons are being excluded from court.

As noted above, it appears that in cases where indigent persons are excluded from participation in criminal or quasi-criminal judicial processes, the Court has not applied heightened scrutiny, but rather a per se bar.[109] There is a reasonable argument that the underlying rationale of *Griffin* and subsequent cases—that once a criminal process has been created by a state, it cannot "bolt the door to equal justice"[110] to exclude some from the process—should apply to *all* classifications that prevent full participation in criminal or quasi-criminal cases, including those that exclude non-veterans from participation in VTCs. To date, the Court has simply not extended its *Griffin* rationale that far.

Because the Court has not: (1) articulated a broad "fundamental right to access the courts;" (2) created any new equal protection-based fundamental rights in the four decades since *Rodriguez*; (3) discussed equal access to the courts outside the context of indigency or ability to pay; or (4) stated that anything other than rational basis review applies to equal protection claims of classifications that impinge equal access to the courts, only rational basis review applies to claims that exclusion from participation in VTCs violates equal protection.

2. Rational Basis Review

As the Supreme Court has repeatedly noted, a classification involving neither a fundamental right nor a suspect class "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[111] Further, the Court has stated that "unreasoned distinctions" may not impede open and equal access to the courts.[112] While there are no published opinions addressing whether providing a separate and preferred criminal justice system for veterans only constitutes a violation of non-veterans' equal protection rights, extensive jurisprudence regarding other federal and state veterans preference programs

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[109] M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) ("[A]ccess to judicial processes in cases criminal or 'quasi criminal in nature' [may not] turn on ability to pay." (quoting Mayer v. City of Chicago, 404 U.S. 189, 196 (1971))).

[110] Griffin v. Illinois, 351 U.S. 12, 24 (1956) (Frankfurter, J., concurring).

[111] Heller v. Doe, 509 U.S. 312, 320 (1993).

[112] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

sheds light on the likely success of such a challenge. Additionally, one recent Supreme Court case, discussing leniency for veterans in the criminal justice process, while not specifically involving equal protection, suggests how the Court might view such a challenge.[113]

Several apparently legitimate interests exist for states to create VTCs, including: expressing gratitude for, and recognizing, military service and sacrifice; easing veterans' transition from military to civilian life; and fulfilling society's obligation to help rehabilitate those who were broken in military service to the nation. Additionally, the various classifications drawn by states that exclude criminal defendants from participation are rationally related to those interests. In short, VTCs' exclusionary qualification requirements withstand rational basis review.

B. Rational Basis Review Applied

1. Government Interests

a. Legitimate Interests for Veterans Preferences Generally

While government interests furthered by veteran hiring preferences do not overlap completely with those driving the exclusionary classifications employed by VTCs, interests identified and analyzed in such cases potentially apply to VTCs and are worthy of consideration. Veterans' hiring preferences are ubiquitous in federal, state, and local government employment and have a long history in the United States. Though there have been *many* veterans preference laws, a review of just a few suffices here.

Just three years before ratification of the Fourteenth Amendment, Congress passed legislation stating that veterans who had been honorably discharged because of "disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointments to civil offices."[114] In 1876,

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[113] United States v. Alvarez, 132 S. Ct. 2537 (2012).

[114] U.S. REV. STAT. § 1754 (1865). The inequality of the preference established by the 1865 law was later explicitly recognized by the Civil Service Commission when it noted, "It has long been evident to the Commission that section 1754 is very inequitable in its operation, and the attention of Congress and the public has

Congress again allowed disabled veterans to be preferred for retention during a reduction in the federal government's civilian workforce.[115] Though the equal protection guarantee was then understood to apply only to the states, such actions predating and postdating ratification of the Fourteenth Amendment at least suggest the principle of equal protection was not originally understood to bar such preferences. Importantly, these actions limited the pool of eligible veterans to those with disability, meaning that the classification at issue was not just "veterans versus non-veterans," but certain veterans versus other veterans.

Since the conclusion of the Civil War, hiring preferences for veterans have been a nearly continuous feature of federal employment law, often related to recently concluded military campaigns.[116] The Veterans' Preference Act of 1944 (VPA)[117] is the most significant legislation regarding federal veterans hiring preference as it exists today. The VPA essentially codified preexisting regulations and executive orders and combined them with preexisting law into a cohesive legislative enactment. The VPA granted hiring preference to non-disabled veterans who performed military service during wartime, disabled veterans, and some others.[118] Congress has modified veterans hiring preferences many times since 1944.[119]

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repeatedly been drawn to the matter . . . ." U.S. CIVIL SERV. COMM'N, ELEVENTH REPORT OF THE UNITED STATES CIVIL SERVICE COMMISSION: JULY 1, 1893, TO JUNE 30, 1894, at 95 (1895), *available at* http://books.google.com/books?id=RA8QAAAAYAAJ&pg=PA95&ots=G56ouIMQYk#v=onepage&q&f=false. Nevertheless, the Commission recognized "Congress alone can enlarge or abridge the class to which preference shall be given." *Id.* at 96.

[115] Act of Aug. 15, 1876, ch. 287, § 3, 19 Stat. 143, 169.

[116] For example, in 1919, Congress expanded veterans' preference in federal executive branch hiring by requiring a veterans' preference for *all* "honorably discharged soldiers, sailors, and marines." Thus, the hiring preference was no longer limited only to disabled veterans and not limited to veterans who served in combat or during war time. Third Deficiency Appropriation Act, ch. 6, 41 Stat. 35, 37 (1919). Note that the requirement that the veteran have served *honorably* remained.

[117] Veterans' Preference Act of 1944, ch. 287, 58 Stat. 387 (1944).

[118] *Id.* § 2, 58 Stat. at 388. "Others" included wives and widows of disabled veterans. *Id.*

[119] *See, e.g.*, 5 U.S.C. 2108 (2012) (expanding preference to all veterans who served on active duty for more than 180 days between January 31, 1955, and October 15, 1976, without a requirement to serve during war, campaign, or conflict); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, 111 Stat. 1629, 1922 (1997) (giving preference to anyone who served on active duty during the Gulf

Throughout the history of veterans' preferences, each of which constitutes a clear classification benefiting a particular class, the Supreme Court has never upheld a challenge to veterans' preference in federal hiring based on equal protection grounds. By contrast, the Court has explicitly recognized Congress' and state legislatures' intent when passing laws that exclusively benefit veterans and has never suggested such a classification was improper. In *Keim v. United States*, the Supreme Court rejected a challenge to a veterans' preference law, observing that "[n]o thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy."[120] Later, in *Mitchell v. Cohen*, the Court explicitly acknowledged the purpose behind the Veterans' Preference Act of 1944, observing that Congress "felt that the problems of these returning veterans were particularly acute and merited special consideration."[121] Moreover, state supreme courts have routinely upheld state veterans' preference statutes as constitutional, acknowledging that veterans often possess characteristics that make them ideal civil service employees, and with the only limitation being that veterans must actually be qualified for the jobs for which they are hired.[122]

War and certain service members who earned campaign medals for service in Bosnia and Herzegovina in support of Operation Joint Endeavor or Operation Joint Guard); Veterans' Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12, 12-13 (giving peace-time preference for Vietnam-era vets who served on active duty for more than 180 consecutive days with at least one day being after January 31, 1955); Veterans Readjustment' Assistance Act of 1952, ch. 875, 66 Stat. 663 (granting preference benefits to those honorably separated veterans who served on active duty in any branch of the armed forces of the United States on or after June 27, 1950). Even the *parents* of certain disabled veterans were awarded hiring preferences in a proposed Senate bill in 2010. S. 3650, 111th Cong. (2010).

[120] 177 U.S. 290, 295 (1900).

[121] 333 U.S. 411, 418 (1948).

[122] *See, e.g.*, Ricks v. Dep't of State Civil Serv., 8 So. 2d 49 (La. 1942) (holding that veterans' preference statute does not violate the Fourteenth Amendment of the federal Constitution); Cook v. Mason, 283 P. 891, 893 (Cal. Dist. Ct. App. 1929) ("[T]he Legislature may have, and doubtless did think, that a person . . . who has been honorably discharged [from the military] had by such service acquired habits of industry, obedience, and fidelity, which are valuable qualifications for any public office or employment . . . ."); Goodrich v. Mitchell, 75 P. 1034, 1036-37 (Kan. 1904) ("[T]here are reasonable and substantial considerations for making a preference in favor of the veterans. The love of country . . . is some assurance . . . of loyalty and fidelity in the civil service," and discipline that "promote[s] promptness, respect for authority and

What is clear from the opinions upholding veterans' preferences is that courts, including the Supreme Court, have upheld a multitude of justifications for veterans' preferences in government hiring. In 1979, the Supreme Court summarized those justifications while addressing an equal protection challenge to a Massachusetts' veterans' preference statute so generous to veterans it was considered "a well-nigh absolute advantage" for veteran job applicants over non-veterans.[123] In *Feeney*, the plaintiff did not allege that the "veteran versus non-veteran" classification was constitutionally infirm, but rather that it constituted a gender classification because of the disproportionate number of male veterans compared to female veterans. The Court rejected the gender discrimination challenge, finding the classification at issue was "a preference for veterans of either sex over nonveterans of either sex, not for men over women."[124] This language clearly demonstrates the Court saw no problem with a veterans' preference, though that was not the holding of the case.

Before reaching its conclusion, the Supreme Court summarized the routine justifications for veterans' preference laws as "designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-disciplined people to civil service occupations."[125] As will be

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obedience to law, courage to meet difficulties and overcome selfish and sinister influences, steadiness of purpose, perseverance, and devotion to duty."); Op. of the Justices, 44 N.E. 625, 626-27 (Mass. 1896) (holding that in passing veterans' preference law, the legislature might have determined that a veteran who had distinguished himself by heroic conduct was a person who had shown such qualities of character that it was for the interests of the commonwealth to appoint him to certain offices and that if such was the legislature's opinion, the statute was constitutionally within its power).

[123] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 264 (1979).

[124] *Id.* at 280. The Court found the veterans preference law was not a *gender* classification because there was no "discriminatory purpose" relating to gender on the part of the Massachusetts legislature. *Id.* at 279-80. The Court noted that, though smaller in number, women veterans were eligible for the preference, and that the law adversely affected many male nonveterans. *Id.* at 275.

[125] *Id.* at 265. The Court noted that "[v]eterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized." *Id.* at n.12 (citing Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), *summarily aff'd*, 410 U.S. 976 (1973); August v. Bronstein, 369 F. Supp. 190 (S.D.N.Y. 1974); Rios v. Dillman, 499 F.2d 329 (5th Cir. 1974); Mitchell v. Cohen, 333 U.S. 411, 419 n.12 (1948); Grace Blumberg, *De Facto and De Jure Sex Discrimination*

discussed below, two of these justifications for veterans' preferences—rewarding veterans for military service and easing the transition from military to civilian life—also apply to VTCs.[126]

The Supreme Court more recently articulated its view of a different type of veterans' preference in the criminal context. In its per curiam opinion in *Porter v. McCollum*, the Court approvingly noted "[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines."[127] Again, this sentiment reaffirms that gratitude toward veterans is a legitimate interest. Though *Porter* is not an equal protection case, the Court's sentiment is important for several reasons. First, it suggests how the Court might rule when applying rational basis review to an equal protection challenge based on veterans receiving preferential treatment in the criminal context. It is hard to imagine the Court could profess its approval for sentencing leniency for combat veterans and yet find that providing leniency to criminal defendant veterans is not a legitimate government interest or that VTCs are not rationally related to accomplishing that interest. Second, *Porter* is a criminal case, which is significant because it demonstrates that prior military service may be relevant to proper adjudication and sentencing in criminal cases. Porter appealed his sentence based on his lawyer's failure to present evidence to the trial court of Porter's extensive meritorious combat service.[128] The Court noted that evidence of criminal defendant Porter's extensive combat service to the criminal case was relevant both because "he served honorably under extreme hardship and gruesome conditions" and that "the jury might find mitigating the intense stress and mental and emotional toll that combat took."[129] This comment

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Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 BUFF. L. REV. 1, 3 (1977)).

[126] Of course, not all the justifications for preferential hiring summarized in *Feeney* apply to VTCs. Specifically, encouraging patriotic service and attracting loyal and well-disciplined people to civil service occupations clearly would not be interests served by VTCs. VTCs are unrelated to civil service and it would be hard to argue that the possibility of having a unique and more rehabilitation-focused criminal justice process for crimes one might potentially commit after military service would serve as an inducement to a "pre-veteran" to serve.

[127] Porter v. McCollum, 558 U.S. 30, 43 (2009).

[128] *Id.* at 30-33.

[129] *Id.* at 43-44.

demonstrates that the Court recognizes that in some way society is obligated to the veteran for injuries incurred during service to the nation.

The Court's determination that combat service is relevant in criminal proceedings is significant to the question of whether VTCs can constitutionally be offered only to veterans, because VTCs are criminal courts, albeit substitutes for harsher criminal tribunals. If evidence of one's military service is important enough to warrant remand for new sentencing when such mitigation evidence was not initially presented, it stands to reason that providing an entire class of such veterans a more lenient criminal process is permissible. Finally, the Court's language "especially for those who fought on the front lines"[130] signifies the Court's likely acceptance of an argument that serving on the front lines is legally distinct from military service generally, thus allowing a jurisdiction rationally to discriminate between veterans whose PTSD and subsequent criminal misconduct can be attributed to combat service and veterans without such combat service.

It is important to note that while *Porter* is relevant to the question of the legitimacy of according veterans leniency in the criminal process, standing alone, *Porter* does not slam the door on potential equal protection challenges to VTCs. As noted above, *Porter* was not an equal protection case. Additionally, the authority cited for the most relevant language—"[o]ur Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines"—is remarkably weak, including no legislation or judicial opinions.[131] A subsequent court wanting to address an equal protection challenge to VTCs and desiring to distinguish or limit *Porter* could do so with ease.

Given the history of cases upholding veterans' preferences, applying rational basis review to laws benefiting veterans seems

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[130] *Id.* at 43.

[131] *Id.* The Court cites only a 1927 article that discusses a "movement to pardon or parole prisoners who were veterans of the Civil War" and a 1940 article that briefly mentions a 1922 report in Wisconsin that suggests "greater leniency . . . . may be shown to ex-service men in court." *Id.* at 43 n.8 (citing Edith Abbott, *The Civil War and the Crime Wave of 1865-70*, 1 SOC. SERV. REV. 212, 232-34 (1927); Betty B. Rosenbaum, *The Relationship Between War and Crime in the United States*, 30 J. CRIM. L. & CRIMINOLOGY 722, 733-34 (1940)).

an easy chore.[132] After all, the Court has already acknowledged some legitimate government interests, and so long as the classification involved in the VTC is rationally related to accomplishing that interest—a very low bar[133]—it should withstand equal protection challenge. However, concluding that VTCs are consistent with the Equal Protection Clause simply because veterans hiring preference statutes have withstood equal protection scrutiny is a leap that must be further explored. First, the leap erroneously assumes that the purposes (i.e., the government interests) of classifications involved in VTCs are indistinguishable from the purposes of veterans hiring preference laws. Stated another way, though a general desire to "help veterans" pervades both hiring preferences and VTCs, the articulable "legitimate interests" involved in VTCs are different than those approved in hiring preference cases. This leads to a related leap that because courts have declared the relationship between hiring preferences and the various classifications involved therein as rational, the relationships between the interests and classifications involved in VTCs are rational. In other words, even though the classifications (means) involved in VTCs and hiring preferences are similar, whether the classifications in VTCs rationally accomplish the interests VTCs are intended to achieve (ends) must be demonstrated, not assumed. It is to that analysis to which we now turn.

b. Legitimate Interests for VTCs

Because states have not yet been forced to articulate in litigation the interests they intend to accomplish with VTCs, we must look elsewhere. Fortunately, recitals and declarations accompanying implementing VTC legislation contain clear indication of potentially applicable interests, as have justifications

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[132] Indeed, the plaintiff in *Feeney* did not even attempt to argue that the Massachusetts' law at issue, which "overtly prefers veterans," was not rationally accomplishing a legitimate state interest. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 277 (1979).

[133] *See, e.g.*, Williamson v. Lee Optical of Okla., 348 U.S. 483, 488, 491 (1955) (In applying rational basis review, "[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it," and "[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds.").

offered by judges and other VTC actors. Such interests include: (1) expressing gratitude for, and recognizing, military service and sacrifice;[134] (2) easing veterans' transition from military to civilian life;[135] and (3) fulfilling society's obligation to rehabilitate that which was broken during a veteran's military service.[136] These

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[134] *See, e.g.*, Act to Establish Veterans Treatment Courts, 2011 Me. Laws 1413, 1414 ("[A]s a grateful State, we must continue to honor the military service of our men and women . . . ."); Veterans and Servicemembers Court Treatment Act, 730 ILL. COMP. STAT. ANN. 167/5 (West Supp. 2011) ("[V]eterans and active, Reserve and National Guard servicemembers have provided or are currently providing an invaluable service to our country."); Act Concerning Authorization for the Establishment of a Veterans Treatment Court Program in Judicial Districts, 2010 Colo. Sess. Laws 464 (codified at COLO. REV. STAT. § 13-5-144) ("Historically, the state of Colorado has honored the noble sacrifices that members of the military have made to protect our freedoms by providing veterans and members of the military certain benefits and rehabilitative services . . . .").

[135] Ashley Teatum, *County Court Targeting Veterans' Special Needs*, TIMES-TRIB., Sept. 25, 2009, at A7, *available at* 2009 WLNR 18924480 ("[V]eterans . . . 'are trained to be violent. That's the reality of it . . . . [They] come home on a Friday, and we expect them to transition and be back to work on a Monday.'" (quoting Pennsylvania Supreme Court Justice Seamus McCaffrey)); Joel Warner, *Can a Veterans Court Help Former GIs Find Justice Here at Home?*, WESTWORD (Feb. 4, 2010), http://www.westword.com/2010-02-04/news/can-a-veterans-court-help-former-gis-find-justice-here-at-home/full/ ("'There's still the problem of coming back from a combat theater and transitioning back into the civilian life. We need to truly make sure soon-to-be veterans aren't just being pushed out, but are being taken care of.'" (quoting Colorado Springs VTC participant offender Sergeant Nic Gray)); Robert T. Russell, *Veterans Treatment Court: A Proactive Approach*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 363 (2009) ("[V]eterans are a niche population with unique needs," and "'service members and their families experience unique stressors as part of the military experience.'" (quoting DEP'T OF DEF. TASK FORCE ON MENTAL HEALTH, AN ACHIEVABLE VISION: REPORT OF THE DEPARTMENT OF DEFENSE TASK FORCE ON MENTAL HEALTH, JUNE 2007, at 41 (2007), *available at* http://justiceforvets.org/sites/default/files/files/Dept%20of%20Defense,%20mental%20health%20report.pdf)).

[136] Act to Establish Veterans Treatment Courts, 2011 Me. Laws 1413, 1414 ("[A] significant number of [veterans] will suffer, as a result of their military service, mental health injuries, such as post-traumatic stress disorder, depression, anxiety and acute stress, and injuries that affect brain function, such as traumatic brain injury," and "combat-related injuries, and the use of drugs and alcohol to cope with such injuries, can lead to encounters with the criminal justice system that would not have occurred without the combat-related injuries . . . ."); Veterans and Servicemembers Court Treatment Act, 730 ILL. COMP. STAT. ANN. 167/5 (West Supp. 2011) (*As a result of injuries suffered during military service*, "some veterans or active duty servicemembers come into contact with the criminal justice system," and "[t]here is a critical need for the criminal justice system to recognize these veterans, provide accountability for their wrongdoing, provide for the safety of the public and *provide for the treatment of our veterans*.") (emphasis added); Act Concerning Authorization for the Establishment of a Veterans Treatment Court Program in Judicial Districts, 2010 Colo. Sess. Laws 464

purposes must be examined to determine whether they are "legitimate government interests."

i. Expressing Gratitude for, and Recognizing, Military Service and Sacrifice

As demonstrated above, expression of gratitude for military service has been employed repeatedly as a justification for veterans hiring preferences. More importantly, the Court has continually indicated its approval of this interest. The *Feeney* Court recognized and implicitly accepted this routine justification[137] and the *Porter* Court explicitly recognized the nation's tradition of rewarding military service with sentencing leniency.[138] Most recently, in *United States v. Alvarez*, the Court agreed that military medals "serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service."[139]

While *Feeney*, *Porter*, and *Alvarez* were not addressing VTCs, in the context of equal protection challenges to VTCs, the first question is whether the *interest*—in this case, rewarding military service and sacrifice—is legitimate, not whether the way in which the state has attempted to accomplish that interest—in this case by providing VTCs—is rational. Thus, while *Feeney* and *Porter* do not dispositively answer whether various classifications employed by states offering VTCs are constitutionally acceptable, they *do* stand for the proposition that rewarding military service and sacrifice is a legitimate government interest. And *Alvarez* goes

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(codified at COLO. REV. STAT. § 13-5-144) ("[C]ombat-related injuries, including the use of drugs and alcohol to cope with such injuries, can lead to encounters with the criminal justice system that would not have otherwise occurred without the combat-related injury . . . ."); *Id.* at 465 ("As a grateful state, we must continue to honor the military service of our men and women by attempting to provide them with an alternative to incarceration when feasible, permitting them instead to access proper treatment for mental health and substance abuse problems resulting from military service."). Like other problem-solving courts, the ultimate mission of veterans treatment courts is to successfully rehabilitate veterans and prevent recidivism. Russell, *supra* note 18, at 132.

137 *Feeney*, 442 U.S. at 265.

138 Porter v. McCollum, 558 U.S. 30, 43-44 (2009).

139 United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012) (internal quotation marks and citation omitted).

further, stating that that interest is not only *legitimate*, but "*important*," an element of assuring national security.[140]

As might be expected, using VTCs to "express gratitude" to veterans is not universally accepted. Some have objected to military members being provided options for lower sentences based solely on their military status.[141] While a debatable policy objection, precedent clearly establishes that according leniency or unique preferences based on veterans' status is a legitimate state activity.

ii. Easing Veterans' Transition from Military to Civilian Life

A host of additional justifications for VTCs can be categorized as "easing veterans' transition from military to civilian life." As with rewarding veterans for their service and sacrifice, Supreme Court precedent clearly establishes this as a legitimate interest. The *Mitchell* Court explicitly recognized that a purpose of the VPA of 1944 was to address "the problems of these returning veterans."[142] The *Feeney* Court observed that "eas[ing] the transition from military to civilian life"[143] is a common justification for veterans hiring preferences. Again, while *Feeney* was not about VTCs, if the *interest* being accomplished by veterans hiring preference systems—easing the transition from military to civilian life—was acceptable in *Feeney*, the same interest must be legitimate in the context of VTCs. Much as veterans hiring preferences have recognized that finding employment may be difficult for veterans returning to civilian life from military service, VTCs recognize that some veterans need assistance transitioning from a violence-oriented existence to a

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[140] *Id.* ("In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.").

[141] Warner, *supra* note 135 ("[S]keptics worry that veteran status could just be a get-out-of-jail-free card for the nation's military."); Matthew Walberg, *Cook County Veterans Court Offers Helping Hand*, CHI. TRIB. (July 15, 2009), http://articles.chicagotribune.com/2009-07-15/news/0907140761_1_special-court-new-veterans-helping (discussing that the Cook County, Illinois Veterans Court was superior to a VTC in Nevada because it did not grant any "free passes" to veterans based solely on their status) (citing ACLU of Illinois spokesman Ed Yohnka).

[142] Mitchell v. Cohen, 333 U.S. 411, 418 (1948).

[143] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 265 (1979).

peaceful civil one, that military activity-induced injuries survive beyond a veteran's discharge, and that many veterans need assistance coping with PTSD's effects even after they become civilians. Admittedly, unlike hiring preferences, which serve as a more proactive transition-easing tool, VTCs seem more reactive. That is, VTCs only step in to ease the transition to civilian life once the inability to make that transition has manifested itself.[144]

iii. Fulfilling a Societal Obligation to "Fix Those Who Were Broken" in Service to that Society

Each of the statutes identified in footnote 136 above explicitly recognizes that military service itself caused the problems the state is attempting to remedy by establishing or allowing VTCs. As such, VTCs are a societal attempt to "fix that which was broken" in military service.

The idea that a state's legitimate interest in creating VTCs stems from fulfilling an obligation to fix that which is broken contains two components: first, that there is an obligation at all on the part of the sovereign, and second, that rehabilitation of broken citizens is a valid interest. While rehabilitation of broken citizens is unarguably a legitimate state interest, and could be an interest independent of the first component, when governments assert that a purpose (i.e., interest) for classifying is to fulfill an *obligation*, then the obligation should be legitimate. Assertions of this obligation by senior officials are common.[145] Here, the Supreme Court has offered some guidance.

Like the other interests identified above, the Supreme Court has recognized that fulfilling society's obligation to returning

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[144] Note that I am not attempting to refute Judge Russell's argument that VTCs are "proactive" in that they attempt to rehabilitate offenders before they move from lesser to more serious crimes. *See* Russell, *supra* note 135.

[145] In October 2013, President Barack Obama referred to the duty to care for combat veterans as "the single most sacred obligation this country has." Philipps, *supra* note 22 (also quoting Colorado Sen. Mark Udall saying, "The American people have an unbreakable covenant with our veterans and we must provide them the very best health care."). United States Sen. Bernie Sanders recently stated that "we have a moral obligation" to fix the VA medical system to better care for injured veterans. David Welna, *A Compromise Deal on Overhauling the VA, but Will It Pass?*, NPR (July 29, 2014, 4:55 AM), http://www.npr.org/2014/07/29/336228182/a-compromise-deal-on-overhauling-the-va-but-will-it-pass.

veterans is an appropriate government interest. In fact, the Court has expressly acknowledged that Congress was discharging those "obligations" in providing veterans hiring preference.[146] The *Keim* Court did not specify the nature of the obligations Congress was acceptably discharging, but a variety of "obligations" could be owed by a nation to its veterans. The Court could have been referring only to an "obligation of gratitude," which would be included in the first interest discussed above. Just as supportable, however, is the notion that the obligation being discharged in veterans hiring preferences is the responsibility to make veterans whole. While *Keim* and most Supreme Court cases addressing veterans' preferences have been about making veterans *financially* whole, the obligation to rehabilitate veterans' physical and mental injuries is even more significant—and legitimate—than remunerative responsibility.

A potential argument against the legitimacy of a *state's* interest in fulfilling an obligation is that the state is under no such obligation because servicemembers being rehabilitated through VTCs were not injured in state service, but rather in federal service.[147] That is, the sovereign to which the veterans' injuries, and arguably the injury-related subsequent misconduct, can be attributed is the United States, not one of the several states. Thus, no individual state has any "obligation" to rehabilitate the veteran. This argument is not persuasive. First, though veterans *can* sustain injuries such as PTSD and TBI in state service through the National Guard, all combat operations—the type of activities through which the vast majority of veterans suffer injuries addressed by VTCs—participated in by living veterans have been in *national* service.[148] Another peripheral counterargument might be that the federal government is often providing the rehabilitative services, through the VA, and thus it

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[146] Keim v. United States, 177 U.S. 290, 295 (1900) ("No thoughtful person questions the obligations which the nation is under to those who have done faithful service in its army or navy.").

[147] There are a few federal VTCs, but the vast majority are state courts. *See, e.g.*, Jeff Sturgeon, *U.S. Attorney General Eric Holder Praises Veterans Court in Roanoke*, ROANOKE TIMES (Jan. 23, 2014, 11:24 PM), http://www.roanoke.com/news/article_9e155062-849e-11e3-9296-001a4bcf6878.html.

[148] State militias have not engaged in combat in their state capacities since at least the Civil War.

is not the *state* fulfilling the obligation. While true, VTCs are almost exclusively state courts,[149] and even if the state doesn't pay for the rehabilitative services, the state foregoes its fundamental interest[150] in punishing misconduct when a veteran avoids conviction or incarceration for crimes that would lead others to convictions and imprisonment. In other words, the state *is* "paying" for a significant part of veterans' rehabilitation through VTCs, even when it does not directly provide the rehabilitation treatment.

The primary counter to the argument that states have no obligation—and therefore no legitimate interest—to rehabilitate federal veterans is that states are permitted to *voluntarily* fulfill general societal obligations even when they are not the cause of them. This is demonstrated in courts' repeated acceptance of states' veterans' preferences even when states were neither the cause of the veterans' military service nor the employment difficulties veterans faced upon returning from that service. For example, though the *Feeney* Court did not speak of obligations per se, it voiced no objection to Massachusetts operating a veterans preference system that attempted to reward veterans for their federal service.[151] If states can voluntarily reward veterans for their national service, why could states not voluntarily assume the nation's general obligation to rehabilitate veterans injured in that service? The question would be entirely different if the federal government was forcing states to fill this role, but so long as states are voluntarily assuming an obligation, it is analogous to other situations where courts have approved state involvement in veterans' services and is legitimate.

2. VTC Classifications

Judge Russell, the original creator of the rapidly spreading form of VTC, once asserted that his VTC does not violate the

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[149] There are presently only a handful of federal VTCs. Obviously, a federal VTC is not susceptible to the argument that the sovereign providing the VTC has no obligation to the veteran.

[150] Bearden v. Georgia, 461 U.S. 660, 669 (1983) ("The State, of course, has a fundamental interest in appropriately punishing persons . . . who violate its criminal laws.").

[151] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

constitutional concept of equal protection under the law because "'[i]t's not discriminatory' based on religion, race or gender."[152] "'If you served in the armed forces, you can come into the program.'"[153] Although perhaps intended for a broader audience unfamiliar with the meaning of the term "discrimination," Judge Russell's comment belies the principal discrimination inherent in VTCs: non-veterans are ineligible.

As discussed above, states offering VTCs have several legitimate interests, so the remaining question for equal protection analysis is whether the VTCs' exclusionary identity-based qualification requirements are rationally related to accomplishing those interests. The analysis of this fit between legitimate interests (ends) and the classifications (means) is very lax.[154] Rational basis review requires only that "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[155] Classifications "must be upheld against equal protection challenge if there is *any reasonably conceivable state of facts that could provide a rational basis* for the classification."[156] Such classifications are "accorded a strong presumption of validity."[157] So strong, in fact, that "[t]he burden is on the one attacking the legislative arrangement *to negative every conceivable basis* which might support it."[158] "Rational" does not mean "the best" or even "intelligent."[159] So

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[152] McMichael, *supra* note 25 (quoting the Hon. Robert Russell).

[153] *Id.*

[154] Heller v. Doe, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends.").

[155] Cent. State Univ. v. Am. Ass'n of Univ. Professors, 526 U.S. 124, 128 (1999) (quoting *Heller*, 509 U.S. at 320).

[156] FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993) (emphasis added).

[157] *Heller*, 509 U.S. at 319.

[158] Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (emphasis added) (quoting Madden v. Kentucky, 309 U.S. 83, 88 (1940)) (internal quotation marks omitted).

[159] "[A]s I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws.'" N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring); *see also* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (A classification does not fail rational-basis review because it "is not made with mathematical nicety or because in practice it results in some inequality." (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911))).

long as a law advances a legitimate government interest, it must be sustained "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous."[160]

We must address whether the various exclusionary classifications VTCs employ can leap—or perhaps more accurately, step over—this low "hurdle." The eligibility requirements are myriad,[161] but of the status requirements VTCs employ, three are the most significant and common. The most obvious classification is at the very heart of the veterans' court: non-veterans are excluded. Some VTCs classify even more restrictively, allowing only veterans with combat service or injuries clearly traceable to military service to participate. Finally, many VTCs are restricted to veterans with honorable service characterizations. Each of these restrictions on participation constitutes a classification that must be rationally related to a legitimate interest if the VTC is to withstand equal protection scrutiny.

a. Veterans vs. Non-Veterans

A VTC that excludes non-veterans is clearly rationally related to accomplishing the legitimate interests identified above. Though there are many other ways in which a state could express its gratitude and recognition for military service, creating a separate criminal justice system for veterans is clearly a rational way of accomplishing that goal. The Supreme Court has already countenanced sentencing leniency in the criminal context.[162] Moreover, when attempting to accomplish the legitimate interest of easing the transition from military to civilian life, excluding non-veterans is not only rational, but is required, as non-veterans have no such military-to-civilian transition to accomplish.

Similarly, in attempting to discharge society's obligation to veterans who were injured during service to the nation, a state's decision to provide a separate criminal justice system specifically

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[160] Romer v. Evans, 517 U.S. 620, 632 (1996).

[161] A survey conducted by the John Marshall Law School Veterans Legal Support Center & Clinic is instructive, demonstrating that even courts within the same state have differing VTC eligibility rules. *See supra* note 28.

[162] Porter v. McCollum, 558 U.S. 30, 43-44 (2009).

tailored to addressing those injuries and their consequences is rational. Indeed, if the interest is to fix what was broken in military service, it would be *irrational* to include those not broken in military service.

It is perhaps here that those who oppose VTCs' exclusion of non-veterans lodge their strongest argument.[163] Veterans are not the only persons in the population who suffer from PTSD and TBIs.[164] Moreover, non-veterans routinely engage in the same types of mental health and drug addiction related criminal activities as those addressed by VTCs. Indeed, the Veterans Treatment Court's origin in drug and mental health courts demonstrates the similarities between the crimes committed by veterans and non-veterans. Given the apparent early success of VTCs in achieving meaningful rehabilitation and reducing recidivism, wise *policy* might suggest states offer VTC-like avenues to non-veterans. But rational basis scrutiny does not require states to create the best classification—just conceivably rational ones. And in fact, most states do offer problem-solving, rehabilitation-focused criminal justice avenues to non-veterans through standard drug and mental health courts.

The fact that in some jurisdictions veterans are able to participate in VTCs for crimes that would be ineligible for non-veteran offenders in drug and mental health courts requires further assessment of the special privilege being afforded veterans through VTCs. Aside from a state's desire to express gratitude for veterans' service, the *cause* of most veterans' PTSD is directly attributable to government action. In many cases, veterans' crime-producing PTSD was caused by engaging in combat-related activities in which the veteran was ordered, by force of law,[165] to participate.

In a real sense, those traumatic combat experiences were legally caused by the United States. By offering VTCs to veterans, states are accepting responsibility to remedy *government-created*

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[163] Warner, *supra* note 135 (VTCs may be under-inclusive "'because PTSD might be a very real factor in crimes committed by persons with no military experience at all.'" (quoting Mark Silverstein, legal director of the Colorado ACLU)).

[164] *Id.*

[165] Article 92, Uniform Code of Military Justice, criminalizes servicemembers' failure to obey lawful orders. 10 U.S.C. § 892 (2012).

problems, albeit ones created by federal activity, not state activity. Thus, the nature of the cause of the injuries that lead to criminal activity adequately justifies disparate treatment: through VTCs, the consequences of injuries caused by government action are addressed in a separate system than those that are not.

On a related point, some VTC advocates have suggested veterans are uniquely suited to rehabilitation.[166] While data are still scarce, the data that do exist suggest VTCs are outperforming similar problem-solving courts like traditional drug and mental health courts. One early study showed a recidivism rate under two percent for VTC graduates.[167] By comparison, drug courts boast—and rightfully so, because they are outperforming the traditional criminal justice system—a national twenty-five percent recidivism rate.[168] Thus, even though VTCs use "therapeutic justice" approaches very similar to their problem-solving counterparts, the early data suggest VTCs work *better*. One possibility is that the veteran population is more amenable to rehabilitation. By choosing to rehabilitate veterans, states are electing to commit resources toward a criminal reduction method that *works*, a rational choice indeed.

States are not only trying to discharge an obligation to veterans, but more broadly are attempting to rehabilitate wayward citizens, and veterans happen to be prime candidates for rehabilitation.[169] If rehabilitation of citizens is a state interest being accomplished by VTCs and if veterans are in fact more disposed to rehabilitation efforts than the population at large,

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[166] Ted Sullivan, *Rock County Veterans Treatment Court First in the State*, JANESVILLE GAZETTE, Sept. 20, 2009, at 3A, *available at* 2009 WLNR 18553795 (VTCs have a special ability to help offenders because they can draw on veterans' ability to be disciplined and follow orders.); Brian Brueggemann, *Program May Get Federal Cash*, BELLEVILLE NEWS-DEMOCRAT, Nov. 12, 2009, at 1A (VTCs can be successful because they can capitalize on structure veterans have had in their lives.) (quoting Tyler Bateman, public defender for the VTC in Madison County, Illinois).

[167] Justin Holbrook and Sara Anderson, *Veterans Courts: Early Outcomes and Key Indicators for Success* 30 (Widener Law Sch. Legal Studies Research Paper Series, Paper No. 11-25, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912655.

[168] *Drug Courts Work*, NAT'L ASS'N OF DRUG COURT PROF'LS, http://www.nadcp.org/learn/drug-courts-work (last visited Mar. 10, 2015).

[169] Indeed, one could argue this is an entirely separate "legitimate state interest" behind VTCs.

then limiting participation in VTCs to veterans is rationally related to accomplishing the rehabilitative goal of VTCs. That is, if what states are truly trying to accomplish is rehabilitation into society through the use of problem-solving courts, limiting participation to a population that is more likely to achieve those rehabilitative goals is rationally related to the rehabilitative interest.

b. Combat Veterans vs. Non-Combat Veterans

Many VTCs consider the nature of the military service of the offender relevant when determining whether to permit participation by a particular veteran.[170] While some VTCs are open to participation by any veteran whose offenses are "related to military service,"[171] others require that VTC participants have a mental injury or illness that directly resulted from military service in a combat zone and affected the criminal conduct at issue.[172] So some veterans who have PTSD from non-combat or non-military sources may be excluded.

Perhaps understandably, the notion that some veterans merit preferential treatment to others who served in the military at the same time, though not in combat, is the source of some contention. Yet the idea that some veterans might receive special consideration over other veterans is not new and has been expressly sanctioned by the Supreme Court. In *Mitchell v. Cohen*, the Court assessed whether the plaintiff "veterans" were covered as "ex-servicemen" under the 1944 VPA.[173] In deciding that veterans who "performed military service without interference with their normal employment and mode of life"[174] were not "ex-servicemen" as that term was intended in the 1944 VPA, the Court concluded that Congress' purpose was to:

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[170] In fact, even some who object to some versions of VTCs as being over-inclusive acknowledge the difference between combat veterans and other veterans who did not experience combat. Warner, *supra* note 135 ("'The experience of an Iraqi or Vietnam combat veteran is far different than a person who trained thirty-some-odd years ago and was then in the National Guard during peacetime.'" (quoting Mark Silverstein, the legal director of the Colorado ACLU)).

[171] *See, e.g.*, NEV. REV. STAT. ANN. § 176A.285(2)(b) (West 2009).

[172] *See, e.g.*, TEX. GOV'T CODE ANN. § 124.002(a)(2) (West 2014).

[173] 333 U.S. 411 (1948).

[174] *Id.* at 420.

> help only those who had sacrificed their normal pursuits and surroundings to aid in the struggle to which this nation had dedicated itself. It was the veterans or ex-servicemen who had been completely divorced from their civilian employment by reason of their full-time service with the armed forces who were the objects of Congressional solicitude. Reemployment and rehabilitation were considered to be necessary only as to them.[175]

The Court determined that the plaintiffs, who served in the Volunteer Port Security Force of the Coast Guard Reserve, were not intended to be included in the 1944 VPA because they continued their normal civilian employment during the war, served on active duty for only relatively short periods each week, could be dis-enrolled at their own request, received no military pay and very few allowances, and could not be transferred away from their homes without their consent, and therefore retained "the essential elements of their civilian life."[176] The Court's focus on Congressional intent regarding which veterans would be granted preferential hiring treatment demonstrates its acceptance that legislatures might choose to provide benefits only to veterans whose service involved more sacrifice or life disruption. Indeed, the Court not only sanctioned legislative classification based on the nature of military service but engaged in such classification itself.

The *Mitchell* Court expressly found the impact of a veteran's service on his life was a legitimate factor for determining which veterans would receive preferential treatment, implicitly accepting that classifying among veterans based on the extent of their military sacrifice is rational. In fact, the Court held that allowing veterans whose military sacrifice was not "full scale" would have "diluted the benefits conferred on those ex-servicemen who had made full-scale sacrifices."[177] Not only was the Court thereby *allowing* Congress to discriminate among veterans based on the nature of their service, it was substantively agreeing with that choice and expressing the idea that treating all veterans equally would have been unwise. Accordingly, it seems clear that

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[175] *Id.* at 419-20 (footnote omitted).

[176] *Id.* at 422.

[177] *Id.* at 420.

limiting VTC participation to veterans with combat service is rationally accomplishing several of the legitimate interests identified above.

All honorable military service is worthy of gratitude, in part because of its voluntary nature and the servicemember's acceptance that they may at any time be deployed for long periods of time away from home and sent into combat. Naturally, *actual*, rather than merely possible combat service, during which the servicemember's life is endangered, deserves an even greater measure of appreciation and recognition.

The *Mitchell* Court understood Congress' intent to be to ease the transition from military to civilian life for those veterans who had made "full-scale sacrifices" rather than those whose "civilian life was substantially unaltered" and accordingly needed no "aiding their readjustment back to such a life."[178] Similarly, it is rational to expect that servicemembers who have experienced or engaged in violence will need greater assistance in making that transition than servicemembers who have not served in combat. While all military service involves some sacrifice and impact on civilian life, including to career prospects and personal relationships, the way in which VTCs ease the transition to civilian life is particularly related to combat service, because VTCs seek to address and rehabilitate injuries and their transgressive effects especially attributable to the types of experiences frequently suffered in combat.

The related legitimate interest of discharging society's obligation to fix that which was broken in service to society is also well-served by a classification that limits participation in VTCs to those with combat service. When resources are limited, discriminating between veterans whose military service had a causal role in subsequent criminal behavior and those whose service had no such relationship is clearly rational. Moreover, outside combat, most veterans' PTSD-causing experiences are of the same nature as those civilians suffer, including experiencing a catastrophic accident, being a crime victim, and so on. Those VTCs that limit participation to veterans with combat-related injuries thus limit their services to those whose injuries are of a nature not

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[178] *Id.*

experienced by civilians. Moreover, while it is certainly possible that a veteran with no combat service could experience a service-related incident leading to PTSD and subsequent misconduct, such incidents are far more infrequent and the causal relationship is more difficult to prove. Limiting VTC resources to those situations where proof of causality is easier is likewise rational.

Remembering that rational basis review does not require a state make the *best* policy choice, discriminating between veterans with combat service and those without is rationally related to legitimate interests. However, if the real reason behind such a choice is to limit participation in VTCs to those whose criminal misconduct is attributable to military service, simply examining a veteran defendant's military service record for evidence of combat service is too blunt an instrument. The better approach would be to, as Texas has, require veterans to demonstrate they have service-related PTSD or other injury that led to the criminal misconduct being addressed. While this would place a higher burden on VTC participants and an increased administrative burden on courts, it would allow courts to offer services only to those who were "broken" as a result of service to the nation. Understandably, states and courts wishing to accomplish other interests—such as gratitude to all veterans, or who wish to reduce the administrative burden on courts or the proof burden on veterans—might choose not to require such specificity in order to participate in a VTC. Either choice is rational, and either is constitutional.

c. Veterans with Honorable Service Characterizations vs. Others

United States servicemembers who serve beyond their initial training period are discharged with one of the following service characterizations: honorable; under honorable conditions (general); under other than honorable conditions; bad conduct; or dishonorable.[179] Many VTCs limit participation to veterans with

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[179] 10 U.S.C. § 819 (2012); DEP'T OF DEFENSE, DIRECTIVE NUMBER 1332.14: ENLISTED ADMINISTRATIVE SEPARATIONS § E3.A2.1.3 (1993), *available at* http://biotech.law.lsu.edu/blaw/dodd/corres/pdf2/d133214p.pdf ("Bad conduct" and "dishonorable" discharge characterizations are only available as part of an adjudged sentence at a court-martial. The other discharge characterizations are considered "administrative" rather than "punitive.").

honorable or under honorable conditions (general) service characterizations.[180] One understandable reason for this limitation may be that VTCs should only benefit those who served honorably. However, a more practical and direct reason for the limitation exists: veterans with "dishonorable" service characterizations, as that term is defined by the Department of Veterans Affairs, are barred from all VA benefits.[181] This restriction is significant because most VTCs rely on the VA to provide the rehabilitation and medical services central to the VTC model.[182] Thus, even though the vast majority of VTCs are established by states to address state crimes, the most significant *cost* of the VTC model is borne by the federal government, an arrangement without which VTCs are unlikely to have gained as much popularity.

Extending preferential treatment to only those veterans who served honorably is not new.[183] Nevertheless, this classification must be analyzed for its rationality in relationship to the government interests being advanced by VTCs. In fact, this classification is not rationally related to *all* the legitimate interests discussed in this Article.

Discriminating between veterans with honorable service records and those without is clearly rational when related to accomplishing the interest of rewarding veterans for their service and sacrifice. Obviously, veterans whose service record is

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[180] A 2012 survey of fifty-nine VTCs found that 47.4 percent of VTCs exclude persons from participation who have a dishonorable discharge, 28.8 percent exclude veterans with a bad conduct discharge, and 5 percent excluded persons with an other than honorable discharge characterization. BALDWIN, *supra* note 20, at 14. Additionally, 32.2 percent excluded veterans who were ineligible for VA benefits, ostensibly based on discharge characterizations. *Id.*

[181] Dishonorable service characterizations include, inter alia, punitive discharges from general courts-martial (bad conduct discharge, dishonorable discharge, or a dismissal for officers) and "a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct." 38 C.F.R. § 3.12(d)(4) (2013).

[182] BALDWIN, *supra* note 20, at 18.

[183] As noted above, the Third Deficiency Appropriation Act required veterans to have been honorably discharged to receive preference in federal executive branch hiring. Additionally, when approving veterans' preference, the *Keim* Court observed that "[n]o thoughtful person questions the obligations which the nation is under to those who have done *faithful* service in its army or navy." Keim v. United States, 177 U.S. 290, 295 (1900) (emphasis added).

unmarred by misconduct are most deserving of gratitude, so limiting preferential treatment to such individuals rationally accomplishes the goal of expressing gratitude for military service.

Less clear is the relationship between excluding veterans without honorable service characterizations and the interest of easing the transition from military to civilian life. At a minimum, one's negative service characterization has no relationship to their need for assistance in transitioning to civilian life. And in fact, veterans who do not have honorable service records arguably need *more* assistance in the transition to civilian life, not less. Employment prospects are significantly dimmer for veterans without honorable service characterizations, and many of the VA programs designed to ease that transition, such as health care and benefits programs like home loan guarantees and education benefits, are unavailable to them.

Also in doubt is the relationship between classifying among veterans based on service characterization and the interest in rehabilitating those who have been injured during service to the nation. If a servicemember is injured by military service, it makes no difference whether their subsequent military service was honorable or not in determining society's obligation and ability to rehabilitate the servicemember.

On the other hand, proponents of excluding veterans without honorable service records have two arguments available as to why such exclusions *are* rationally related to the interest of fixing what was broken in service to society. First, as noted above, VA rehabilitative services are generally unavailable to veterans without honorable service records and thus excluding people who cannot get VA rehabilitation services from VTCs is not only rational but required if the ends to be achieved include rehabilitation. The problems with this argument are its circularity and false assumption that without *VA* rehabilitative services, *no* rehabilitative services are available. The second argument is that some servicemembers who received other than honorable discharge characterizations have descended so far into significant crime that they are "beyond rehabilitation." That may be true for *some* veterans who committed sufficient misconduct prior to their discharge to have their service characterized as something other than honorable. However, the existence of large numbers of both

veterans who are capable of rehabilitation despite not having honorable service records and veterans who have descended "beyond rehabilitation" even though they did receive honorable service characterizations suggests the classification is not for the purpose of advancing the interest of fixing what was broken in service to the nation.

In any event, to be upheld a classification must have a rational relationship to only *one* legitimate interest.[184] Accordingly, classifying among veterans based on their service characterization withstands rational basis review because the classification is rationally related to expressing gratitude and rewarding veterans for their service and sacrifice, even if the classification is not rationally related to, or does not advance, other interests.

d. A Policy Plea

Though the purpose of this Article is to conduct an equal protection analysis of various aspects of VTCs, the policy question of excluding veterans with other than honorable service characterizations requires further dialog. Beneath the pronouncements by VTC 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 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.

For many veterans without honorable service characterizations, exclusion from VTCs is based solely on the timing of the veteran's discharge from the military. For veterans whose discharge precedes their misconduct, honorable service characterizations are the norm, while for veterans whose military discharge occurs *after* they have begun committing misconduct, honorable service characterizations are rare.

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[184] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("[L]egislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to *a* legitimate state interest.") (emphasis added).

The story of Kash Alvaro is typical. He joined the Army in 2008 and was hit by multiple bomb blasts in Afghanistan in 2009, suffering TBI and then PTSD.[185] Upon returning to his home base, Fort Carson in Colorado Springs, Alvaro engaged in low-level criminal misconduct such as being late to formation, missing appointments, getting in an argument with a superior, and missing work altogether.[186] Due to this misconduct, which can be symptomatic of TBI and PTSD, Alvaro was discharged from the Army with an other than honorable conditions discharge, leaving him jobless, uninsured, homeless, and without VA benefits.[187]

Misconduct discharges from the Army—most characterized as "other than honorable"—have surged in recent years.[188] This surge has been most notable at Army posts that are home to a disproportionate number of combat troops, suggesting a possible correlation between combat injuries and subsequent misconduct.[189] Though the Army does not keep statistics demonstrating how many of the soldiers discharged for misconduct have diagnosed injuries, an estimated 500,000 servicemembers and veterans of the Iraq and Afghanistan conflicts have TBI and/or PTSD, and over 76,000 soldiers were discharged for misconduct between 2006 and 2012.[190] In many cases, it is difficult for military authorities to accurately determine whether misconduct is related to injury.[191]

Whether injury-related misconduct begins prior to discharge is based on a variety of factors. Some veterans separate from the military quickly after their combat tours, so insufficient time

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185 Philipps, *supra* note 22. Philipps' work on this series of articles related to the tribulations befalling wounded and discharged soldiers was awarded the Pulitzer Prize. *The 2014 Pulitzer Prize Winners*, PULITZER PRIZES, http://www.pulitzer.org/citation/2014-National-Reporting (last visited Mar. 10, 2015).

186 Philipps, *supra* note 22.

187 *Id.*

188 *Id.* The number of soldiers discharged from the Army for misconduct surged from below 8,000 in 2006 to more than 12,500 in 2012. *Id.*

189 *Id.* (Between 2009 and 2012, misconduct discharges increased at Fort Bragg, Fort Bliss, Fort Drum, Fort Campbell, Fort Hood, Joint Base Lewis-McChord, Fort Riley, and Fort Carson; two such posts saw a 65 percent increase in misconduct discharges in 2012 over 2011.). This suggested correlation is not *proven*; the Army does not keep statistics regarding how many soldiers discharged for misconduct have diagnosed injuries. *Id.*

190 *Id.*

191 *Id.*

elapses between injury and discharge for the injury to be fully diagnosed, for symptoms to arise, or for misconduct to begin before discharge. Others' injuries are latent, waiting years to be symptomatic, with the same result: they are discharged honorably before their subsequent misconduct begins. On the other hand, some veterans' injuries quickly progress toward misconduct or they choose to remain on active duty long enough that their eventual criminal misconduct begins before discharge. And sometimes the military's intolerance of misconduct—even low-level misconduct—encourages other than honorable discharges to be executed faster and earlier than they otherwise might.[192]

In any event, had Alvaro's misconduct began *after* separating from the Army, rather than before, he would likely have received an honorable discharge and been entitled to veterans health care and benefits. Misconduct occurring after his discharge could have been addressed by a VTC. Frequently, and tragically, the very type of low-level misconduct in which servicemembers engage that leads to other than honorable conditions discharges, thus excluding them from subsequent participation in VTCs, is the same type of misconduct VTCs are designed to address.[193]

While excluding veterans from VTCs who do not have honorable service characterizations may withstand rational basis review, it is a policy choice that fails to resolve a problem based

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[192] One Army prosecutor advised that soldiers who were being evaluated for medical injuries and possible medical retirements, who were also committing low-level misconduct, be threatened with prosecution and discharged with other than honorable conditions discharges to "get the Soldiers out quickly." *Id.* (quoting an email from Maj. Javier Rivera, Fort Carson's "lead prosecutor" as of Aug. 2009); *see also* Bill Murphy Jr., *Critics: Fort Carson Policy Targeted Troubled, Wounded Soldiers*, STARS & STRIPES (Nov. 15, 2011), http://www.stripes.com/critics-fort-carson-policy-targeted-troubled-wounded-soldiers-1.160871 (detailing critics' claims that the strategy of lawyers at Ft. Carson to get "wounded, troubled soldiers out of the Army fast" became unofficial policy at the post).

[193] One Army prosecutor lamented that some soldiers awaiting medical evaluation boards for their injuries "continue[] to use drugs, [don't] show up to work, [and get] in trouble all the time." Philipps, *supra* note 22 (quoting an email from Maj. Javier Rivera, Fort Carson's "lead prosecutor" as of Aug. 2009); Murphy, *supra* note 192 (recounting cases of soldiers whose injuries led to drug use and other misconduct and who ultimately received under other than honorable conditions discharges); Dave Philipps, *Pattern of Misconduct*, GAZETTE (Oct. 7, 2013), http://cdn.csgazette.biz/soldiers/day4.html (U.S. Rep. Mike Coffman observed, "Tossing people out for minor infractions without care for the very issues that might have caused them to act up? It's really disturbing.").

primarily on the date of military discharge. Clearly, veterans whose misconduct predates and postdates their military discharge need rehabilitative assistance just as much as those whose misconduct postdates their military separation. If a purpose of VTCs is to rehabilitate that which was broken in service to the nation, the date of a servicemember's discharge should not matter. A more precise instrument for determining who is entitled to a VTC would be to require proof that the offender's misconduct is attributable to a military service-related injury, without regard to the timing and characterization of the veteran's military discharge. While some may argue this casts too wide a net, because undoubtedly some veterans have poor service characterizations because of misconduct that predates or is otherwise un-attributable to service-related injuries, judges are quite capable of excluding such individuals from the VTC process with a case-by-case determination, rather than blanket exclusion. And judges should resist the temptation to rely solely on the military's analysis of whether misconduct is attributable to PTSD or other injury, as the system for making such is susceptible to significant errors and improper motives.[194]

CONCLUSION

After examining the government interests and classification methods by which VTCs rationally further those interests, whether VTCs meet rational basis review is not a close question. In fact, the purposes being accomplished by VTCs are not only legitimate, but perhaps compelling, which returns us to the question with which this equal protection analysis began: whether there is an equal protection-based "fundamental right to equal access to the courts."

In light of the above discussion of government interests, VTCs are a desirable and positive development for the participants and society. If a broadly held equal protection-based "fundamental right to equal access to the courts" did exist, offering VTCs to only a special class of criminal defendants would contravene such a right. That VTCs would be prohibited

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[194] Philipps, *supra* note 22.

illustrates yet another[195] flaw of fundamental rights equal protection jurisprudence: it would unnecessarily restrict a state's ability to solve societal problems in a positive, non-invidious way.[196]

VTCs simply do not constitute an evil the Equal Protection Clause has been understood to prevent. A very abridged history of the evolution of the Court's understanding of the Equal Protection Clause demonstrates the point. The earliest Fourteenth Amendment jurisprudence indicated the purpose of the Equal Protection Clause was to prevent discrimination based on race, a non-issue with VTCs.[197] The Court's understanding evolved to realize the Equal Protection Clause prohibited class legislation that singled out a particular group of persons for special benefits or burdens *without adequate public purpose justification*.[198] Again, the public purposes ("government interests") of VTCs detailed above more than "adequately" justify the classifications involved. VTCs do not even trigger equal protection concerns under Justice Stone's vision that heightened scrutiny should be applied to laws that: (1) on their face are within a specific prohibition of the Constitution; (2) "restrict[] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"; or (3) are directed at particular religious, national, racial, or other "discrete and insular" minorities needing protection from the operation of political processes.[199] The subsequent "suspect classification" and heightened scrutiny focus of equal protection jurisprudence reflected that, in certain contexts, there is great "skepticism that a public value is in fact being served"[200] by a special benefit or burden for a particular class of people. Again, in light of the above discussion of

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[195] That general "fundamental rights" jurisprudence suffers from the fatal illness of countermajoritarianism has been thoroughly demonstrated. *See, e.g.*, Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 772 (1991) (fundamental rights as "a constitutional theory represents not so much an attempt to cope with the countermajoritarian problem as a surrender to it").

[196] Criminal laws and courts are, after all, a government method of effecting social policy.

[197] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

[198] Barbier v. Connolly, 113 U.S. 27, 31-32 (1884).

[199] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

[200] Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 143.

government interests, there is little argument that VTCs do not serve a significant public purpose. Finally, even under the modern three-tier equal protection analysis model, which is so focused on "purging governmental decisionmaking of certain illegitimate considerations,"[201] no illegitimate or invidious considerations appear to be animating the VTC revolution.

While the *notion* of "equal access to the courts" appeals to all but the least egalitarian among us, the idea that some kind of fundamental right to equal access to the courts might be articulated that would have the effect of preventing states' attempts to rehabilitate veterans—or any class of offenders—in the tailored and successful way VTCs have is alarming. Indeed, it is entirely possible the reason the Court never articulated a broad "fundamental right to equal access to the courts" and has not extended its "equal access to courts" jurisprudence beyond cases of indigency is that it saw where its road paved with good intentions was headed.

Veterans treatment courts offer significant benefits to criminal defendants over traditional criminal courts. These advantages will undoubtedly appear even more desirable to criminal defendants ineligible for them because of VTCs' exclusionary individual qualification requirements. When the inevitable equal protection claim is lodged by such an excluded defendant, the answers are clear: heightened scrutiny does not apply, and VTCs' exclusionary classifications withstand rational basis review. VTCs' identity-based qualification requirements do not violate the Equal Protection Clause.[202]

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[201] Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 309 (1997).

[202] Those wishing VTCs were less exclusive can hope that as VTCs continue successfully and visibly to rehabilitate criminal defendants, the larger criminal justice system will learn from the problem-solving model and court reform toward more forward-looking therapeutic justice will follow.