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# Questioning the Sacrosanct: How to Reduce Discrimination and Inefficiency in Veterans' Preference Law

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Craig Westergard

*Veterans' preference law grants military veterans decisive advantages when applying for government positions. While rewarding veterans and assisting their transition back to civilian life may be worthy goals, veterans' preference has at least two major defects. First, veterans' preference disparately affects women, LGBT persons, disabled persons, and others because of the military's traditional exclusion of these groups. Second, veterans' preference unnecessarily reduces the quality of the federal workforce because it prioritizes military service over merit and competition. Potential statutory and constitutional solutions have been precluded by the courts, and so these problems persist. This Note recommends that Congress modify veterans' preference by imposing limitations on its duration and usage; in the alternative, it suggests other ways in which veterans' preference law might be improved.*

## INTRODUCTION

Veterans' preference law gives veterans assistance in securing government employment, but it does so at the expense of nondiscrimination and efficiency. First, veterans' preference discriminates against women, LGBT persons, and others because these groups have traditionally been prohibited from serving in the military. Second, veterans' preference promotes inefficiency because it suspends merit and competition in favor of less rational considerations. Legislators and courts have generally overlooked these flaws, however, and so they remain embedded in the law.

This Note describes the legal framework of veterans' preference, analyzes its effects, and proposes ways in which the law could be improved. Part I summarizes the history of veterans' preference law, outlines its substantive provisions, and surveys federal antidiscrimination law. Part II describes veterans' preference law's disparate impact on protected classes, evaluates its constitutional foundations, and critiques its policy justifications. Part III proposes numerous potential modifications to veterans' preference—including time and usage limitations—and this Note concludes by calling upon Congress to enact such changes.

## I. LEGAL FRAMEWORK OF VETERANS' PREFERENCE LAW

Veterans' preference law's history stretches from pensions awarded to disabled veterans after the Revolutionary War, to the barebones federal statute that followed the Civil War, to the Veterans' Preference Act of 1944.<sup>1</sup> Today, veterans' preference involves hiring veterans over candidates who may possess superior qualifications, which results in a disproportionate number of veterans filling federal positions.<sup>2</sup> This, in turn, disparately impacts several classes traditionally protected by federal antidiscrimination law and breeds inefficiency.<sup>3</sup>

### A. *History of Veterans' Preference Law*

#### 1. Revolutionary War to Civil War

Throughout the history of organized conflict, soldiers have received compensation for their efforts, partly in the form of regular pay, but also in the form of preferential post-conflict treatment.<sup>4</sup> In Europe, early preference

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<sup>1</sup> See Part I.A. Though this Note addresses several state veterans' preference statutes, its focus is on federal veterans' preference law.

<sup>2</sup> See Part I.B.

<sup>3</sup> See Part I.C.

<sup>4</sup> See, e.g., Rebecca Beatrice Brooks, *Continental Soldiers in the Revolutionary War*, HIST. MASS. BLOG (Dec. 26, 2017), <https://historyofmassachusetts.org/continental-soldiers-revolutionary-war/> [<https://perma.cc/AR44-8MYJ>] (discussing compensation of

systems featured the use of pensions, enlistment and service bonuses, and compensation or medical care for service-related injuries and disabilities.<sup>5</sup> In the United States, pensions were awarded to disabled veterans as far back as 1636.<sup>6</sup> While there was not an express legal basis for extending these benefits to veterans, familiar policies like adequately compensating servicepersons for the risks of combat and incentivizing military service were likely at play.<sup>7</sup>

The Continental Congress enacted the country's first veteran pension law in 1776, granting a lifetime annuity to veterans who would lose limbs or incur other serious disabilities during the Revolutionary War.<sup>8</sup> This pension was worth up to half the veteran's previous pay.<sup>9</sup> These benefits were extended to the widows and orphans of Revolutionary War veterans in 1816.<sup>10</sup>

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Revolutionary War soldiers); Valerie M. Hope, *Constructing Roman Identity: Funerary Monuments and Social Structure in the Roman World*, 2 MORTALITY 103, 116 (1997) (describing the Roman Empire's practice of granting citizenship to foreign nationals who served in the military for twenty-five years).

<sup>5</sup> *Veterans Services: Vet Guide*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals/> [<https://perma.cc/EC8D-66RG>] [hereinafter OPM, VET GUIDE].

<sup>6</sup> U.S. DEP'T OF VETERANS AFFS., VA HISTORY IN BRIEF 3, [https://www.va.gov/opa/publications/archives/docs/history\\_in\\_brief.pdf](https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf) [<https://perma.cc/EC8D-66RG>] [hereinafter VA HISTORY IN BRIEF]. As the Supreme Court has aptly observed, veterans' preference laws tend to ebb and flow with the tide of the nation's wars. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 280 (1979) ("After a war, [veterans' preference] laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise.").

<sup>7</sup> OPM, VET GUIDE, *supra* note 5; *see also* Part II.C (discussing these policies).

<sup>8</sup> VA HISTORY IN BRIEF, *supra* note 6, at 3. When the new government discovered that this promise would be difficult to keep, it authorized grants of public lands in lieu of payment. *See id.* It is unlikely that more than three thousand veterans actually collected pension payments. *Id.*

<sup>9</sup> VA HISTORY IN BRIEF, *supra* note 6, at 3. There was not a strong distinction between pension benefits, military compensation, and veterans' preference during this time. *Id.* at 8.

<sup>10</sup> *Id.* at 3. Depending on the reader's perspective, governmental concern for the wives and children of deceased or disabled veterans may appear either noble or patriarchal. *See*

The United States' next veteran pension law, the Revolutionary War Pension Act of 1818, was enacted in response to the War of 1812.<sup>11</sup> The act required that veterans demonstrate both wartime service and financial need before receiving benefits—though neither burden was particularly onerous.<sup>12</sup> These benefits took the form of a fixed pension sufficient for a “comfortable and frugal existence.”<sup>13</sup> The Service Pension Law of 1818 remained the country's only approximation of a veterans' preference statute until after the Civil War.<sup>14</sup>

## 2. Civil War to World War II

Between 1865 and 1945, Congress enacted numerous statutes which expressly provided for veterans' preference. These statutes contained the same basic requirements which exist today regarding the preferential treatment of veterans in appointment, retention, and reinstatement.<sup>15</sup>

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Steven Lim, *The Effect of Veterans' Reemployment Rights, Veterans Preference Laws, and Protective Labor Laws on the Status of Women Workers in the World War II Period*, 2 HOFSTRA LAB. L.J. 301 (1985) (documenting attitudes towards women during the 1940s); John H. Fleming & Charles A. Shanor, *Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?*, 26 EMORY L.J. 13, 20 (1977) (veterans' preference statutes not sex-neutral).

<sup>11</sup> Patricia E. Dilley, *The Evolution of Entitlement: Retirement Income and the Problem of Integrating Private Pensions and Social Security*, 30 LOY. L.A. L. REV. 1063, 1095 (1997). See generally John P. Resch, *Politics and Culture: The Revolutionary War Pension Act of 1818*, 8 J. EARLY REPUBLIC 139 (1988).

<sup>12</sup> Dilley, *supra* note 11, at 1095–96 (describing this “double test of worthiness”). To demonstrate financial need, veterans “had to report their residence, occupation, health, income, debts, and an inventory of real and personal property to the War Department,” as well as their “age, gender, physical condition,” household relationships, and other sources of financial aid. John P. Resch, *Federal Welfare for Revolutionary War Veterans*, 56 SOC. SERV. REV. 171, 172 (1982). This burden was slight, however, and, along with the statute's lack of a disability requirement, it allowed the number of recipients to increase by over eight hundred percent. See VA HISTORY IN BRIEF, *supra* note 6, at 3–4.

<sup>13</sup> Resch, *supra* note 12, at 173 (footnote omitted).

<sup>14</sup> See Part I.A.2.

<sup>15</sup> See Part I.B.2.

The first of these laws was enacted at the close of the Civil War in 1865.<sup>16</sup> In broad and generalized terms, it proclaimed the nation's official policy of granting preference to *disabled* veterans when filling federal positions, provided that applicants were able to perform the essential functions of the job in question.<sup>17</sup> This statute did not permit preferential treatment of veterans at the expense of applicants with superior qualifications, however.<sup>18</sup> Because there was no uniform civil service examining system at the time, "this preference law had only such effect as each appointing officer was willing to give it."<sup>19</sup> In 1881, the Attorney General officially interpreted the law as only requiring preference when veterans' qualifications were equal to those of other applicants.<sup>20</sup> Veterans' preference law expanded to cover both retention rights<sup>21</sup> and reinstatement<sup>22</sup>

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<sup>16</sup> A Resolution to Encourage the Employment of Disabled and Discharged Soldiers, Res 27, 38th Cong., 13 Stat. 571 (1865).

<sup>17</sup> *Id.* ("Persons honorably discharged from the military or naval service by reason of disability resulting from wounds or sickness incurred in the line of duty, shall be preferred for appointment to civil offices, provided they be found to possess the business capacity necessary for the proper discharge of the duties of such offices."); *see also* Act of June 8, 1929, 46 Stat. 21; Act of July 11, 1919, 41 Stat. 131, 142; Act of Mar. 3, 1919, 40 Stat. 1291, 1293; Act of Mar. 1, 1919, 40 Stat. 1213, 1224; Act of Jan. 16, 1883, 22 Stat. 403.

<sup>18</sup> Stewart S. Manela, Note, *Veterans' Preference in Public Employment: The History, Constitutionality, and Effect on Federal Personnel Practices of Veterans' Preference Legislation*, 44 GEO. WASH. L. REV. 623, 625 (1976) [hereinafter *Veterans' Preference in Public Employment*]; *see also* Astrid De Parry, *De Jure Discrimination in the Public Sector: Is Veterans' Preference Legislation Rational?*, 12 INDUS. & LAB. REL. F. 65, 67 (1977) ("although the Pendleton Act sanctioned existing veterans' preference-policies, it did not require substantial deviations from the competitive norm to permit preferential advancement of less qualified veterans.").

<sup>19</sup> U.S. CIV. SERV. COMM'N, HISTORY OF VETERAN PREFERENCE IN FEDERAL EMPLOYMENT, 1865–1955 at 1 (1955).

<sup>20</sup> *Id.* at 2. This interpretation prevailed until 1910, when the Taft administration began to require more absolute preference, and it was then changed again in 1923. *Veterans' Preference in Public Employment*, *supra* note 18, at 624–25.

<sup>21</sup> Act of August 15, 1876, 19 Stat. 169 ("in making any reduction in force in any of the executive departments the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military"); *see also* 5 U.S.C. § 3502; 5 C.F.R. § 351.203, .501, .602 (2018); Act of Aug. 23, 1912, 37 Stat. 413.

during this period, and veterans' preference also survived the arrival of the Pendleton Act in 1883.<sup>23</sup> Other statutes which enlarged veterans' preference protections included the General Pension Act of 1862,<sup>24</sup> the Homestead Act of 1862,<sup>25</sup> and various state laws.<sup>26</sup> The expansion of veterans' preference law culminated after World War I, when veterans' preference was extended "to all honorably discharged soldiers, sailors, and marines" and their widows, regardless of their disability status or periods of service.<sup>27</sup>

This trend of broadening veteran protections resulted in an explosion of veterans' preference claims: from less than one thousand per year before the

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<sup>22</sup> Exec. Order of June 18, 1889 (allowing reinstatement of veterans who were also former federal employees without respect to the amount of time elapsed since their employment as such); *see also* U.S. CIV. SERV. COMM'N, *supra* note 19, at 3.

<sup>23</sup> Pendleton Civil Service Reform Act of 1883, 22 Stat. 403 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., and 40 U.S.C.). The Pendleton Act contained a provision expressly preserving veterans' preference. *Id.* ("[N]othing herein contained shall be construed to take away from those honorably discharged from the military or naval service any preference conferred by the 1754th section of the Revised Statutes"). The Pendleton Act required applicants to demonstrate individual merit in seeking government positions and was the forerunner of the modern civil service examining system; it was created to combat the corruption which had plagued several administrations. *See generally* Victor Lapuente & Marina Nistotskaya, *To the Short-Sighted Victor Belong the Spoils: Politics and Merit Adoption in Comparative Perspective*, 22 GOVERNANCE 431 (2009) (finding a positive correlation between merit-based hiring systems and political stability).

<sup>24</sup> General Pension Act of 1862, 12 Stat. 566 (granting benefits to disabled veterans, orphans, widows, and other dependent relatives, and including veterans who served during peacetime); *see also* Peter Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 10 (2000) (discussing the General Pension Act). Remaining confederate veterans did not become eligible for benefits under this act until they were pardoned in 1958. John P. Stimson, *Veterans' Preference Act Of 1944*, ENCYCLOPEDIA.COM (2004), <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/veterans-preference-act-1944> [<https://perma.cc/D6CK-C3HS>].

<sup>25</sup> Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392 (granting certain preferences to Union veterans in homesteading); *see also* VA HISTORY IN BRIEF, *supra* note 6, at 3.

<sup>26</sup> *See, e.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, n.6 (1979) (citing sources compiling state veterans' preference laws).

<sup>27</sup> Census Act of March 3, 1919, 40 Stat. 1293; U.S. CIV. SERV. COMM'N, *supra* note 19, at 5. This 1919 statute remained the basic federal veterans' preference law until the enactment of the Veterans' Preference Act of 1944. *See id.*

1919 Census Act to over sixty thousand per year following its enactment.<sup>28</sup> Consequentially, the civil service system began to evolve to better account for veterans' preference laws and to address concerns that preference was negatively impacting the federal workforce.<sup>29</sup> A system in which applicants were evaluated on a one hundred point scale was already in use, but it was modified to require that either five or ten additional points be awarded to veterans, depending on their disability status.<sup>30</sup> After this, the top three applicants would be referred to the selecting official.<sup>31</sup> This "Rule of Three" was designed to "restore competition" rather than requiring "that appointments be given to veterans irrespective of applicants of much superior qualifications."<sup>32</sup> Under the Rule of Three, passing over a veteran in favor of a less qualified or equally qualified candidate required written justification.<sup>33</sup> Military experience was independently creditable during evaluation of applicants if the service was similar to the work being performed.<sup>34</sup> These changes were followed by increased lobbying from veterans' groups and demonstrations,<sup>35</sup> the creation of the Veterans

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<sup>28</sup> U.S. CIV. SERV. COMM'N, *supra* note 19, at 6.

<sup>29</sup> *Id.* at 6–7.

<sup>30</sup> U.S. CIV. SERV. COMM'N, HISTORY OF THE FEDERAL CIVIL SERVICE, 1789 TO THE PRESENT 102 (1941). This one hundred point scale is still in use today. *See, e.g.*, 5 C.F.R. § 337.101(a) (2018).

<sup>31</sup> This referral was and is generally referred to as "certification" or "issuing the certificate." BEN L. ERDREICH ET AL., U.S. MERIT SYS. PROT. BD., THE RULE OF THREE IN FEDERAL HIRING: BOON OR BANE? vii (1995), <https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=253660&version=253947&application=ACROBAT> [<https://perma.cc/2QV4-Q57L>].

<sup>32</sup> U.S. CIV. SERV. COMM'N, *supra* note 19, at 7 (quoting from a Civil Service Commission letter to President Warren G. Harding).

<sup>33</sup> Exec. Order No. 5610 (1931), 3 C.F.R. § 6.2, 7.1.

<sup>34</sup> Exec. Order No. 3801 (1923), *reprinted as amended* in 3 U.S.C. § 3311(2). This provision was included in the Veterans' Preference Act of 1944 and is now codified at 5 U.S.C. § 3311(2). If the veteran's employment in a similar position is "interrupted" by military service, the entire period of military service is creditable, regardless of whether the veteran was engaged in activities similar to those of the position during the service period. *Id.* 5 U.S.C § 3311(1).

<sup>35</sup> VA HISTORY IN BRIEF, *supra* note 6, at 9–11; U.S. CIV. SERV. COMM'N *supra* note 19, at 15.



Administration,<sup>36</sup> and eventually the World War II G.I. Bill<sup>37</sup> and the Veterans' Preference Act of 1944.<sup>38</sup>

### 3. World War II to Present

The Veterans' Preference Act of 1944 was enacted against the backdrop of the largest war, as well as the greatest financial crisis, the United States had ever experienced.<sup>39</sup> Both the House and the Senate introduced legislation to ease the transition of millions of returning servicepersons,<sup>40</sup> and the House bill passed by an impressive margin.<sup>41</sup> President Franklin D. Roosevelt signed the act into law on June 27, 1944.<sup>42</sup> The statute conferred veterans' preference on honorably discharged veterans with service-connected disabilities, as well as their wives and unmarried widows; honorably discharged veterans who served during specified periods; and the mothers of deceased or disabled veterans who met certain conditions.<sup>43</sup> The act applied to hiring, reinstatement, and retention, and it also granted veterans certain appeal rights.<sup>44</sup> Congress also gave legislative sanction to

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<sup>36</sup> VA HISTORY IN BRIEF, *supra* note 6, at 12.

<sup>37</sup> Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (providing veterans with unemployment compensation, federal loans, and subsidized education).

<sup>38</sup> See Part I.A.3.

<sup>39</sup> Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified as amended in scattered sections of 5 U.S.C.).

<sup>40</sup> H.R. 4115, 78th Cong. (1944); S. 1762, 78th Cong. (1944). Congress did not rigorously evaluate what preferences were being granted, however, and it did not consider the law's collateral effects. See, e.g., *Hearings on S. 1762 and H.R. 4115 Before the S. Comm. on Civil Service*, 78th Cong., 2d Sess. 32 (1944) (statement of H. Eliot Kaplan, Executive Secretary of the National Civil Service Reform League); *Hearings on S. 1762 and H.R. 4115 Before the S. Comm. on Civil Service*, 78th Cong., 2d Sess. 8-9 (1944) (remarks of Rep. Joe Starnes).

<sup>41</sup> The bill passed the House with only one dissenting vote; it was approved unanimously in the Senate. U.S. CIV. SERV. COMM'N, *supra* note 19, at 15-16.

<sup>42</sup> *Id.*

<sup>43</sup> The act did not cover those serving in semi-military or civilian positions with the armed forces. *Id.* at 20. Nor did the act cover veterans who had served during peacetime. Stimson, *supra* note 24.

<sup>44</sup> Nonveterans did not acquire appeal rights until 1962. See Exec. Order No. 10,987, 27 Fed. Reg. 550 (1962); see also Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92

benefits previously created by executive order or regulation, including five- and ten-point preference and the Rule of Three.<sup>45</sup>

In the years since the Veterans' Preference Act became law, legislators have frequently attempted to amend the statute. The Veterans' Preference Act now covers veterans of World War II, the Korean War, the Vietnam War, the Persian Gulf War, the Iraq War, and other conflicts.<sup>46</sup> The most significant attempt at reform occurred when the Carter administration tried to include veterans' preference in the Civil Service Reform Act of 1978.<sup>47</sup> The administration proposed ten-year and single-usage limitations on veterans' preference for non-disabled veterans, as well as lesser retention rights for veterans and exclusions for high-level military retirees.<sup>48</sup> The time limitation was increased to fifteen years before the bill was passed out of

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Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (sanctioning appeal rights for all federal employees because governmental deprivation of the property interest in employment requires due process).

<sup>45</sup> Stimson, *supra* note 24; U.S. CIV. SERV. COMM'N, *supra* note 19, at 15. The act contains certain exceptions for the legislative branch, the judicial branch, and some executive positions. 5 U.S.C. § 3304(d).

<sup>46</sup> OPM, VET GUIDE, *supra* note 5.

<sup>47</sup> See H.R. 11280, 95th Cong. (1978); S. 2640, 95th Cong. (1978); see also Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

<sup>48</sup> See, e.g., B. Drummond Ayres, Jr., *Carter Wins in House Committee on Cutting Veteran's Preference*, N.Y. TIMES, June 29, 1978, at A18, <https://www.nytimes.com/1978/06/29/archives/carter-wins-in-house-committee-on-cutting-veterans-preference.html?searchResultPosition=1> [https://perma.cc/WFE7-DFLZ]; see also CQ Press, *Congress Approves Civil Service Reforms*, 34 CQ ALMANAC 818 (1979) (remarks of Rep. Patricia Schroeder asserting that the Veterans' Preference Act of 1944 was intended to grant temporary rather than perpetual benefits to veterans). The veterans' preference limitations were generally supported by federal managers, suggesting that those tasked with applying veterans' preference law were aware of its negative effects. Naomi B. Lynn & Richard E. Vaden, *Bureaucratic Response to Civil Service Reform*, 39 PUB. ADMIN. REV. 333, 339 (1979) (finding that seventy-five percent of federal managers supported time limits for veterans' preference).

committee, but the proposals were nonetheless defeated by veterans' lobbying groups.<sup>49</sup>

Today, veterans' preference law is at its zenith, and attempts to modernize the Veterans' Preference Act are quickly quashed by veterans' lobbying groups.<sup>50</sup> Other laws benefiting veterans enacted since 1944 include: the Vietnam Era Veterans Readjustment Act, which requires affirmative action for veterans;<sup>51</sup> the Veteran Employment Opportunities Act of 1998, which provides a special federal hiring authority for veterans;<sup>52</sup> and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which prohibits discrimination against veterans.<sup>53</sup>

## *B. Overview of Veterans' Preference Law*

### **1. Federal Hiring Process**

Understanding the application of veterans' preference law first requires an understanding of the federal hiring process. Like in the private sector,

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<sup>49</sup> Ayres, *supra* note 48, at A18; CQ Press, *supra* note 48. Another factor in the demise of the Carter administration's proposal was congressional reluctance to tether the fate of the entire reform bill to the emotionally charged subject of veterans' preference. *Id.*

<sup>50</sup> The power of veterans' lobbying groups is immense. *See, e.g.*, Michael Waterstone, *Returning Veterans and Disability Law*, 85 NOTRE DAME L. REV. 1081, 1101 n.92 (2010) (relating example of an aborted change to the tax-free status of veteran disability payments); David A. Gerber, *Disabled Veterans and Public Welfare Policy: Comparative and Transnational Perspectives on Western States in the Twentieth Century*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 77, 85 (2001) ("[d]isabled veterans have been a particularly well-organized segment of modern society"); Samuel H. Ordway, *The Veteran in the Civil Service*, 238 ANNALS AM. ACAD. POL. SOC. SCI. 133, 133 (1945) ("Veteran pressure groups continually seek extension of the coverage and the amount of preference granted, with more and more disregard for criteria of qualification for the position sought.").

<sup>51</sup> Vietnam Era Veterans' Readjustment Assistance Act, Pub. L. No. 93-508, 88 Stat. 1578 (1974).

<sup>52</sup> Veteran Employment Opportunities Act of 1998, Pub. L. No. 105-339, 11 Stat. 3182.

<sup>53</sup> Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended at 38 U.S.C. §§ 4301-4335); *see also* Part II.C.4 (documenting various other protections).

federal hiring begins with localized needs, which are submitted to agency human resources specialists for assessment and analysis.<sup>54</sup> Human resources specialists then create job announcements that remain open for predetermined amounts of time, after which applicants' credentials are evaluated, candidates are certified to selecting officials, and interviews are conducted.<sup>55</sup> Candidates' references are then checked, selections made, tentative offers issued, and background investigations begun—after which selectees receive final job offers and their entry on duty dates.<sup>56</sup> Veterans' preference is applied at the time that applicants' credentials—such as their resumes, cover letters, and transcripts—are evaluated; however, the process differs depending on whether the Rule of Three or a Category Rating method is utilized.<sup>57</sup>

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<sup>54</sup> U.S. OFF. OF PERS. MGMT., END-TO-END HIRING INITIATIVE 5–6, 10 (2008), <https://www.opm.gov/policy-data-oversight/human-capital-management/talent-management/end-to-end-hiring-initiative.pdf> [<https://perma.cc/4GVJ-96HK>].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* It is not uncommon for this process to take several months. *See, e.g.*, Nicole Ogrysko, *It Took Agencies an Average of 106 Days to Hire New Employees in 2017*, FED. NEWS NETWORK, (March 1, 2018, 5:26 PM) <https://federalnewsnetwork.com/hiring-retention/2018/03/it-took-agencies-an-average-of-106-days-to-hire-new-employees-in-2017/> [<https://perma.cc/67GA-8LUG>]. This process may differ for individual agencies, positions, and hiring authorities excepted from normal competitive procedures. *See* 5 C.F.R. § 302 (2020); U.S. MERIT SYS. PROT. BD., VETERAN HIRING IN THE CIVIL SERVICE: PRACTICES AND PERCEPTIONS 21–24 (2014), <https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1072040&version=1076346&application=ACROBAT> [<https://perma.cc/274V-JV39>] [hereinafter MSPB, VETERAN HIRING] (describing the excepted service).

<sup>57</sup> *See* Part I.B.2. As discussed in Part I.A.2, the Rule of Three originated during the 1920s. The Category Rating method involves referring all candidates in the “best qualified” category, and it received government-wide authorization in 2002. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 1312, 116 Stat. 2135, 1312 (codified at 5 U.S.C. § 3319(a)). In 2010, the Obama administration issued an executive memorandum requiring agencies to use the Category Rating method. Memorandum on Improving the Federal Recruitment and Hiring Process, 1 PUB. PAPERS 998 (May 14, 2010), <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-improving-federal-recruitment-and-hiring-process> [<https://perma.cc/5UQD-VG5L>]. Nevertheless, the Rule of Three remains enshrined in the United States Code. *See* 5 U.S.C. § 3318(a).

## 2. Substantive Provisions of Veterans' Preference Law

For veterans' preference to attach, applicants for federal<sup>58</sup> positions must first meet the minimum requirements for the position in question,<sup>59</sup> and they must also satisfy the statutory definition of "veteran."<sup>60</sup> This definition requires the applicant to have participated in active duty service during periods corresponding with specified United States wars or military campaigns.<sup>61</sup> Veterans' preference only applies to appointment procedures and promotions between agencies; internal agency promotions are excepted.<sup>62</sup>

After these coverage requirements are met, the application of veterans' preference rules depends on whether the Rule of Three or a Category

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<sup>58</sup> All fifty states have some form of veterans' preference law. Fleming & Shanor, *supra* note 10, at 13; *see also* Michael D. Sutton, Comment, *Forging a New Breed: The Emergence of Veterans' Preference Statutes Within the Private Sector*, 67 ARK. L. REV. 1081, 1081 n.1 (2014) (compiling statutes). These statutes differ, however, in their application to hiring, promotion, and retention; requirements regarding residency, honorable discharge, receipt of medals, and disability status; and coverage of mothers, orphans, unmarried spouses, etc. *See id.* at 1088–91. Some state laws also award preference for characteristics not covered by federal veterans' preference law and many are quite vague. *See, e.g.*, ALASKA STAT. ANN. § 39.25.159(a)(1) (2019) (awarding additional points to former prisoners of war); MICH. COMP. LAWS ANN. § 38.413 (2019) (awarding additional points to "war veterans.").

<sup>59</sup> *See, e.g.*, Sutton, *supra* note 58, at 1096.

<sup>60</sup> *See* 5 U.S.C. § 2108(1).

<sup>61</sup> *See id.* § 2108(1)(A)–(D). Veterans' preference may extend to the spouses, unmarried widows or widowers, and parents of veterans under specified conditions. *See id.* § 2108(3). The definition of "veteran" excludes non-disabled veterans who retire at the rank of major or above. *See id.* § 2108(4)–(5). The definition's full-time requirement also generally excludes reservists, though they may be covered under state laws. *See id.* § 2108(1)(B); *see also* ALASKA STAT. ANN. § 39.25.159(c) (2019); GA. CODE ANN. § 43-1-9 (2019); NEV. REV. STAT. § 284.260(1)(d) (2017).

<sup>62</sup> *See* 5 U.S.C. § 3304(f); 5 C.F.R. § 335.106 (2020); *Brown v. Dep't of Veterans Affs.*, 247 F.3d 1222, 1225 (Fed. Cir. 2001). The preference granted to veterans applying for inter-agency promotion positions takes the form of the opportunity to compete rather than affirmative selection advantages. *See Special Hiring Authorities for Veterans*, U.S. OFF. OF PERS. MGMT., <https://www.fedshirevets.gov/job-seekers/special-hiring-authorities/> [<https://perma.cc/PF5X-V2EK>].

Rating method is employed.<sup>63</sup> Under the Rule of Three, human resources specialists first assign each applicant a numerical rating before adding additional points to the scores of qualified veterans.<sup>64</sup> Most preference eligible veterans receive five additional points, though veterans may receive up to ten points if they have a service-connected disability—even when the disability is not sustained during a statutorily prescribed period.<sup>65</sup>

Under the Category Rating regime, applicants are separated into several quality categories—most often labeled as highly-qualified, well-qualified, and minimally qualified—and all applicants in the highest category are referred to the appropriate selecting officials.<sup>66</sup> Veterans with service-connected disabilities, the equivalent of ten-point veterans under the Rule of Three, are automatically assigned to the highest category if they are minimally qualified, and they must be selected ahead of non-preference eligible candidates within the category.<sup>67</sup> Other veterans, the equivalent of five-point veterans under the Rule of Three, are *not* automatically assigned to the highest quality category, but still must be selected ahead of non-preference eligible candidates within their assigned categories.<sup>68</sup>

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<sup>63</sup> The Category Rating system tends to be more favorable towards veterans than the Rule of Three. *See* MSPB, VETERAN HIRING, *supra* note 56, at 11.

<sup>64</sup> *E.g.*, MSPB, VETERAN HIRING, *supra* note 56, at 7; *Veterans' Preference*, U.S. OFF. OF PERS. MGMT., <https://www.fedshirevets.gov/job-seekers/veterans-preference/> [<https://perma.cc/DA8S-8H4K>].

<sup>65</sup> *See* 5 C.F.R. § 337.101 (2020); MSPB, VETERAN HIRING, *supra* note 56, at 7; U.S. OFF. OF PERS. MGMT., *supra* note 64. Individuals who are the sole surviving immediate family member of a father, mother, or sibling that was killed, rendered completely disabled, or declared missing in action may receive zero point preference, which amounts to a tiebreaker among equally qualified applicants. *See* OPM, VET GUIDE, *supra* note 5; *see also* 5 C.F.R. § 211.102(c)–(d) (2020). The Department of Veterans Affairs generally assesses veteran disability status. *See* 5 U.S.C. § 2108; 38 C.F.R. § 4.1 (2020).

<sup>66</sup> 5 C.F.R. § 337.303 (2020).

<sup>67</sup> *See* 5 U.S.C. § 3319(b), (c)(7); 5 C.F.R. § 337.304 (2020). An exception to this rule occurs for professional and scientific positions that are classified as GS-9 or higher. *See* 5 U.S.C. § 3319(b). Absolute preference is given to veterans applying for guard, elevator operator, messenger, and custodian positions. *Id.* § 3310.

<sup>68</sup> *See* 5 U.S.C. § 3319(b), (c)(7); 5 C.F.R. § 337.304; MSPB, VETERAN HIRING, *supra* note 56, at 10. Veterans alleging an agency violation of their preference rights may

### 3. Effects of Veterans' Preference Law

The foremost consequence of veterans' preference law is that veterans tend to occupy an outsized number of federal positions.<sup>69</sup> Currently the federal government employs over six hundred thousand veterans,<sup>70</sup> approximately thirty percent of the federal workforce.<sup>71</sup> In contrast, veterans account for under ten percent of private sector workers.<sup>72</sup> This imbalance has increased in recent years,<sup>73</sup> and studies have consistently

appeal first to the Department of Labor and then to the Merit Systems Protection Board. See *Willingham v. Dep't of the Navy*, 118 M.S.P.B. 21, 24 (2012); see also 5 U.S.C. § 2302(b)(11).

<sup>69</sup> See, e.g., Rebecca M. Blank, *An Analysis of Workers' Choice Between Employment in the Public and Private Sectors*, 38 INDUS. & LAB. REL. REV. 211, 219 (1985) (finding that veterans are much more likely to work for the federal government than nonveterans of the same race, sex, educational level, and experience). In addition to the effect of veterans' preference on federal hiring, many government contractors are required to implement affirmative action plans for veterans. See 41 C.F.R. § 60-300.44 (2020). Notably, there is no guarantee that compliance will shield contractors from liability. See Kenneth T. Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. ILL. L.F. 69, 166 (1977).

<sup>70</sup> U.S. OFF. OF PERS. MGMT., EMPLOYMENT OF VETERANS IN THE FEDERAL EXECUTIVE BRANCH FISCAL YEAR 2014 i (2015), <https://www.fedshirevets.gov/veterans-council/veteran-employment-data/employment-of-veterans-in-the-federal-executive-branch-fy2014.pdf> [https://perma.cc/5ZS4-278D]. There are about nineteen million veterans in the United States today; following World War II, there were approximately fifteen million; following the Civil War, there were a little under three million, including former Confederate soldiers; following the Revolutionary War, there were a little over two hundred thousand. DEP'T OF VETERANS AFFS., AMERICA'S WARS, [https://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf) [https://perma.cc/BW96-XB4L].

<sup>71</sup> See, e.g., LINDA E. BROOKS RIX, AVUE, THE DANGERS OF OVERRIDING VETERANS' PREFERENCE BY HR SPECIALISTS 1, 3 (2012), <https://www.avuetech.com/wp-content/uploads/2017/09/WHITE-PAPER-AVUE-DANGERS-OF-OVERRIDING-VETERANS-PREFERENCE.pdf> [https://perma.cc/U9FH-THAW]; see also U.S. GEN. ACCT. OFF., FEDERAL HIRING: DOES VETERANS' PREFERENCE NEED UPDATING? 1, 2 (1992), <https://www.gao.gov/assets/160/151726.pdf> [https://perma.cc/36DE-PYN7].

<sup>72</sup> E.g., BROOKS RIX, *supra* note 71, at 3.

<sup>73</sup> Compare U.S. OFF. OF PERS. MGMT., EMPLOYMENT OF VETERANS IN THE FEDERAL EXECUTIVE BRANCH: FISCAL YEAR 2017 (2019), <https://www.fedshirevets.gov/veterans-council/veteran-employment-data/employment-of-veterans-in-the-federal-executive-branch-fy2017.pdf> [https://perma.cc/F2X8-GNU8], with U.S. OFF. OF PERS. MGMT.,

found that veterans are three to four times more likely to hold federal positions than nonveterans.<sup>74</sup> While in theory veterans' preference involves only slight bonuses, in practice it operates as a per se bar for many nonveteran applicants.<sup>75</sup>

This effect creates several problems, most notably a disparate discriminatory impact on women and other protected classes, but also a trend towards a less qualified federal workforce.<sup>76</sup> Additionally, veterans' preference laws have evolved to a point of dizzying complexity; they vary by individual veterans, their family members, the specific hiring authorities utilized, and even by individual federal human resource specialists and hiring managers.<sup>77</sup> This complexity results in perceptions of untoward favoritism and invites manipulation.<sup>78</sup>

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EMPLOYMENT OF VETERANS IN THE FEDERAL EXECUTIVE BRANCH: FISCAL YEAR 2008 (2009), <https://www.fedshirevets.gov/veterans-council/veteran-employment-data/employment-of-veterans-in-the-federal-executive-branch-fy2008.pdf> [<https://perma.cc/2C2C-EG6X>].

<sup>74</sup> See, e.g., Gregory B. Lewis, *The Impact of Veterans' Preference on the Composition and Quality of the Federal Civil Service*, 23 J. PUB. ADMIN. RES. & THEORY 247, 255 (2013); Louis J. Virelli III, *Don't Ask, Don't Tell, Don't Work: The Discriminatory Effect Of Veterans' Preferences On Homosexuals*, 38 J. MARSHALL L. REV. 1083, 1088 (2005); see also Gregory B. Lewis & Mark A. Emmert, *Who Pays for Veterans' Preference?*, 16 ADMIN. & SOC. 328, 342–43 (1984) (finding that veterans' preference strongly influences initial hiring but has lesser effects on promotions, transfers, and retention).

<sup>75</sup> See, e.g., U.S. GEN. ACCT. OFF., CONFLICTING CONGRESSIONAL POLICIES: VETERANS' PREFERENCE AND APPORTIONMENT VS. EQUAL EMPLOYMENT OPPORTUNITY i (1977), <https://www.gao.gov/assets/130/120280.pdf> [<https://perma.cc/UWM4-N3LT>] (“the preferences awarded to veterans often are insurmountable barriers for female applicants”) (emphasis added); *Veterans' Preference in Public Employment*, *supra* note 18, at 630, n.68 (describing study of federal appointments in which women demonstrated superior qualifications to veterans but “retained little benefit from their competitive performance once examination scores were augmented by veteran bonuses”); see also De Parry, *supra* note 18, at 74 (“granting a bonus of five or ten points on examination scores may constitute an absolute preference in the current job market”).

<sup>76</sup> See Part II.

<sup>77</sup> See MSPB, VETERAN HIRING, *supra* note 56, at i.

<sup>78</sup> See *id.* at 25–36 (favoritism); *id.* at ii (finding that hiring officials frequently write job specifications with specific veterans in mind, select candidates with limited regard for



These problems stem from the conflicting directives that face hiring agencies: on one hand, they are required to make selections “solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity”;<sup>79</sup> on the other, they are required to give preference to veterans, regardless of their relative qualifications.<sup>80</sup> As such, adjustments to the current veterans’ preference system are needed.<sup>81</sup>

### *C. History and Overview of Antidiscrimination Law*

#### **1. Civil Rights Act**

The Civil Rights Act of 1964 was enacted in large part because of the nation’s history of slavery and Jim Crow.<sup>82</sup> Black Americans suffered from various forms of discrimination, including in employment, and they began to evoke change during the 1950s and 1960s.<sup>83</sup> The Civil Rights Movement prompted Congress to consider hundreds of civil rights bills,<sup>84</sup> despite the controversial nature of such legislation,<sup>85</sup> and the movement culminated in passage of the Civil Rights Act of 1964.<sup>86</sup>

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their qualifications, and leave positions vacant until preselected veterans retire from military service).

<sup>79</sup> 5 U.S.C. § 2301(b)(1); *see also* 5 C.F.R. § 300.102 (2020).

<sup>80</sup> *See* 5 U.S.C. § 2302(b)(11).

<sup>81</sup> *See* Part III.

<sup>82</sup> *See, e.g.,* Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 FLA. L. REV. 251, 262–63 (2011); *see also* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 441–43 (1966) (Title VII was principally designed to remedy discrimination against Black people).

<sup>83</sup> *See, e.g.,* Craig Westergard, Note, *You Catch More Flies with Honey: Reevaluating the Erroneous Premises of the Military Exception to Title VII*, 20 MARQ. BENEFITS & SOC. WELFARE L. REV. 215, 221–22 (2019) (describing this history).

<sup>84</sup> *See* Cynthia Elaine Tompkins, *Title VII at 50: The Landmark Law Has Significantly Impacted Relationships in the Workplace and Society, But Title VII Has Not Reached Its True Potential*, 89 SAINT JOHN’S L. REV. 693, 774–82 (2016).

<sup>85</sup> *See id.* at 785–92.

<sup>86</sup> *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e–2000e-17).

Title VII of the Civil Rights Act prohibits employers with fifteen or more employees from discriminating in the terms, conditions, or privileges of employment because of race, color, religion, sex, or national origin.<sup>87</sup> The statute did not define discrimination, but courts have held that it encompasses disparate treatment, disparate impact, harassment, and retaliation.<sup>88</sup> Title VII has been amended numerous times—most notably in 1972, when it was extended to cover government employees,<sup>89</sup> and in 1991, when Congress recognized disparate impact discrimination, clarified the burden of proof required for mixed motive cases, and placed statutory caps on damages.<sup>90</sup> Violations of Title VII may result in an award of backpay, compensatory damages, punitive damages, attorneys’ fees, or equitable relief.<sup>91</sup>

## 2. Age Discrimination in Employment Act

The Civil Rights Act also charged Secretary of Labor W. Willard Wirtz with studying factors that tend to result in discrimination.<sup>92</sup> Wirtz’s study

<sup>87</sup> 42 U.S.C. § 2000e-2(a); *id.* § 2000e(b).

<sup>88</sup> *See, e.g.*, *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 252–54 (1981) (disparate treatment); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (disparate impact); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986) (harassment); 42 U.S.C. § 2000e-3(a) (retaliation). Veterans’ lobbying groups sometimes misunderstand or misconstrue the law to omit disparate impact discrimination. *See, e.g.*, CQ Press, *supra* note 48, at 10 (statement of Norman B. Hartnett of the Disabled American Veterans) (“[L]aws or regulatory provisions do not discriminate, it is people who discriminate in their implementation of such laws and regulations”).

<sup>89</sup> *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16(a)). Courts have held that this extension did not cover the military, however. *But see generally* Westergard, *supra* note 83 (arguing against Title VII’s military exception).

<sup>90</sup> *See* Civil Rights Act of 1991, Pub. L. No. 102-166, §§ 105–106, 105 Stat. 1071, 1074–75 (codified at 42 U.S.C. §§ 1981(a)(1), b(3), 2000e-2(k)).

<sup>91</sup> *See* U.S. EQUAL EMP. OPPORTUNITY COMM’N, REMEDIES FOR EMPLOYMENT DISCRIMINATION, <https://www.eeoc.gov/employers/remedies.cfm> [<https://perma.cc/38XN-89WW>].

<sup>92</sup> Civil Rights Act of 1964 § 715, Pub. L. No. 88-352, 78 Stat. 266 (codified as amended at 42 U.S.C. § 2000e-14).

found that while older workers were not subject to the same sort of animus as other classes, employers often assumed that age negatively impacted performance.<sup>93</sup> Following the Wirtz study, Congress held extensive hearings devoted to the problem of age discrimination in employment,<sup>94</sup> and the Age Discrimination in Employment Act (ADEA) was enacted shortly thereafter in 1967.<sup>95</sup>

The ADEA prohibits age discrimination and most mandatory retirement ages.<sup>96</sup> The act originally covered workers between the ages of forty and sixty-five, but the upper age limit was raised to seventy in 1978,<sup>97</sup> and then eliminated in 1986.<sup>98</sup> In 1990, the ADEA was amended to prohibit employers from coercing employees into early retirements without their knowing and voluntary assent.<sup>99</sup> In part because age is sufficiently dissimilar to the characteristics found in Title VII,<sup>100</sup> the ADEA contains distinct coverage requirements, causation standards, defenses, and remedies.<sup>101</sup>

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<sup>93</sup> See U.S. DEP'T OF LAB., THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965), <https://www.eeoc.gov/reports/older-american-worker-age-discrimination-employment> [https://perma.cc/2DZ7-SZ7N].

<sup>94</sup> Roberta Sue Alexander, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen Paper World*, 25 U. DAYTON L. REV. 75, 79–80 (1999); see Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 235 (1990).

<sup>95</sup> See Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §§ 621–634).

<sup>96</sup> See 29 U.S.C. § 623(a), (f).

<sup>97</sup> See Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified as amended at 29 U.S.C. § 631(a)).

<sup>98</sup> Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified as amended at 29 U.S.C. § 631(a)).

<sup>99</sup> See Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621–634).

<sup>100</sup> E.g., Michael C. Harper, *ADEA Doctrinal Impediments to the Fulfillment of the Wirtz Report Agenda*, 31 U. RICH. L. REV. 757, 759–63 (1997).

<sup>101</sup> See, e.g., 29 U.S.C. § 630(b) (twenty or more employees); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009) (but-for causation); Michael C. Harper, *Reforming the Age Discrimination in Employment Act: Proposals and Prospects*, 16 EMP. RTS. & EMP. POL'Y J. 13, 23–24, 31 (2012) (reasonable factors other than age defense and remedies).

### 3. Rehabilitation Act and Americans with Disabilities Act

Disability discrimination also has a long history in the United States.<sup>102</sup> In 1973, Congress passed the Rehabilitation Act to prohibit disability discrimination by federal employers and recipients of federal funds, and it modeled the legislation after the Civil Rights Act.<sup>103</sup> In 1990, Congress passed the Americans with Disabilities Act (ADA) to extend this prohibition to cover private sector employers.<sup>104</sup> After several Supreme Court decisions limiting the ADA,<sup>105</sup> Congress passed the Americans with Disabilities Act Amendment Act in 2008,<sup>106</sup> which instructed courts to construe the act broadly.<sup>107</sup>

The Rehabilitation Act and the ADA contain similar coverage requirements to Title VII.<sup>108</sup> They also contain similar requirements for producing a prima facie case of discrimination—though disability includes

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<sup>102</sup> See, e.g., Adrienne Phelps Coco, *Diseased, Maimed, Mutilated: Categorizations of Disability and an Ugly Law in Late Nineteenth-Century Chicago*, 44 J. SOC. HIST. 23, 23–24 (2010) (documenting negative attitudes towards disabled persons and Chicago’s “ugly” law); see also 42 U.S.C. § 12101(a)(2); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding state practice of forcibly sterilizing certain disabled persons).

<sup>103</sup> See Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–797); see also Architectural Barriers Act of 1968, Pub. L. No. 90-480, 82 Stat. 718 (codified as amended at 42 U.S.C. §§ 4151–4157); Vocational Rehabilitation Act of 1954, Pub. L. No. 83-565, 68 Stat. 652 (codified as amended at scattered sections of 20 U.S.C. and 29 U.S.C.); Vocational Education Act of 1917, Pub. L. No. 64-347, 39 Stat. 929 (codified as amended at 20 U.S.C. §§ 11–29).

<sup>104</sup> See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213); Craig Westergard, Note, *Unfit to Be Seen: Customer Preferences and the Americans with Disabilities Act*, 33 BYU J. PUB. L. 179, 184–85 (2020).

<sup>105</sup> See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488 (1999) (strengthening the substantial limitation component of the definition of disability); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999) (same); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 523 (1999) (same); *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (strengthening the major life activity component of the definition of disability).

<sup>106</sup> See Americans with Disabilities Act Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3555 (codified as amended at 42 U.S.C. §§ 12101–12213).

<sup>107</sup> See 42 U.S.C. § 12102(4)(A).

<sup>108</sup> See *id.* § 12112(b); *id.* § 12111(2), (5).

actual disability, being regarded as disabled, and having a record of disability.<sup>109</sup> Disability refers to physical or mental impairments that substantially limit one or more major life activities.<sup>110</sup> Major life activities include caring for oneself, eating, sleeping, breathing, seeing, and hearing; walking, standing, lifting, and bending; speaking and communicating; working and performing manual tasks; thinking, reading, concentrating, and learning; and certain bodily functions.<sup>111</sup> Both statutes require that employers reasonably accommodate disabled employees and job-applicants.<sup>112</sup>

#### 4. Burden-Shifting Framework

In analyzing employment discrimination claims, courts have established a three-part burden-shifting framework which differs depending on whether the claim is one of disparate treatment or disparate impact.<sup>113</sup> First, a plaintiff must produce evidence that he or she: belongs to a protected class; was qualified for the position in question; and suffered a materially adverse

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<sup>109</sup> *See id.* U.S.C. § 12102(1); 29 U.S.C. § 794.

<sup>110</sup> 42 U.S.C. § 12102(1)(A). The ADA does not cover LGBT-related conditions, sex behavior disorders, kleptomania, pyromania, compulsive gambling, or ongoing substance abuse. *See id.* § 12211.

<sup>111</sup> *Id.* § 12102(2). Impairments that substantially limit bodily functions generally include conditions like cancer or diabetes. *See* 45 C.F.R. § 1153.103(1) (2020).

<sup>112</sup> 42 U.S.C. § 12112(b)(5); U.S. OFF. OF PERS. MGMT., DISABILITY EMPLOYMENT: PROVIDING ACCOMMODATIONS, <https://www.opm.gov/policy-data-oversight/disability-employment/providing-accommodations/> [<https://perma.cc/8EQJ-VUYJ>].

<sup>113</sup> *See* McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1973); *see also* George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2314–23 (2006) (examining the differences between disparate treatment and disparate impact discrimination); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 954, 1000–02 (2005) (describing the dominance of disparate treatment theories of discrimination at the expense of disparate impact theories).

employment action, either because of his or her membership in a protected class or because of a specific discriminatory policy or practice.<sup>114</sup>

If the adverse employment action occurred *directly*—because of the plaintiff’s membership in a protected class—the defendant must then *produce* evidence of a legitimate nondiscriminatory reason for the adverse employment action.<sup>115</sup> The burden then shifts back to the plaintiff to prove that the proffered reason was pretextual, and to persuade the factfinder of the unlawful discrimination’s ultimate reality.<sup>116</sup>

If the adverse employment action occurred *indirectly*—because of a specific, facially neutral policy with outsized effects on a protected class—the defendant must then *prove* the policy or practice was job-related and consistent with business necessity.<sup>117</sup> The burden then shifts back to the plaintiff to prove that the defendant could have achieved its objectives through other, less discriminatory means, and to likewise persuade the factfinder of the unlawful discrimination’s ultimate reality.<sup>118</sup>

## II. DISPARATE IMPACT AND INEFFICIENCY OF VETERANS’ PREFERENCE LAW

There are two major problems with veterans’ preference law. First, veterans’ preference disparately affects women, LGBT persons, disabled persons, and other protected classes, which conflicts with antidiscrimination law and with the Constitution.<sup>119</sup> Second, veterans’ preference is inefficient

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<sup>114</sup> See, e.g., Tarik Ajami et al., *EEO Law Basics*, AMERICAN BAR ASSOCIATION 6 (2006), <https://silo.tips/download/american-bar-association-20>, [https://perma.cc/69UA-4AT5].

<sup>115</sup> See, e.g., Tristin K. Green, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983 (1999).

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., Hannah A. Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. REV. 419, 430–31 (1982).

<sup>118</sup> *Id.*

<sup>119</sup> See Part II.A; Part II.B.

and does not effectively accomplish its stated policy goals.<sup>120</sup> As such, Congress should amend veterans' preference law to better comport with the nation's goals of nondiscrimination and governmental efficiency.<sup>121</sup>

### *A. Disparate Impact of Veterans' Preference Law*

#### **1. Possible Statutory Preclusion**

Disparate impact liability for veterans' preference-based personnel actions may be statutorily precluded. Title VII of the Civil Rights Act of 1964 includes a short provision stating that "[n]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans."<sup>122</sup> On its face, this provision seems unequivocal.<sup>123</sup> However, there are reasons to think that the provision may not preclude statutory liability. First, the Civil Rights Act of 1964 originally applied only to the private sector and not the government;<sup>124</sup> when Title VII was amended in 1972, the legislature

<sup>120</sup> See Part II.C.

<sup>121</sup> See Part III.

<sup>122</sup> 42 U.S.C. § 2000e-11. The EEOC has interpreted this provision as only protecting *mandatory* veterans' preferences. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.056, POLICY GUIDANCE ON VETERANS' PREFERENCE UNDER TITLE VII (1990), [https://www.eeoc.gov/policy/docs/veterans\\_preference.html](https://www.eeoc.gov/policy/docs/veterans_preference.html) [https://perma.cc/FEE2-U5CN]. Preference systems based on policy or undertaken voluntarily may be insufficient. *Brown v. Puget Sound Elec. Apprenticeship & Training Tr.*, 732 F.2d 726, 730–31 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985) (reliance on internal policies insufficient); *Bailey v. Se. Area Joint Apprenticeship Comm.*, 561 F. Supp. 895 (N.D.W. Va. 1983) (same); *Krenzer v. Ford*, 429 F. Supp. 499 (D.D.C. 1977) (invalidating Veterans Administration policy of appointing only veterans to the Board of Veterans Appeals). This guidance is particularly important given the recent proliferation of state statutes which contemplate voluntary private sector veterans' preference systems. Joy Waltemath, *State Voluntary Veterans' Preference Laws Keep Marching Along*, WOLTERS KLUWER (April 23, 2015), <http://www.employmentlawdaily.com/index.php/2015/04/23/state-voluntary-veterans-preference-laws-keep-marching-along/> [https://perma.cc/C4BM-27ZP].

<sup>123</sup> See, e.g., *W. Va. Univ. Hosp., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991) (preeminence of the text in statutory interpretation).

<sup>124</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 1964, 78 Stat. 265.

made no reference to this provision, and so it is possible that it applies only to private employers.<sup>125</sup> Second, disparate impact liability may be said to “preempt” veterans’ preference law instead of “repealing” or “modifying” it.<sup>126</sup> Third and most significantly, the ADEA, the Rehabilitation Act, and the ADA do *not* contain similar provisions expressly preserving veterans’ preference.<sup>127</sup> Nonetheless, courts have indicated that this provision prevents most challenges to veterans’ preference statutes, regardless of their statutory bases.<sup>128</sup>

The legislative history of Title VII does not provide much support for this judicial interpretation, however. The first mention of veterans’ preference in the congressional record occurred on July 24, 1963, when Senator Hubert Humphrey added the veterans’ preference exception as part of an overlapping bill.<sup>129</sup> The language in the bill was substantially similar to what was eventually enacted and the addition appears to have received no comment.<sup>130</sup> The legislative history contains only two subsequent references to veterans’ preference in relation to Title VII, both of which seem to be mischaracterizations made by opponents of the legislation.<sup>131</sup>

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<sup>125</sup> Fleming & Shanor, *supra* note 10, at n.9.

<sup>126</sup> The enacting legislature could have chosen a more precise word, such as “preempt,” if this was its intended application. On the other hand, diminishing the application of veterans’ preference laws could be seen as a modification, and the word “construed” likely broadens the meaning of this provision. See 42 U.S.C. § 2000e-11.

<sup>127</sup> See 42 U.S.C. §§ 12101–12213 (ADA); 29 U.S.C. §§ 701–797 (Rehabilitation Act); *id.* §§ 621–634 (2018) (ADEA). Discrimination on the basis of veteran status may be conceived of as a reasonable factor other than age under the ADEA, however. See, e.g., *Hodgson v. Approved Pers. Serv., Inc.*, 529 F.2d 760, 767–68 n.14 (4th Cir. 1975).

<sup>128</sup> See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 256 n.2 (1979) (noting that this provision may preclude plaintiffs from challenging veterans’ preference statutes under Title VII); see also *Skillern v. Bolger*, 725 F.2d 1121, 1123 (7th Cir.), *cert. denied*, 469 U.S. 835 (1984) (challenge to state veterans’ preference laws precluded); *Bannerman v. Dep’t of Youth Auth.*, 436 F. Supp. 1273, 1279 (N.D. Cal. 1977), *aff’d per curiam*, 615 F.2d 847 (9th Cir. 1980) (same).

<sup>129</sup> 109 CONG. REC. 13248 (1963).

<sup>130</sup> See *id.*

<sup>131</sup> The first remark was made by Rep. John Lesinski, Jr., of Michigan. 110 CONG. REC. 2536 (1964) (“I urge the veterans to consider the bill carefully, for it could affect their



The fact that the provision was included in the 1964 version of the statute may indicate that Congress chose to prioritize veterans' preference over nondiscrimination goals—or it may evince the power of veterans' lobbying groups, inattention by the legislature, or compromise on the part of the bill's sponsors. Drawing a definitive conclusion is indeed akin to looking over a crowd and picking out one's friends.<sup>132</sup>

## 2. Disparate Impact on Women

“[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as ‘built-in headwinds’ for minority groups and are unrelated to measuring job capability.”<sup>133</sup> Here, Chief Justice Burger, writing for the Supreme Court, captures the essence of the problem with veterans' preference: neither good intent, facial neutrality, nor Congressional imprimatur can truly redeem veterans' preference law from its discriminatory effects.<sup>134</sup> While veterans' preference statutes may

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veterans' preference rights.”). The second remark was made by Sen. Russell B. Long of Louisiana. *Id.* at 11919 (asserting that veterans' preference statutes require discrimination and that the proposed civil rights law “would result in [those who comply with veterans' preference laws] being put in jail because they had been discriminating”).

<sup>132</sup> *E.g.*, *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); *see also* Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination under Title VII*, 12 *INDUS. RELS. L.J.* 1, 41 (1990).

<sup>133</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). Like the high school diploma requirement in *Griggs*, veterans' preference statutes are facially neutral. Pat Labbadia III, Comment, *Veterans' Preference Statutes: Do They Really Discriminate against Women?*, 18 *DUQ. L. REV.* 653, 680 (1980).

<sup>134</sup> While the disparate effects of veterans' preference may be most pronounced for women, LGBT persons, and disabled persons, they are also felt by other classes. For instance, “veterans' preference is one of the few, if not the only, neutral selection device that affords African Americans an advantage over whites.” Eang L. Ngov, *When “The Evil Day” Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 *AM. U. L. REV.* 535, n.263 (2011); *see also* Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 *UCLA L. REV.* 305, 368 (1983); *Smith v. City of E. Cleveland*, 363 F. Supp. 1131, 1134 (N.D. Ohio 1973), *cert. denied*, 426 U.S. 934 (1976) (thirty-six percent of white applicants preference eligible,

be excepted from disparate impact *claims*,<sup>135</sup> they nonetheless disparately affect women and other protected classes and are socially undesirable.

The disparate effect of veterans' preference on women is primarily due to the military's history of imposing absolute restrictions on female servicepersons. Until 1918, the official policy of the United States was that women were not allowed to serve in the military at all.<sup>136</sup> Until 1942, women were barred from all military positions except those pertaining to nursing.<sup>137</sup> From 1948 to 1967, Congress officially limited female servicepersons to no more than two percent of the total constituency of the armed forces.<sup>138</sup> After this statutory requirement was lifted, women were still ordinarily limited to the same percentage by Department of Defense policy.<sup>139</sup> Numerous other restrictions endured past the end of this quota

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compared to seventy-five percent of Black applicants). Veterans' preference also disparately impacts certain nationalities, and it may impact certain religious groups associated with those nationalities. Lewis, *supra* note 74, at 263 (finding that the number of Hispanic and Asian federal employees would be approximately twenty percent higher in the absence of veterans' preference). Veterans' preference likely operates to the advantage of older employees, however, since at least a period of most preference eligibles' lives must have been spent in military service. See GERALD MAYER, CONG. RSCH. SERV., SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS 1, 8 (2014), <https://fas.org/sgp/crs/misc/R41897.pdf> [<https://perma.cc/U2B8-SNSY>]. This Note neglects analysis of the effects of veterans' preference on other federally protected classes, such as political partisans and union affiliates.

<sup>135</sup> Such claims would otherwise easily state a *prima facie* case of discrimination. See Part I.C.4. Women, for instance, are members of a protected class, they generally qualify for the federal positions for which they apply, failure to hire is an adverse employment action, and veterans' preference law represents a specific policy which causes employers to pass over female job applicants. Veterans' preference is not job-related and consistent with business necessity, since employees are often more productive in the private sector, where veterans' preference is not as widespread. See Part II.C.2. Lastly, there are many less discriminatory means by which the policies underlying veterans' preference may be accomplished. See Part III.

<sup>136</sup> *Anthony v. Massachusetts*, 415 F. Supp. 485, 489–90 (D. Mass. 1976); Fleming & Shanor, *supra* note 10, at n.136.

<sup>137</sup> *Anthony*, 415 F. Supp. at 489–90; Fleming & Shanor, *supra* note 10, at n.136.

<sup>138</sup> Women's Armed Services Integration Act of 1948 § 102, Pub. L. No. 80-625, 62 Stat. 356, 357.

<sup>139</sup> See 10 U.S.C. § 3209(b); 32 C.F.R. § 580.4(b) (1976).

system, and many, such as restrictions on women in combat roles, still persist today.<sup>140</sup>

Women have historically been subject to other restrictions as well. For instance, women have been required to meet stricter standards than men regarding age, educational attainment, familial status, and physical fitness.<sup>141</sup> In addition, women have been systematically excluded from the military reserves and numerous military academies.<sup>142</sup> Perhaps the most significant barrier which prevents women from receiving veteran status is their exclusion from the selective service.<sup>143</sup>

While many women and men may choose not to serve in the military, this history of restriction likely contributes to the cultural conception of military service as a primarily male endeavor, which artificially depresses the number of female enlistees. Women constituted less than one percent of the armed forces before 1943; they continued to make up less than two

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<sup>140</sup> E.g., Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 104–08 (2008); Marcia Clement, *Women in the Military: Should Combat Roles Be Fully Opened to Women?*, 19 CQ RESEARCHER 957, 963 (2009).

<sup>141</sup> For example, men had to be seventeen to enlist with parental consent, while women had to be eighteen; men had to be eighteen to enlist without parental consent, while women had to be twenty-one; men without prior military service did not have to possess a high school degree, while women did; men were not subject to marriage or child-care restrictions, while women were; and men were not subject to sexual history checks, while women were. See, e.g., *Schlesinger v. Ballard*, 419 U.S. 498 (1975); Harry C. Beans, *Sex Discrimination in the Military*, 67 MIL. L. REV. 19, 54–83 (1975); Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1539–56 (1973); see also 32 C.F.R. § 571.2 (1976).

<sup>142</sup> Comment, *Veterans' Public Employment Preference as Sex Discrimination: Anthony v. Massachusetts and Branch v. Du Bois*, 90 HARV. L. REV. 805, 811 n.53 (1977).

<sup>143</sup> 50 U.S.C. § 3802 (requiring males over the age of eighteen, but not females, to register for the draft); EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 122; see also *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding Congress's decision to allocate funds to draft men but not women). There is a certain amount of tension between *Rostker* and decisions in which courts have struck down statutes which disparately benefit male members of the military. E.g., *Frontiero v. Richardson*, 411 U.S. 677, 688–91 (1973); see also Part II.B.

percent of the armed forces until the 1970s.<sup>144</sup> Today, around fifteen percent of servicepersons are women, which is far from the equal ratio that might otherwise be expected.<sup>145</sup>

Because the military has a history of express and unambiguous discrimination against women, veterans' preference statutes necessarily reflect this history—perpetuating, magnifying, and legitimizing it.<sup>146</sup> Though the effects of sex discrimination in the military have likely diminished over time,<sup>147</sup> scholars have found that veterans' preference remains a substantial restraint on female appointment and advancement in the federal service.<sup>148</sup> The Equal Employment Opportunity Commission (EEOC), the Government Accountability Office (GAO),<sup>149</sup> federal

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<sup>144</sup> Fleming & Shanor, *supra* note 10, at 13–14; *see also* *Frontiero*, 411 U.S. at 681 (“approximately 99% of all members of the uniformed services are male”).

<sup>145</sup> EILEEN PATTEN & KIM PARKER, PEW RSCH. CTR., WOMEN IN THE U.S. MILITARY: GROWING SHARE, DISTINCTIVE PROFILE 4 (2011), <https://www.pewresearch.org/wp-content/uploads/sites/3/2011/12/women-in-the-military.pdf> [<https://perma.cc/E9A7-HCWB>]; Lewis, *supra* note 74, at 263.

<sup>146</sup> Fleming & Shanor, *supra* note 10, at 25; *Veterans' Public Employment Preference as Sex Discrimination: Anthony v. Massachusetts and Branch v. Du Bois*, *supra* note 142, at 812.

<sup>147</sup> Bonnie G. Mani, *Challenges and Opportunities for Women to Advance in the Federal Civil Service: Veterans' Preference and Promotions*, 59 PUB. ADMIN. REV. 523, 533 (1999).

<sup>148</sup> *See, e.g.*, Tim Johnson, *Service After Serving: Does Veterans' Preference Diminish the Quality of the US Federal Service?*, 25 J. PUB. ADMIN. RSCH. & THEORY 669, 671–72 (2014) (“Given that veterans are predominantly white, heterosexual, native-born males, veterans' preference increases those individuals' representation in the federal service and reduces the representation of Latinos, Asians, females, gays, lesbians, bisexuals, and immigrants.”) (internal citations omitted); Bonnie G. Mani, *Women in the Federal Civil Service: Career Advancement, Veterans' Preference, and Education*, 31 AM. REV. PUB. ADMIN. 313 (2001).

<sup>149</sup> U.S. GEN. ACCT. OFF., VETERANS' PREFERENCE IN THE FEDERAL CIVIL SERVICE 4 (1977), <https://www.gao.gov/assets/100/98596.pdf> [<https://perma.cc/35D4-SF2C>] (“We found that large numbers of highly qualified women cannot be certified to Federal agencies for employment consideration because they are being displaced on registers by the preference afforded to veterans.”); U.S. GEN. ACCT. OFF., *supra* note 75, at 11–12 (documenting instances where women would have ranked significantly higher on federal registers but for the application of veterans' preference, including one instance where a female applicant would have bypassed all eighty-one individuals listed ahead of her).

managers,<sup>150</sup> Congress,<sup>151</sup> scholars,<sup>152</sup> and courts<sup>153</sup> have likewise determined that veterans' preference "operates overwhelmingly to the advantage of men" and results in "far fewer opportunities" for women, which shows that "such preferences have an adverse impact on women for Title VII purposes."<sup>154</sup>

### 3. Disparate Impact on LGBT Persons

The military's past and present discriminatory policies have a similar impact on LGBT persons.<sup>155</sup> During World War II, all non-heterosexual persons were prevented from serving in the military and were discharged, and sometimes court-martialed, if they were found to have circumvented the military's restrictions.<sup>156</sup> After the war, the military's official policy

<sup>150</sup> CQ Press, *supra* note 48 ("Federal managers responsible for affirmative action hiring complain that preference puts veterans—usually white males—at the top of the civil service hiring lists, pushing equally qualified non-veteran women and minority applicants out of the running for federal jobs.").

<sup>151</sup> See, e.g., Fleming & Shanor, *supra* note 10, at n.51 ("The legislative conception of veterans as a class of males is perhaps most easily inferable from statutes which extend preferences to 'widows' of veterans.").

<sup>152</sup> See, e.g., Mani, *supra* note 147; Kato B. Keeton, *Women's Access to Federal Civil Service Management Positions: The Issue of Veterans' Preference*, 22 SE. POL. REV. 37 (1994); *Veterans' Preference in Public Employment*, *supra* note 18, at 630 (describing veterans' preference law's "particularly adverse effect on the job opportunities of women"). See generally MARY M. HALE & RITA MAE KELLY, *GENDER, BUREAUCRACY, AND DEMOCRACY: CAREERS AND EQUAL OPPORTUNITY IN THE PUBLIC SECTOR* (Greenwood Press 1989) (documenting the adverse effects of veterans' preference in state governments).

<sup>153</sup> See, e.g., *Feinerman v. Jones*, 356 F. Supp. 252, 256 (M.D. Pa. 1973).

<sup>154</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 122.

<sup>155</sup> Until recently, the circuit courts were split on whether LGBT persons were protected by federal antidiscrimination law. Compare *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (2017), *cert. denied*, 138 S. Ct. 557 (2017) (no), with *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (yes). The Supreme Court recently considered the issue, and it resolved the split in favor of LGBT persons. See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). See generally Coco Arima, *Protecting the People: Expanding Title VII's Protection Against Sex Discrimination to Sexual Orientation Discrimination*, 68 DEPAUL L. REV. 69 (2019).

<sup>156</sup> Virelli, *supra* note 74, at 1089; see also Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 72–75

remained that homosexuality was incompatible with military service because it allegedly threatened military cohesion, efficiency, and discipline.<sup>157</sup> In 1993, the Department of Defense implemented its Don't Ask Don't Tell policy, which continued to suppress LGBT enlistments and was not repealed until 2011.<sup>158</sup> Today, transgender persons are still discriminated against in their attempts to participate in the armed forces.<sup>159</sup>

Because of this repressive history, LGBT persons are severely underrepresented in the military.<sup>160</sup> Therefore, far fewer LGBT persons receive veterans' preference than might otherwise be expected.<sup>161</sup>

#### 4. Disparate Impact on Disabled Persons

Disabled persons are also disparately affected by veterans' preference. This impact is of a different kind than that experienced by women and LGBT persons, however, and it is mitigated by certain provisions of veterans' preference law and by special federal hiring authorities for disabled persons. Disabled persons are denied the opportunity to gain

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(1991) (discussing the military's pre-World War II policies). *See generally* ALLAN BÉRUBÉ, *COMING OUT UNDER FIRE: THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II* (20th ed. 1990).

<sup>157</sup> William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 *UMKC L. REV.* 121, 132 (1995) (citing U.S. DEP'T OF DEF., Directive 1332.14, (Jan. 28, 1982); U.S. DEP'T OF DEF., Directive 1332.30, (Jan. 15, 1982)).

<sup>158</sup> Peter Stanley Federman & Nicole M. Rishel Elias, *Beyond the Lavender Scare: LGBT and Heterosexual Employees in the Federal Workplace*, 19 *PUB. INTEGRITY* 22, 23–26 (2017); Virelli, *supra* note 74, at 1098; *see also* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516, (2010) (repeal codified at 10 U.S.C. § 654).

<sup>159</sup> *See, e.g.*, Westergard, *supra* note 83, at 220–21.

<sup>160</sup> *E.g.*, Gregory B. Lewis & David W. Pitts, *LGBT-Heterosexual Differences in Perceptions of Fair Treatment in the Federal Service*, 47 *AM. REV. PUB. ADMIN.* 1, 10 (2015); Lewis, *supra* note 74, at 263. It should be noted that studies have only found that non-heterosexual men are less likely to have served in the military; LGBT women are in fact *more* likely than their heterosexual counterparts to have served. *E.g.*, Lewis & Pitts, *supra*, at 10. These studies have not estimated what the enlistment rates of LGBT women might be in the absence of the military's discriminatory policies, however. *See id.*

<sup>161</sup> Virelli, *supra* note 74, at 1098, 1118.

veteran status primarily because of the Department of Defense’s enlistment standards.<sup>162</sup> These standards allow the military discretion to deny applications for any number of reasons, such as inadequate vision or hearing, epilepsy, insufficient natural teeth, brain disorders, and many other physical or mental impairments.<sup>163</sup> The military is excepted from the reasonable accommodation provisions of the Rehabilitation Act and the ADA, and so it is not required to adjust its demands to the needs of disabled persons.<sup>164</sup> Because of these standards, fewer disabled persons join in the military than would if the armed forces were subject to the same legal requirements as other entities.<sup>165</sup>

The military provides substantial benefits to persons who become disabled because of their military service, however, including medical care and veterans’ preference protections.<sup>166</sup> The federal government also provides a special hiring authority for disabled persons that permits

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<sup>162</sup> See U.S. DEP’T OF DEF., Instruction 6130.03 (May 6, 2018), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/613003p.pdf?ver=2018-05-04-113917-883> [<https://perma.cc/TC3F-HVUA>].

<sup>163</sup> See *id.*; see also *Medical Conditions that Can Keep You from Joining the Military*, MILITARY.COM (2019), <https://www.military.com/join-armed-forces/disqualifiers-medical-conditions.html> (summarizing conditions) [<https://perma.cc/6NUY-MMZR>].

<sup>164</sup> 42 U.S.C. §§ 12111(5)(B)(i), 12131; *Coffman v. Michigan*, 120 F.3d 57, 59 (6th Cir. 1997) (“claims under the Rehabilitation Act may not be asserted by uniformed members of the armed forces”). *But see* Westergard, *supra* note 83 (arguing against military exceptionalism).

<sup>165</sup> Little scholarship exists on the effects of the military’s enlistment standards on disabled persons, though it seems logical that concerns for military readiness may insulate these standards from judicial review. See, e.g., *Feres v. United States*, 340 U.S. 135 (1950). See generally Earl F. Martin, *America’s Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 MISS. L.J. 135 (2006).

<sup>166</sup> See Waterstone, *supra* note 50, at 1105–07 (medical benefits); U.S. DEP’T OF VETERANS AFFS., FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS 15–27 (2008), <http://www.apwuiowa.com/Department%20of%20Veterans%20Affairs.pdf> [<https://perma.cc/3JZV-QLNG>] (same); 5 U.S.C. § 2108(3) (veterans’ preference); 5 C.F.R. § 337.101(b)(2) (2020) (same); see also Part II.C.4 (other protections afforded to disabled and non-disabled veterans).

agencies to expedite hiring processes for them.<sup>167</sup> Thus, even if the military's enlistment standards do create a barrier for disabled applicants, these policies may mitigate its effects. If veterans' preference does disparately impact disabled persons, individual plaintiffs are more likely to be able to state a claim, since the Rehabilitation Act and the ADA do not contain specific provisions preserving veterans' preference.<sup>168</sup>

## *B. Constitutionality of Veterans' Preference Law*

### **1. Possible Constitutional Preclusion**

The Supreme Court may have precluded constitutional challenges to veterans' preference law in *Personnel Administrator of Massachusetts v. Feeney*;<sup>169</sup> however, its decision in that case was flawed and should be reevaluated.<sup>170</sup> In *Feeney*, the Court upheld a state veterans' preference statute that afforded absolute preference to all qualified veterans.<sup>171</sup> While the statute extended this preference to "any person, male or female, including a nurse,"<sup>172</sup> the Supreme Court accepted the lower court's finding that the statute operated "overwhelmingly to the advantage of males."<sup>173</sup> Nonetheless, the Court upheld the preference law by requiring a finding of discriminatory intent on the part of the enacting legislature.<sup>174</sup>

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<sup>167</sup> 5 C.F.R. § 213.3102(u); U.S. OFF. OF PERS. MGMT., DISABILITY EMPLOYMENT: HIRING, <https://www.opm.gov/policy-data-oversight/disability-employment/hiring/#url=Schedule-A-Hiring-Authority> [<https://perma.cc/N3MZ-PPNN>].

<sup>168</sup> See 29 U.S.C. §§ 701–797 (Rehabilitation Act); 42 U.S.C. §§ 12101–12213 (ADA). As noted in Part II.A.1, however, the Rehabilitation Act and the ADA were modeled after Title VII, and courts have been reluctant to expand these statutes beyond the scope of the Civil Rights Act. See, e.g., *Skillem v. Bolger*, 725 F.2d 1121, 1123 (7th Cir. 1984).

<sup>169</sup> 442 U.S. 256 (1979).

<sup>170</sup> Such a reversal appears unlikely, however, and so this Note focuses on legislative solutions. See Part III.

<sup>171</sup> *Feeney*, 442 U.S. at 262, 279.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 259.

<sup>174</sup> *Id.* at 279.



Ordinarily, intent may mean that an actor knows a particular result is likely yet is indifferent to its consequences.<sup>175</sup> The Court, however, chose to uphold the state preference statute by requiring discrimination that is motivated “at least in part *because of* . . . its adverse effects upon an identifiable group”—that is, intent which is motivated by animus.<sup>176</sup> This construction was not required, since the Court is free to evaluate constitutional claims unscientifically.<sup>177</sup> This choice was also contrary to many of the Court’s previous decisions,<sup>178</sup> the body of antidiscrimination law,<sup>179</sup> and the goals of equal protection,<sup>180</sup>—and it constitutes poor public policy.<sup>181</sup>

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<sup>175</sup> *E.g.*, David Crump, *What Does Intent Mean?*, 38 HOFSTRA L. REV. 1059, 1063–66 (2010).

<sup>176</sup> *Feeney*, 442 U.S. at 279 (emphasis added) (internal quotation marks omitted).

<sup>177</sup> *United States v. Virginia*, 518 U.S. 515, 567–68 (1996) (Scalia, J., dissenting).

<sup>178</sup> *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 466 (1973) (“A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.”); *Kilgarlin v. Hill*, 386 U.S. 120, 121–122 (1967) (accepting statistical discrepancies without evidence of legislative animus in racial gerrymandering suit); *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (condemning “discriminations which are *steps* toward reducing [Black people] to the condition of a subject race”) (emphasis added). Many of these Supreme Court decisions also deal specifically with official discrimination against women. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199 (1977) (pension benefits); *Craig v. Boren*, 429 U.S. 190 (1976) (drinking ages); *Stanton v. Stanton*, 421 U.S. 7 (1975) (child support); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (jury selection); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (forced maternity leave); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (military dependent benefits); *Stanley v. Illinois*, 405 U.S. 645 (1972) (parental rights).

<sup>179</sup> *See* *Smith v. City of Jackson*, 544 U.S. 228 (2005) (disparate impact under the ADEA); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (ADA); *Alexander v. Choate*, 469 U.S. 287 (1985) (recipients of federal funds covered by the Rehabilitation Act); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII); *Prewitt v. U.S. Postal Serv.*, 662 F.2d 292 (5th Cir. 1981) (Rehabilitation Act).

<sup>180</sup> *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 937–39 (1989) (arguing against the Supreme Court’s discriminatory purpose requirement because it precludes meaningful results).

<sup>181</sup> *See* Part II.A; Part II.C.

## 2. Equal Protection Analysis

Analyzing whether actions by the government violate the Equal Protection Clause of the Fourteenth Amendment requires three steps.<sup>182</sup> First, a court must determine whether there is a discriminatory classification.<sup>183</sup> Second, a court must determine which level of scrutiny applies to the classification.<sup>184</sup> And third, a court must determine whether the classification satisfies the chosen level of scrutiny.<sup>185</sup> If the classification does not, the requirement may be struck down as unconstitutional.<sup>186</sup> The Supreme Court has strengthened the first discriminatory classification requirement and its interplay with the appropriate level of scrutiny by requiring a discriminatory purpose, rather than disparate impact, in some of its Equal Protection Clause jurisprudence.<sup>187</sup>

The discriminatory classification in question here is veterans' preference. Modern federal veterans' preference is arguably facially neutral and does not differentiate between men and women, or other classes, apart from veterans.<sup>188</sup> Nonetheless, veterans' preference has a disparate impact upon

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<sup>182</sup> The Equal Protection Clause of the Fourteenth Amendment applies to the federal government because it is incorporated by the Fifth Amendment. *See, e.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 497–99 (1954).

<sup>183</sup> *See, e.g.*, Russell W. Galloway Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 121–26 (1989).

<sup>184</sup> *Id.* This process is unscientific, however, and courts may apply rational basis scrutiny, intermediate scrutiny, or strict scrutiny, depending on whether “it seems like a good idea to load the dice.” *United States v. Virginia*, 518 U.S. 515, 567–68 (1996) (Scalia, J., dissenting); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1297–98 (2007) (describing the requirements of each level of scrutiny).

<sup>185</sup> Galloway, *supra* note 183, at 121–26.

<sup>186</sup> *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>187</sup> *See, e.g.*, *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977); *Washington v. Davis*, 426 U.S. 229, 246–48 (1976); *see also* *Branch v. Du Bois*, 418 F. Supp. 1128, 1130, 1133 (N.D. Ill. 1976).

<sup>188</sup> *But see* *Fleming & Shanor*, *supra* note 10, at 26 (in reality veterans' preference statutes are “no more gender-neutral than would be a pre-Nineteenth Amendment statute granting public employment preferences to registered voters”); *Frontiero v. Richardson*,

several protected classes, including women.<sup>189</sup> Equal Protection claims based on veterans' preference have encountered insurmountable resistance at this step, however, largely because of the difficulty of proving discriminatory purpose.<sup>190</sup> Laying aside the near impossibility of ascertaining the state of mind of an entire legislative body,<sup>191</sup> the forty-year-old conclusions of certain courts regarding Congress's lack of legislative purpose are weakened by Congress's clear cognizance of, and apathy towards, the effects of veterans' preference law.<sup>192</sup>

If indeed veterans' preference does not represent purposeful discrimination, courts may be justified in applying rational basis scrutiny. While the policy goals of veterans' preference may be legitimate, the means the legislature has chosen in pursuing those goals cannot fairly be categorized as rational.<sup>193</sup> This is because discrimination is neither rational nor efficient.<sup>194</sup> Moreover, sex discrimination is usually subject to

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411 U.S. 677, 689 n.22 (1973) (“these statutes seize upon a group—women—who have historically suffered discrimination in employment, and rely on the effects of this past discrimination as a justification for heaping on additional economic disadvantages”) (military benefits case).

<sup>189</sup> See Part II.A.

<sup>190</sup> See, e.g., Fleming & Shanor, *supra* note 10, at n.5 (compiling failed challenges).

<sup>191</sup> See, e.g., Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 1 (1992).

<sup>192</sup> See, e.g., Fleming & Shanor, *supra* note 10, at n.51 (Congressional cognizance of the disparate impact of veterans' preference law); see also Virelli, *supra* note 74, at 1102 (arguing that policies such as Don't Ask Don't Tell represent even more deliberate discrimination by Congress against LGBT persons than policies excluding women from the military); Eloise Taylor, *Equal Protection; Sex Discrimination; Veterans' Preference Statutes*, Feeney v. Massachusetts, 12 AKRON L. REV. 557, 570–71 (1979) (parties are presumed to intend the natural and foreseeable consequences of their actions).

<sup>193</sup> See Part II.C.1.

<sup>194</sup> E.g., KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 159 (Cambridge Univ. Press 2004); see also Part II.C.2. There are also clearly other, less discriminatory means for Congress to achieve its stated policy goals. See Part III.

heightened scrutiny, and so veterans' preference law may thus be unconstitutional.<sup>195</sup>

### 3. Due Process Analysis

Analyzing whether action by the government violates the Due Process Clause of the Fifth Amendment likewise requires three steps. First, a court must determine whether the governmental action implicates Procedural or Substantive Due Process.<sup>196</sup> Second, a court must determine whether the plaintiff has been deprived of an interest in life, liberty, or property.<sup>197</sup> And third, a court must weigh whether the plaintiff's interest is likely to be affected, whether that interest is surpassed by the government's own legitimate interests, and whether there are any other means available to better preserve the plaintiff's interests.<sup>198</sup>

Because there is no fundamental right to federal employment, only Procedural Due Process may be implicated by a plaintiff's challenge of veterans' preference law.<sup>199</sup> The Supreme Court has held that employment constitutes a property interest within the meaning of the Constitution.<sup>200</sup>

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<sup>195</sup> *Craig v. Boren*, 429 U.S. 190, 197–98 (1976) (sex discrimination); *Johnson v. Robison*, 415 U.S. 361, 374–75 (1974) (veterans' preference law); *Green v. Waterford Bd. of Educ.*, 473 F.2d 629, 633 (2d Cir. 1973) (public employment). *But see Hoyt v. Florida*, 368 U.S. 57, 61–62 (1961) (applying rational basis scrutiny to sex discrimination claim because the Court anachronistically believed women to be “the center of home and family life”).

<sup>196</sup> *See, e.g., Moya v. Garcia*, 895 F.3d 1229 (10th Cir. 2018) (McHugh, J., concurring in part and dissenting in part).

<sup>197</sup> *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 481 (1982).

<sup>198</sup> *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>199</sup> *E.g., Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd* 410 U.S. 976 (1973).

<sup>200</sup> *Compare Bd. of Regents v. Roth*, 408 U.S. 564, 576–78 (1972), *with Perry v. Sindermann*, 408 U.S. 593, 599–600 (1972). *See Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). Courts have also held that applicants have the “right to be fairly considered for public employment.” *Koelfgen*, 355 F. Supp. at 250 n.8; *see also Greene v. McElroy*, 360 U.S. 474, 492 (1959) (“the right . . . to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts of the Fifth Amendment”) (internal quotation marks omitted) (citation omitted); *Wieman v.*

Under the third step of Due Process analysis, plaintiffs' interests are likely implicated by the preclusive effects of veterans' preference.<sup>201</sup> As under the Equal Protection Clause, the government clearly has a bona fide interest in rewarding and assisting veterans;<sup>202</sup> however, an applicant's interest in a fair chance at securing federal employment also bears weight, particularly when the value of potential adjustments to veterans' preference law are considered.<sup>203</sup> Absolute preference laws,<sup>204</sup> and even some more nuanced preference laws, effectively preclude a large number of female, LGBT, and disabled applicants from securing federal positions.<sup>205</sup> The Due Process Clause was designed to ensure that governmental actions beget logical and impartial results.<sup>206</sup> Veterans' preference law likely fails this standard.<sup>207</sup>

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Updegraff, 344 U.S. 183, 192 (1952) ("constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently . . . discriminatory"); Slaughter-House Cases, 83 U.S. 36, 122 (1873) (Bradley, J., dissenting) ("A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.").

<sup>201</sup> See Part I.B.3; Part II.A.

<sup>202</sup> See Part II.C.1.

<sup>203</sup> See Part III.

<sup>204</sup> The most extreme example of this type of law can be seen in one former Massachusetts statute, which granted veterans preference even when they *failed* competitive examinations. See, e.g., Fleming & Shanor, *supra* note 10, at 17–18.

<sup>205</sup> See Part II.A.

<sup>206</sup> See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) (describing the policies of "fairness" and "reason" which underlie the Due Process Clause); see also Morrissey v. Brewer, 408 U.S. 471, 499 (1972) (Douglas, J., dissenting in part) (the Due Process Clause promotes "faith that our society is run for the many, not the few, and that fair dealing, rather than caprice, will govern the affairs of men").

<sup>207</sup> In addition, legislatively mandated preferences may impermissibly interfere with the executive branch's constitutional power to appoint and remove federal employees. See, e.g., White v. Gates, 253 F.2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); see also U.S. CONST. art. II. Such separation of powers challenges have not generally been successful, however. See, e.g., Coster v. United States, 485 F.2d 649, 651 (Ct. Cl. 1973); Born v. Allen, 291 F.2d 345, 348–49 (D.C. Cir. 1960); Reynolds v. Lovett, 201 F.2d 181 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 926 (1953). Other commentators have argued that veterans' preference is an unconstitutional "badge of nobility." See Comment, *Titles*

## C. Policy Shortcomings of Veterans' Preference Law

### 1. Flawed Foundations

It must first be acknowledged that the policy goals of veterans' preference are not without merit.<sup>208</sup> The Supreme Court has summarized these goals as “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.”<sup>209</sup> These goals are not all created equal, however; while the first two bear some weight, the others lack logical and empirical support.

The most important goal of veterans' preference is to reward veterans for their military service. This was likely the primary purpose for which veterans' preference statutes were enacted following the Civil War and World War II.<sup>210</sup> The rationale behind the idea of rewarding veterans is twofold. First, enlistees receive a relatively small amount in basic pay for their service.<sup>211</sup> Second, military service sometimes involves undertaking

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*of Nobility and the Preferential Treatment of Federally Employed Military Veterans*, 19 WAYNE L. REV. 1169 (1973); *see also* U.S. CONST. art. I, § 9, cl. 8.

<sup>208</sup> Ordinarily, it is the responsibility of the legislature to weigh the importance of various policies. *See, e.g.*, *Branch v. Du Bois*, 418 F. Supp. 1128, 1131 (N.D. Ill. 1976); *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976). Nevertheless, the judiciary plays a key role in ensuring that the legislature's chosen policies are both efficient and fair—particularly in cases involving disfavored groups. *See, e.g.*, *Brown v. Bd. of Education*, 347 U.S. 483 (1954); Henry J. Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 U. MIAMI L. REV. 21, 42 (1978) (“There is no need to panic because courts are now deciding questions of social policy; they have been doing this throughout the history of the common law.”). While increased deference may be appropriate where Congress acts to directly execute one of its enumerated functions, the Supreme Court has held that post-war benefits are sufficiently distant from Congress's military responsibilities to justify *judicial* scrutiny. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973); *see also* U.S. CONST. art. I, § 8, cls. 1, 12–14.

<sup>209</sup> *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979).

<sup>210</sup> *See, e.g.*, *Johnson*, *supra* note 148, at 674; Part I.A.

<sup>211</sup> *See, e.g.*, Rod Powers, *Understanding Military Pay*, BALANCE CAREERS (May 6, 2019), <https://www.thebalancecareers.com/understanding-military-pay-3356713> [<https://perma.cc/3YYZ-MKFV>]. *Compare* U.S. DEP'T OF DEF., 2020 MILITARY BASIC PAY TABLE,

extraordinary risks.<sup>212</sup> As such, a basic sense of fairness seems to require that society remedy this perceived imbalance.<sup>213</sup>

At the risk of questioning the sacrosanct, several aspects of the above equation are dubious. First, it is debatable whether servicepersons are inadequately compensated. Veterans receive extra benefits such as pension plans, subsidized education, lifelong healthcare, and tax-free stipends for food and housing which augment their basic pay.<sup>214</sup> Second, the degree of risk involved in military service is less today than it was following enactment of the Veterans' Preference Act of 1944,<sup>215</sup> and the risks are

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<https://militarypay.defense.gov/Portals/3/Documents/ActiveDutyTables/2020%20Military%20Basic%20Pay%20Table.pdf> [<https://perma.cc/QCU9-DFVT>] (enlistee pay), with U.S. OFF. OF PERS. MGMT., 2020 GENERAL SCHEDULE (GS) LOCALITY PAY TABLE, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2020/RUS.pdf> [<https://perma.cc/J6AC-VQ2H>] (civilian pay). *But see* U.S. DEP'T OF DEF., *supra* (officer pay).

<sup>212</sup> *See, e.g.*, Robert J. Stevenson, *The Physical and Social Risks of Military Service during War*, 5 MICH. SOCIO. REV. 66, 66 (1991).

<sup>213</sup> *See, e.g.*, 90 CONG. REC. 3506 (1944) (“[T]his nation has trained 12,000,000 fighting men to destroy and kill. They have been taken away from schools, colleges, and jobs. Their home life has been broken up, and they . . . will need jobs, money, training, hospitalization, and other assistance. They expect stability and security, so that they can start rebuilding their private lives. We must give them all that. It is the least we can do for them.”) (statement of Rep. Thomas D’Alessandro).

<sup>214</sup> *See, e.g.*, Marc A. Perez & Mark C. Jansen, *Service Member Compensation and Benefits Communication: Could the Grass Not Be Greener on the Other Side?* 15–19 (Dec. 2018) (unpublished master’s thesis, Naval Postgraduate School), <https://apps.dtic.mil/dtic/tr/fulltext/u2/1069690.pdf> [<https://perma.cc/C8GY-SYA4>] (concluding that the notion that servicepersons are not compensated as well as their civilian counterparts is a myth); Ryan Guina, *Do Military Members Get Paid Enough?*, MILITARY WALLET (Dec. 19, 2017), <https://themilitarywallet.com/do-military-members-get-paid-enough/> [<https://perma.cc/4QBF-7WFJ>] (documenting benefits); Powers, *supra* note 211 (same); *see also* Part II.C.4.

<sup>215</sup> *See* NESE F. DEBRUYNE, CONG. RSCH. SERV., AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 1–3 (2018), <https://fas.org/sgp/crs/natsec/RL32492.pdf> [<https://perma.cc/AC3Z-UADB>] (sixteen percent death rate and thirteen percent injury rate during the Civil War; three percent death rate and four percent injury rate during World War II; less than one percent death rate and less than one percent injury rate during the Persian Gulf War); Neale D. Guthrie, *The Impact of Technological Change on Military Manpower in the 21st Century* 48–49, 51 (June 1990) (unpublished master’s thesis, Naval Postgraduate School),

generally known and affirmatively accepted by enlistees.<sup>216</sup> Nevertheless, the risk of death or serious injury that accompanies military service is readily apparent, and so the scales may still weigh in favor of granting veterans additional benefits for their service—particularly when they serve in combat or when they are compelled to enlist.

The second goal of veterans' preference, assisting servicepersons in transitioning to civilian life, may also have merit.<sup>217</sup> Veterans transitioning to civilian life may encounter health issues, cultural barriers, difficulty adapting military skills to civilian positions, difficulty competing against civilians with more relevant work experience, and other problems.<sup>218</sup>

The need to assist transitioning servicepersons, while present, is less persuasive today than it was following World War II. First, there are fewer

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<http://www.dtic.mil/dtic/tr/fulltext/u2/a232472.pdf> [<https://perma.cc/EA7U-MT3Z>] (foreign deployment is relatively rare, and military service increasingly involves technical and clerical work). See generally JOSHUA S. GOLDSTEIN, WINNING THE WAR ON WAR: THE DECLINE OF ARMED CONFLICT WORLDWIDE (2011) (decreasing frequency of armed conflict). Reservists and members of the National Guard have been denied veterans' preference in part because the risks they are incur are less than those incurred by active duty servicepersons. See, e.g., *Mitchell v. Cohen*, 333 U.S. 411, 420 (1948).

<sup>216</sup> See, e.g., H.R. REP. NO. 94-487, at 29-30 (1975) ("Military service today is purely voluntary—a matter of personal choice. The volunteer army [as compared to a drafted military] offers a wide variety of advantages including higher salaries, educational programs, and assignments in the area of the enlistee's choice.") (letter from the Chair of the Civil Service Commission to the Chair of the House Committee on Veterans' Affairs).

<sup>217</sup> See, e.g., *Mitchell*, 333 U.S. at 420-21; H.R. REP. NO. 1289, 78th Cong., 2d Sess. 4-5 (1944) (letter of President Franklin D. Roosevelt urging passage of Veterans' Preference Act of 1944); see also *Johnson v. Robison*, 415 U.S. 361, 378-79 (1974).

<sup>218</sup> See, e.g., Mary Keeling et al., *Exploring U.S. Veterans' Post-Service Employment Experiences*, 30 MIL. PSYCH. 63 (2018); Christopher Stone & Dianna L. Stone, *Factors Affecting Hiring Decisions About Veterans*, 25 HUM. RES. MGMT. REV. 68 (2015); Meagan Conway, *Improving the Process of Transferring Military Skills into Civilian Certification and Licenses*, 2 HOMELAND & NAT'L SEC. L. REV. 1 (2014). Veteran unemployment can at least partly be seen as frictional, however. See, e.g., W. S. Woytinsky, *Prewar Experience: The Labor Force and Employment*, 9 SOC. SEC. BULL. 8, 14-15 (1946).



stigmas surrounding veterans today than existed previously.<sup>219</sup> Second, rehabilitation alone cannot justify ongoing veterans' preference, since the need for rehabilitation generally diminishes as time passes.<sup>220</sup> Third, the percentage of the workforce transitioning from military service to civilian life is much lower today than it was in 1945.<sup>221</sup> And fourth, Congress has enacted other legal protections to assist veterans in finding private sector employment.<sup>222</sup>

The third goal of veterans' preference, incentivizing military service, is not supported empirically or logically. Veterans' preference has not been shown to be a significant motivating factor for military enlistees.<sup>223</sup> It is somewhat illogical to think that enlistees risk their lives merely to receive potential future advantages in securing potential future government positions.<sup>224</sup> In addition, the selective service reduces the need to incentivize military service because it can forcibly provide the military with new recruits if necessary.<sup>225</sup>

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<sup>219</sup> *E.g.*, William Hays Weissman, *The OFCCP's New Veterans' Regulations Fail to Address What Veterans Really Need*, 40 EMP. REL. L.J. 31, 32–33 (2014).

<sup>220</sup> *See, e.g., id.* at 32 (“Hiring a 50 year old veteran who has been in the civilian workforce for 20 years . . . does little to assist transitioning veterans.”).

<sup>221</sup> *Compare* U.S. FED. RESERVE BANK OF ST. LOUIS, CIVILIAN LABOR FORCE (2019), <https://fred.stlouisfed.org/series/CLF16OV> [<https://perma.cc/8XZG-ZZAE>] (approximately sixty million workers in the United States following World War II), *with* U.S. DEP'T OF VETERANS AFFS., ANNUAL REPORT FOR FISCAL YEAR ENDING JUNE 30, 1 (1946), <https://www.va.gov/vetdata/docs/FY1946.pdf> [<https://perma.cc/8WK2-UN64>] (approximately thirteen million returning veterans in the United States following World War II).

<sup>222</sup> *See* Part II.C.4.

<sup>223</sup> *See, e.g.*, Rachael Ann Schacherer, *The Conditions Affecting Military Enlistments*, 3 PUB. PURPOSE 76 (2005); *see also* Amy Lutz, *Who Joins the Military: A Look at Race, Class, and Immigration Status*, 36 J. POL. & MIL. SOC. 167 (2008); M. REBECCA KILBURN & JACOB A. KLERMAN, ENLISTMENT DECISIONS IN THE 1990S: EVIDENCE FROM INDIVIDUAL-LEVEL DATA (1999).

<sup>224</sup> *E.g.*, *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 287 (1979) (Marshall, J., dissenting).

<sup>225</sup> 50 U.S.C. §§ 3801–3820.

The last goal of veterans' preference, attracting courageous, obedient, and loyal workers to the federal service, is likewise unsupported by data.<sup>226</sup> Congress did not employ this line of thinking when it enacted the Veterans' Preference Act of 1944,<sup>227</sup> and the notion is at odds with the rehabilitation theory of veterans' preference, since veterans with marketable qualities would not need assistance securing civilian employment.<sup>228</sup> Though bravery, obedience, and fidelity may be valuable attributes in public positions,<sup>229</sup> the correlation between these attributes and veteran status "lacks a demonstrable factual basis" and "is at most a makeweight justification."<sup>230</sup> In fact, veterans' preference actually tends to *reduce* the overall quality of the federal workforce.<sup>231</sup>

## 2. Inefficiency and Lack of Competition

Veterans' preference reduces the quality of the federal workforce because it circumvents merit and competition. Researchers have found that veterans' preference leads to a federal workforce that is less educated, that is promoted less frequently, and that consistently underperforms.<sup>232</sup> In hiring,

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<sup>226</sup> See, e.g., Lewis, *supra* note 74; Patricia A. Taylor, *Income Inequality in the Federal Civilian Government*, 44 AM. SOCIO. REV. 468, 473 (1979); Ordway, *supra* note 50, at 133.

<sup>227</sup> See *Johnson v. Robison*, 415 U.S. 361, 376–77 (1974).

<sup>228</sup> Fleming & Shanor, *supra* note 10, at 49.

<sup>229</sup> Taylor, *supra* note 192, at 557.

<sup>230</sup> Fleming & Shanor, *supra* note 10, at 29, 49.

<sup>231</sup> See Part II.C.2.

<sup>232</sup> See, e.g., Lewis, *supra* note 74, at 248, 263; Nancy Killefer & Lenny Mendonca, *Unproductive Uncle Sam*, BLOOMBERG BUSINESSWEEK (Aug. 14, 2006), <https://www.bloomberg.com/news/articles/2006-08-13/unproductive-uncle-sam> [<https://perma.cc/22E8-DRMD>]; see also Lewis & Emmert, *supra* note 74, at 328 (veterans' preference "contributes little to . . . competence, representativeness, and executive leadership"); Taylor, *supra* note 226, at 473 ("veterans' preference, applied at entry to the federal service, places individuals of lower ability into jobs for which they would otherwise not qualify"). Education and promotions are each strongly correlated with job performance. See, e.g., Thomas W. H. Ng & Daniel C. Feldman, *How Broadly Does Education Contribute to Job Performance?*, 62 PERS. PSYCH. 89 (2009); James A.

veterans' preference effectively *requires* agencies to hire less qualified applicants.<sup>233</sup> In retention, veterans' preference leads to the termination of more capable personnel in favor of less capable personnel.<sup>234</sup> Thus, the practical effect of veterans' preference is to decrease the competence and effectiveness of the federal workforce.<sup>235</sup> The Veterans' Preference Act of 1944 itself implicitly acknowledges this in its exemption of highly graded professional and scientific positions.<sup>236</sup> The Supreme Court has likewise acknowledged that veterans' preference represents an awkward and potentially unfair exception to the normal rules of competition in government employment, and may thus constitute "unwise policy."<sup>237</sup>

Veterans' preference results in inefficiency because it sidesteps the merit system and reduces competition.<sup>238</sup> The merit system assumes that job performance is related to applicant qualifications—which human resources professionals attempt to approximate via numeric ratings.<sup>239</sup> Veterans' preference, however, destroys the correlation between these ratings and applicant qualifications because it permits veterans to "float" to the top of registers and receive extra points.<sup>240</sup> This inevitably diminishes the

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Fairburn & James M. Malcomson, *Performance, Promotion, and the Peter Principle*, 38 REV. ECON. STUDS. 45 (2001).

<sup>233</sup> See Ordway, *supra* note 50, at 133; see also *White v. Gates*, 253 F.2d 868, 871 (D.C. Cir.) (Prettyman, J., dissenting), *cert. denied*, 356 U.S. 973 (1958).

<sup>234</sup> See, e.g., *Reynolds v. Lovett*, 201 F.2d 181 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 926 (1953) (retention of less capable personnel in supervisory positions).

<sup>235</sup> See Lewis, *supra* note 74, at 263; see also Ordway, *supra* note 50, at 138.

<sup>236</sup> See 5 U.S.C. § 3319(b); see also *Veterans' Preference in Public Employment*, *supra* note 18, at 637. There would be no reason for this exemption if veterans' preference had a positive or neutral effect on performance. Because veterans' preference still applies to lower graded positions, however, many would-be federal employees are effectively excluded from entry level positions necessary to begin federal careers. See Part I.B.3.

<sup>237</sup> *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 280–81 (1979).

<sup>238</sup> Making decisions on the basis of merit is both fair and efficient. E.g., William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 334–37 (2017).

<sup>239</sup> See, e.g., Harry Kranz, *Are Merit and Equity Compatible?*, 34 PUB. ADMIN. REV. 434 (1974).

<sup>240</sup> De Parry, *supra* note 18, at 67.

effectiveness of the merit system and decreases competition.<sup>241</sup> A lack of competition, whether it be in the market for vegetables, steel, or federal employees, invites inefficiency.<sup>242</sup>

Veterans' preference is inefficient for other reasons, too. Veterans' preference diminishes employees' incentives to achieve higher performance ratings.<sup>243</sup> Veterans' preference decreases morale.<sup>244</sup> Veterans' preference requires agencies to forgo many of the positive effects of diversity.<sup>245</sup> And veterans' preference inflicts a unique burden on nonveterans seeking public employment.<sup>246</sup>

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<sup>241</sup> *Veterans' Preference in Public Employment*, *supra* note 18, at 629. The ill effects of veterans' preference have less to do with the fact that the beneficiaries are veterans than with the suspension of performance-based criteria. *Veterans' Public Employment Preference as Sex Discrimination: Anthony v. Massachusetts and Branch v. Du Bois*, *supra* note 142, at 807.

<sup>242</sup> *See, e.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (the law generally favors competition); *see also* 48 C.F.R. § 6.101 (2020) (assuming that competition engenders optimal results in government contracting); De Parry, *supra* note 18, at 67 (veterans' preference statutes grant veterans a "virtual monopoly in public employment").

<sup>243</sup> *See White v. Gates*, 253 F.2d 868, 870 (D.C. Cir.) (Prettyman, J., dissenting) (retaining lower performing veterans over higher performing employees diminishes incentives for employees to perform well).

<sup>244</sup> *See, e.g.*, Robert H. Elliot, *The Fairness of Veterans' Preference in a State Merit System: The Employees' View*, 15 PUB. PERS. MGMT. 311, 321–22 (1986).

<sup>245</sup> *See generally* Jennifer A. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715 (2011); Swinton W. Hudson, Jr., *Diversity in the Workforce*, 3 J. EDUC. & HUM. DEV. 73 (2014); M. V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, WILLIAMS INST. (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Support-Workplace-May-2013.pdf> [<https://perma.cc/3P2X-6GJW>]; Bonnie McElhinny, *Affirmative Action and Veterans' Hiring Preferences: Two Types of Quota Systems*, 4 VOICES 1 (2000); Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998).

<sup>246</sup> Grace Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 BUFF. L. REV. 1, 9 (1976).

### 3. Historical Overexpansion

Veterans' preference law has expanded far beyond the text and intended scope of the veterans' preference statutes of 1865 and 1944.<sup>247</sup> Veterans' preference began as a limited pension system to care for disabled veterans.<sup>248</sup> This original conception of veterans' preference has been lost as the law has expanded to cover federal hiring, nondisabled veterans, and non-wartime periods—thanks in part to the efforts of veterans' lobbying groups.<sup>249</sup> The veterans' preference statutes that were enacted after the Civil War and World War II were intended to reward veterans of specific military conflicts and aid their transition back to civilian life. Today, military operations lack the same magnitude, and other laws and modern technology reduce the need for rehabilitation.<sup>250</sup> Veterans' preference is now often viewed as a right rather than a privilege,<sup>251</sup> and this sort of exceptionalism undermines veterans.<sup>252</sup> Veterans' preference law has expanded far beyond the *limited* benefits that were originally granted to *disabled* veterans of *major* conflicts. Because of this expansion, the law is no longer adequately supported by its policy underpinnings.

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<sup>247</sup> See Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified as amended in scattered sections of 5 U.S.C.); A Resolution to Encourage the Employment of Disabled and Discharged Soldiers, Res 27, 38th Cong., 13 Stat. 571 (1865); see also Part I.A. The very word "preference" connotes a generalized affinity for veteran applicants—rather than the almost per se hiring mandate that veterans' preference has become. *Preference*, OXFORD ENGLISH ONLINE DICTIONARY, <https://en.oxforddictionaries.com/definition/us/preference> [<https://perma.cc/25ZL-PJ8T>].

<sup>248</sup> See Part I.A.1.

<sup>249</sup> See Part I.A.2; I.A.3.

<sup>250</sup> See Part II.C.1; II.C.4.

<sup>251</sup> E.g., Brooks Rix, *supra* note 71, at 2.

<sup>252</sup> Michael J. Wishnie, *A Boy Gets into Trouble: Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. REV. 1709, 1711–12 (2017) (arguing that special treatment of veterans results in a legal isolation that undermines veterans' interests over time).

#### 4. Redundancy and Imprecision

Veterans' preference law substantially overlaps with numerous other state and federal protections for veterans, many of which were enacted after the Veterans' Preference Act of 1944. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) is the most significant of these.<sup>253</sup> USERRA prohibits employers from discriminating against veterans because of their military service,<sup>254</sup> and it also requires that employers reinstate veterans under certain conditions.<sup>255</sup> USERRA further mandates that reinstatement-eligible veterans receive positions and benefits equivalent to those they would have received in the absence of military service.<sup>256</sup>

In addition, veterans receive numerous benefits unavailable to civilians. For instance, veterans are eligible for special life insurance policies and special medical and healthcare benefits.<sup>257</sup> Veterans may also receive assistance in obtaining housing and acquiring land, and they are shielded from litigation for the year following their return from service.<sup>258</sup> Veterans receive certain preferences when applying to receive government contracts,<sup>259</sup> and they are also entitled to interest rates that are capped at six percent, specialized loans, and protection against foreclosures and evictions.<sup>260</sup> Employers that hire veterans may receive certain tax credits,

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<sup>253</sup> Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified at amended at 38 U.S.C. §§ 4301–4335).

<sup>254</sup> 38 U.S.C. § 4311.

<sup>255</sup> *See id.* § 4312.

<sup>256</sup> *Id.* § 4313; *see also* Fishgold v. Sullivan Drydock, 328 U.S. 275, 284 (1946) (upholding USERRA predecessor and announcing this “escalator” principle).

<sup>257</sup> 38 C.F.R. §§ 8.0–8.34 (2020) (life insurance); *id.* §§ 17.1–17.4135 (healthcare).

<sup>258</sup> 49 C.F.R. §§ 24.124.603 (housing assistance); Servicemembers Civil Relief Act, 50 U.S.C. §§ 3901–4043 (litigation shield and other protections).

<sup>259</sup> 48 C.F.R. § 19.

<sup>260</sup> 50 U.S.C. § 3937 (interest rates); *id.* § 3953 (foreclosures); *id.* § 3901 (evictions); 38 C.F.R. §§ 11.75–11.130 (specialized loans).

and veterans are also eligible for vocational training and educational funding.<sup>261</sup>

In addition to being somewhat redundant, veterans' preference law is also imprecise in its attempts to reward and rehabilitate veterans. Rather than compensating veterans for their service directly, veterans' preference grants *indirect* hiring benefits. Rather than providing veterans with tools to secure jobs independently, veterans' preference suspends competition. This imprecision provides legislators with an opportunity to improve veterans' preference law to accomplish its goals more directly, while also reducing discrimination and inefficiency.

### III. PROPOSALS TO IMPROVE VETERANS' PREFERENCE LAW

There are numerous ways in which veterans' preference law could be improved. First and most importantly, veterans' preference could be limited in its duration and usage.<sup>262</sup> Second, the policy goals of veterans' preference could be accomplished more directly.<sup>263</sup> Third, the discriminatory effects of veterans' preference could be mitigated.<sup>264</sup> And fourth, inefficiency in veterans' preference law could be reduced.<sup>265</sup> Abandoning veterans' preference entirely may be one potential solution—and it would comport with the policies of many other countries—but such a drastic departure is unlikely.<sup>266</sup> Nevertheless, Congress has amended veterans' preference law before, and it can do so again.<sup>267</sup>

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<sup>261</sup> See 26 U.S.C. § 51 (federal tax credit); 38 C.F.R. §§ 21.1–21.9770 (job training and education).

<sup>262</sup> See Part III.A.

<sup>263</sup> See Part III.B.

<sup>264</sup> See Part III.C.

<sup>265</sup> See Part III.D.

<sup>266</sup> See, e.g., ALEXANDER BELLIS ET AL., U.K. HOUSE OF COMMONS LIBRARY, SUPPORT FOR UK VETERANS 6–7, 50–58 (2019), <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7693#fullreport> [<https://perma.cc/TG5B-PQWF>]; AUSTL. DEP'T OF VETERANS' AFFS., PRIME MINISTER'S VETERANS' EMPLOYMENT PROGRAM, <https://www.veteranemployment.gov.au/> (last visited Nov. 3, 2019). Other countries and

### A. Limit Duration and Usage

The most effective and politically palatable modification to veterans' preference would probably be to limit its duration and usage. This modification has been proposed before by government agencies, the Carter administration, and others who have examined veterans' preference law.<sup>268</sup> Other benefits are similarly limited in their duration,<sup>269</sup> and veterans' preference could be better aligned with other areas of federal personnel law, such as the three-year noncompetitive hiring authority available for returning Peace Corps volunteers.<sup>270</sup>

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some states use tiebreaker systems similar to the 1865 veterans' preference statute. *See, e.g., Frequently Asked Questions: Priority Hiring*, CAN. DEP'T OF VETERANS AFFS. (Feb. 12, 2019), <https://www.veterans.gc.ca/eng/education-and-jobs/finding-a-job/federal-government-jobs/faqs> [<https://perma.cc/T5VE-5ZNN>]; COLO. REV. STAT. § 31-30-210 (2019). Other proposals hearken back to earlier veterans' preference systems by eliminating register floating and requiring veterans to demonstrate hardship. *See* Part I.A.1; Part I.A.2.

<sup>267</sup> *See, e.g.,* Veterans' Education and Employment Assistance Act of 1976 § 702, Pub. L. No. 94-502, 90 Stat. 2405 (codified at 5 U.S.C. § 2108) (excluding veterans who did not serve during specified periods). Previous amendments show that this area of the law is not above modification or even contraction.

<sup>268</sup> *See, e.g.,* NAT'L COMM'N ON MIL., NAT'L, AND PUB. SERV., *INSPIRED TO SERVE* 71–72 (2020), <https://inspire2serve.gov/sites/default/files/final-report/Final%20Report.pdf> [<https://perma.cc/46CT-G248>] (recommending that veterans' preference be limited to one year during the first ten years after service, and that it only apply in tiebreaker situations); BENJAMIN COLLINS, CONG. RSCH. SERV., *FEDERAL GOVERNMENT EMPLOYMENT: VETERANS' PREFERENCE IN COMPETITIVE EXAMINATION* 11 (2016), <https://fas.org/sgp/crs/misc/R44652.pdf> [<https://perma.cc/BN2C-ELJ3>]; U.S. GEN. ACCT. OFF., *supra* note 75, at 22–23; *see* Part I.A.3 (Carter administration's proposal); Anthony v. Massachusetts, 415 F. Supp. 485, 499 (D. Mass. 1976); CQ Press, *supra* note 48 (“I served 30 years ago . . . I wasn't injured. Most of the time I was punching a typewriter or being an administrative officer. The United States gave me an education, a law degree, helped me buy my first house, enabled me to get a loan to buy the building I had my law office in. Why should the non-disabled like myself have some preference 30 years after I was in service?”) (statement of Rep. Mo Udall).

<sup>269</sup> *See, e.g.,* Post-Vietnam Era Veterans' Educational Assistance Act of 1977 §§ 401–403, Pub. L. No. 94-502, 90 Stat. 2392 (ending educational benefits under the World War II GI bill as of January 1, 1977).

<sup>270</sup> 5 C.F.R. § 315.607 (2020).



Limiting the duration or use of veterans' preference balances the interests of veterans, protected classes, and federal agencies. Veterans would still be rewarded for their service, albeit to a lesser degree. Returning veterans would still have a leg up in securing government employment, albeit only in the years immediately following their return. More notably, these limitations would cabin the discriminatory effects of veterans' preference to the periods directly following military conflicts—when the policy goals of veterans' preference are most applicable. Over time, these limitations would also result in the selection of more qualified applicants for federal positions. For these reasons, Congress should act to limit the duration and use of veterans' preference.

### *B. Reward and Assist Veterans Directly*

There are many other ways in which veterans' preference could be improved to more directly accomplish the law's policy goals.<sup>271</sup> First, military service could be rewarded directly through higher pay, enlistment bonuses, discharge bonuses, service medals, ceremonies, honorary plaques, pins, parking spaces, etc.<sup>272</sup> Veterans could receive free postsecondary or graduate education during their military service, or assistance converting their military certifications to civilian credentials.<sup>273</sup> Veterans could be given resume assistance, career coaching, counseling on their rights under

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<sup>271</sup> See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 265 (1979) (the policy goals of veterans' preference are to reward and rehabilitate veterans, incentivize military service, and attract skilled individuals to the federal workforce).

<sup>272</sup> See, e.g., Fleming & Shanor, *supra* note 10, at 54, n.174; Steven Condlly et al., *The Effects of Incentives on Workplace Performance: A Meta-Analytic Review of Research Studies*, 16 PERFORMANCE IMPROVEMENT Q. 46, 52 (2003) (benefits of both monetary and non-monetary rewards). One of the drawbacks of using veterans' preference to reward military service is that not all veterans want to work for the government after they are discharged; direct compensation would help solve this problem.

<sup>273</sup> Conway, *supra* note 218 (proposing legislation that would help veterans convert military certifications to equivalent civilian credentials).

USERRA and other statutes, or help meeting potential employers.<sup>274</sup> If military service requires additional incentives, servicepersons could receive larger enlistment bonuses, or veterans' preference could be limited to individuals who serve for a specified number of years.<sup>275</sup> If military service imbues servicepersons with beneficial qualities, increased service requirements would buttress this policy goal, or hiring managers could simply measure such attributes directly. There are many ways to better accomplish the policy goals of veterans' preference.

### C. Reduce Discrimination

Modifying veterans' preference law could also reduce discrimination against women, LGBT persons, disabled persons, and others. Proposals to limit veterans' preference necessarily reduce discrimination because they better align with merit selection principles.<sup>276</sup> Efforts to reduce barriers to entry for women and LGBT persons seeking to enlist, and efforts to amend the draft, may also mitigate the disparate effects of veterans' preference.<sup>277</sup>

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<sup>274</sup> See, e.g., AUSTL. DEP'T OF VETERANS' AFFS., REHABILITATION (June 28, 2019), <https://www.dva.gov.au/factsheet-mrc05-rehabilitation> (promoting private sector veteran employment, providing transitioning veterans with separation documentation and training records, and authorizing individualized transition coaching); U.K. MINISTRY OF DEF., VETERANS: KEY FACTS 3, 23–24 (2017), <https://www.armedforcescovenant.gov.uk/wp-content/uploads/2016/02/Veterans-Key-Facts.pdf> [<https://perma.cc/F4NZ-4JXL>] (providing funding for traditional education, training, and services that connect veterans with private sector employers).

<sup>275</sup> See, e.g., *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976). Alternatively, transition assistance and veterans' preference rights might be granted exclusively to draftees so as to better comport with the rationale behind the rehabilitation policy.

<sup>276</sup> See Part II.C.2.

<sup>277</sup> See, e.g., Patricia Kime, *After Court Ruling, Here's What's Next for Women and the Draft*, MILITARY.COM (Feb. 26, 2019), <https://www.military.com/daily-news/2019/02/26/no-women-dont-have-sign-draft-yet-heres-whats-next.html> [<https://perma.cc/54RY-NRUK>]; Bill Chappell, *Pentagon Says Women Can Now Serve in Front-line Ground Combat Positions*, NPR (Dec. 3, 2015), <https://www.npr.org/sections/thetwo-way/2015/12/03/458319524/pentagon-will-allow-women-in-frontline-ground-combat-positions> [<https://perma.cc/MEX6-SQ78>].

Other commentators have proposed amending the Constitution to prescribe equal rights for women, and such an amendment would likely invalidate many veterans' preference statutes.<sup>278</sup> Reducing the complexity of veterans' preference law would also promote nondiscrimination, as well as efficiency.<sup>279</sup>

#### *D. Reduce Inefficiency*

There are also numerous ways in which veterans' preference could be altered to reduce inefficiency. Limitations on veterans' preference would increase the pool of viable applicants for federal positions, which would allow for qualitatively superior hiring decisions.<sup>280</sup> In addition, veterans' preference could be limited to servicepersons who meet certain performance criteria—such as receiving awards or commendations—or to servicepersons who develop skills and abilities relevant to individual civilian positions.<sup>281</sup> Veterans' preference might be restricted to hiring decisions instead of affecting retention rights and inter-agency promotions, where its policy justifications are weaker.<sup>282</sup> Congress could also enact different kinds of preferences for other citizens in order to further broaden

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<sup>278</sup> See generally Thomas I. Emerson et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

<sup>279</sup> See, e.g., Collins, *supra* note 268, at 11; MSPB, VETERAN HIRING, *supra* note 56, at 1.

<sup>280</sup> U.S. MERIT SYS. PROT. BD., *supra* note 31, at x. Reducing the scope of veterans' preference would also likely shrink the costs of administration. See, e.g., Evan Harris, *Veterans Care vs. Other Countries*, VETERANS ACTION NETWORK (Nov. 25, 2015), [https://web.archive.org/web/20160901205003/https://www.veteransactionnetwork.net/veterans\\_care\\_vs\\_other\\_countries/](https://web.archive.org/web/20160901205003/https://www.veteransactionnetwork.net/veterans_care_vs_other_countries/) [<https://perma.cc/TC2D-C39A>].

<sup>281</sup> See, e.g., Anthony v. Massachusetts, 415 F. Supp. 485, 499 (D. Mass. 1976); Ordway, *supra* note 50, at 137. Such a proposal would have the added benefit of incentivizing meritorious military service. Alternatively, veterans' preference could be limited only to servicepersons applying for civilian employment within the Department of Defense in order to approximate the relevancy criterion.

<sup>282</sup> See, e.g., Pennsylvania ex rel. Maurer v. O'Neill, 83 A.2d 382, 383 (Pa. 1951) (invalidating veterans' preference in promotions because "the skill of the particular examinees in the performance of their tasks is the prime consideration"); Fleming & Shanor, *supra* note 10, at 54, 57–58.

the pool of applicants for federal positions.<sup>283</sup> There are numerous ways in which veterans' preference could be improved.

## CONCLUSION

Veterans' preference originated as a relatively minor benefit but has since grown into a colossal and well-entrenched entitlements system—in part due to the efforts of veterans' lobbying groups. Veterans' preference aims to reward veterans for their service and ease their transition to civilian life, but it often conflicts with other national policies, such as those favoring nondiscrimination and governmental efficiency. These policies are not fundamentally at odds, however. Modifications to the veterans' preference system—including time and usage limitations—can and should be enacted by Congress. Such modifications would effectively balance worthwhile policies like nondiscrimination and efficiency with the nation's goal of honoring military service.

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<sup>283</sup> Compare N.M. STAT. ANN. § 10-9-13.2 (2019) (granting disabled veterans ten preference points and non-disabled veterans five preference points), with N.M. STAT. ANN. § 10-9-13(C) (2019) (granting residents two preference points per year of residency for up to five years and thus ten total points).

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