

CASENOTES

Absolute Veterans' Preference in Public Employment: *Personnel Administrator of Massachusetts v. Feeney*¹—Traditionally, as a reward for their service to this country, veterans² have enjoyed preferential treatment in public civil service employment.³ Most states and the federal government grant veterans who pass the civil service examinations a limited, initial hiring preference.⁴ The two forms most commonly offered are either a point preference⁵ or a tie-breaking preference.⁶ These preferences give eligible veterans a competitive head start over eligible non-veterans by increasing their composite test scores.

¹ 442 U.S. 256 (1979).

² MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 43 (West 1976) provides Massachusetts's general definition of the term veteran as quoted here in pertinent part:

"Veteran" shall mean any person, male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service, provided, that any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete ninety days of active service.

Id. MASS. GEN. LAWS ANN. ch. 31, § 21 (West 1976) adds to the general definition provided in chapter 4:

The word "veteran" as used in this chapter shall mean: any citizen who—

(a) Is a veteran as defined in clause Forty-third of section seven of chapter four, or (b) meets all the requirements of said clause Forty-third except that instead of performing wartime service as so defined he has been awarded one of the campaign badges enumerated in this section, or has been awarded the congressional medal of honor.

Id.

³ See Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 BUFFALO L. REV. 3 (1979) [hereinafter cited as Blumberg]. Many states adopted veterans' employment preferences as early as the period between the Civil War and World War I. More recently, states have added education, counseling, and unemployment benefits to their legislative scheme of rewarding veterans. An important characteristic of these later benefits is that their entire cost is spread among all of the taxpayers. The burden of providing employment preferences, however, is borne by the one individual who would have been granted the civil service position but for the preference. *Id.* at 7-9.

⁴ See Fleming & Shanor, *Veterans' Preference in Public Employment: Unconstitutional Gender Discrimination?*, 26 EMORY L.J. 13 (1977) [hereinafter cited as Fleming & Shanor]. All states and the federal government offer veterans preferences in public employment. These preferences are characterized as either initial hiring preferences, promotional preferences, or lay off preferences. *Id.* at 16. The initial hiring preference, by far the most common form granted, is provided by approximately forty-seven states. See *id.* at 16-17 n.11.

⁵ Approximately forty states provide veterans point preferences in public employment. See *id.* at 17 n.12 for a list of states and statute citations.

⁶ At least seven states provide a tie-breaking preference either in place of or in addition to point preferences. See *id.* at 17 n.14.

Under the point preference, for instance, five or ten points are added to each veteran's score.⁷ Similarly, under the tie-breaking preference, a veteran's test results are deemed higher than identical scores achieved by non-veterans.⁸

Unlike the point or tie-breaking techniques, however, the Massachusetts veterans' preference⁹ is limited neither in its form nor in its effect. The Massachusetts preference is both *permanent*, in that veterans may utilize it repeatedly throughout their lives, and *absolute*, in that it automatically places all eligible veterans ahead of any eligible non-veterans regardless of their composite test scores.¹⁰ Specifically, the Massachusetts Veterans' Preference Statute¹¹ ranks the eligible applicants by a status formula. First, disabled veterans are ranked at the top in order of their composite test scores.¹² Other veterans

⁷ The federal government adds five bonus points to each veteran's test score and ten points to each disabled veteran's test result. See Blumberg, *supra* note 3, at 3 n.1. While some states utilize this same "five-ten" plan, others offer veterans ten bonus points and grant disabled veterans fifteen extra points. *Id.* at 4 n.4.

⁸ See Fleming & Shanor, *supra* note 4, at 17.

⁹ MASS. GEN. LAWS ANN. ch. 31, § 23 (West recodified 1978). On January 1, 1979, after the *Feeney* litigation was commenced, the Massachusetts civil service law was recodified. 1978 Mass. Acts ch. 393, § 11. Currently, the Massachusetts preference is found at MASS. GEN. LAWS ANN. ch. 31, § 26. For accuracy, all references in this casenote to the Massachusetts veterans' preference are to MASS. GEN. LAWS ANN. ch. 31 as it existed prior to its recodification.

¹⁰ See *Anthony v. Massachusetts*, 415 F. Supp. 485, 499 (D. Mass. 1976), *question certified sub. nom. Massachusetts v. Feeney*, 429 U.S. 66 (1976), *question answered*, 373 Mass. 359, 366 N.E.2d 1262 (1977), *vacated*, 434 U.S. 884 (1977), *aff'd*, 451 F. Supp. 143 (D. Mass. 1978), *prob. juris. noted*, 439 U.S. 891 (1978), *rev'd*, 440 U.S. 250 (1979), *acq.*, 475 F. Supp. 109 (D. Mass. 1979).

¹¹ MASS. GEN. LAWS ANN. ch. 31, § 23 (West recodified 1978) provides in full:

The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:—

(1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Id. The actual procedure for obtaining a civil service appointment under the Massachusetts statute is as follows. Massachusetts civil service positions are categorized as either classified official service or classified labor service. Since the appointments which plaintiff sought were in the classified labor service, she was required to take a written examination administered by the state Civil Service Division. The aim of this examination is to measure an applicant's qualifications. These test results are combined in an evaluation of each individual's training and experience to determine each applicant's composite test score. Once an applicant passes this test and receives a composite test score, (s)he becomes an "eligible" and is placed on an eligible list. Applicants on the eligible list are ranked not purely by their composite test scores, but by the preference statute's absolute ranking formula. When a position opens within the Civil Service, candidates from the top of this list are certified for appointment. See *Anthony v. Massachusetts*, 415 F. Supp. at 488.

¹² The term "disabled veteran" is defined at MASS. GEN. LAWS ANN. ch. 31, § 23A (West recodified 1978).

are ranked thereafter, followed by widows and widowed mothers of veterans.¹³ Finally, all other eligibles are ranked, each in order of their respective composite test scores.¹⁴

The operation of this ranking formula prevents any non-veteran from ever being placed ahead of a lower scoring veteran.¹⁵ In contrast with the point and tie-breaking preferences, which preserve the evaluative function of the civil service examinations by simply adjusting veterans' scores,¹⁶ the Massachusetts absolute preference supplants this role by elevating veteran status completely over test results.¹⁷ Further, as long as the number of applicants exceeds the available civil service positions, this absolute preference makes the veteran status a job requirement, not simply a preferred characteristic.¹⁸ For these reasons, the Massachusetts absolute veterans' preference has been subject to numerous constitutional challenges.¹⁹

¹³ Widows and widowed mothers of veterans are included in the definition of "other persons" as provided by MASS. GEN. LAWS ANN. ch. 31, § 23B (West recodified 1978).

¹⁴ MASS. GEN. LAWS ANN. ch. 31, § 23. See note 11 *supra*.

¹⁵ *Anthony v. Massachusetts*, 415 F. Supp. at 497. In delivering the lower court's opinion, Judge Tauro observed that the "practical effect of the Veterans' Preference is clear. Eligible veterans, regardless of qualifications relative to eligible non-veterans, have the public employment field cleared for them on an absolute and permanent basis." *Id.*

¹⁶ As stated in note 11 *supra*, the composite test score is a combination of the applicant's numerical results on the civil service examination and an evaluation of the applicant's job qualifications. By merely increasing this composite test score, the evaluative function is still preserved since the composite test score itself is not disregarded.

¹⁷ *Anthony v. Massachusetts*, 415 F. Supp. at 488-89. The Massachusetts statute ranks eligible applicants primarily by their status and only secondarily by their test results. This factor caused Judge Tauro to observe that "as a practical matter, therefore, the Veterans' Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list." *Id.*

¹⁸ See *Blumberg*, *supra* note 3, at 3 n.3. Professor Blumberg observed that, "The veteran does not merely step in line ahead of the non-veteran to assume one of an endless stream of jobs. When eligible applicants exceed openings . . . previous military experience is effectively a 'job requirement.'" *Id.*

¹⁹ See, e.g., *Hutcheson v. Director of Civil Serv.*, 361 Mass. 480, 281 N.E.2d 53 (1972) (describing the troubled history of the Massachusetts veterans' preference); *Mayor of Lynn v. Commissioner of Civil Serv.*, 269 Mass. 410, 169 N.E. 502 (1929) (Supreme Judicial Court of Massachusetts adopting the Opinion of the Justices, 166 Mass. 589, 44 N.E. 625 (1896), where a majority of four justices declared that it was constitutional to absolutely prefer veterans who pass civil service examinations over all male non-veterans); *Brown v. Russell*, 166 Mass. 14, 43 N.E. 1005 (1896) (holding unconstitutional St. 1895, ch. 501, §§ 2, 6, making the appointment of veterans to the detective force compulsory without examination).

For cases involving challenges to veterans' preferences in states other than Massachusetts, see *Ballou v. State Dep't of Civil Serv.*, 75 N.J. 365, 382 A.2d 1118 (1978) (absolute preference held not to discriminate against women in violation of the equal protection clause); *Branch v. DuBois*, 418 F. Supp. 1128 (N.D. Ill. 1976) (point preference held not to discriminate against women in violation of the equal protection clause); *Feinerman v. Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (sustaining validity of point preference); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972) (sustaining validity of initial absolute hiring preference and "5-point" promotional preference).

Helen B. Feeney, a female resident of the Commonwealth of Massachusetts and a non-veteran,²⁰ began her 12-year tenure in the Massachusetts Civil Defense Agency in 1963 as a Senior Clerk Stenographer.²¹ In 1967, she gained an inter-agency promotion to the position of Federal Funds and Personnel Coordinator.²² Between 1971 and 1974, to secure a better job, Mrs. Feeney took three written civil service examinations.²³ On the first test she received the second highest score, but was placed sixth behind five male veterans, four of whom had lower scores.²⁴ Similarly, in 1973, although achieving the third highest score, she was listed fourteenth, behind twelve male veterans, eleven of whom had lower scores.²⁵ Finally, in 1974, although tied for seventeenth place, Mrs. Feeney was ranked seventieth behind sixty-four veterans, sixty-three of whom were male, forty-nine having lower scores.²⁶ But for the Massachusetts veterans' preference, Mrs. Feeney, by virtue of her high scores, would have been considered for appointment.²⁷ Because of the statute's operation, however, each time she was ranked behind lower scoring veterans, and thus out of the competition.

Contending that the absolute preference formula operated to systematically exclude eligible women from consideration for upper-level civil service positions, Mrs. Feeney²⁸ brought an action under 42 U.S.C. § 1983²⁹ in the

²⁰ Although Mrs. Feeney never formally applied for entry into the armed forces, she did inquire, at age eighteen about enlistment. She was told that females under twenty-one needed parental consent to join the military, whereas similarly situated males did not. Since Mrs. Feeney's mother refused to give her consent, plaintiff was unable to join. See Affidavit of Helen B. Feeney at 8, United States District Court for the District of Massachusetts, Civil Action No. 75-1991-T, compiled at page 180 in Appendix, Supreme Court of the United States, October Term, 1978, No. 78-233.

²¹ Mrs. Feeney had worked for fourteen years in the private sector before becoming a public servant. 442 U.S. at 264.

²² *Id.*

²³ *Anthony v. Massachusetts*, 451 F. Supp. at 492. In 1971 plaintiff completed the examination for Assistant Secretary, Board of Dental Examiners. In 1973, she took the test for the position of Head Administrative Assistant. Finally, in 1974, plaintiff took the examination for an Administrative Assistant's position. *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* Because of a temporary restraining order entered by Judge Tauro on May 23, 1975, no appointments were made to the position of Administrative Assistant while the original action was pending. *Id.* at 487-88. Following the district court's initial decision, see text and note at note 36 *infra*, Massachusetts suspended MASS. GEN. LAWS ANN. ch. 31, § 23 and adopted an interim veterans' point preference statute. 1976 Mass. Acts ch. 200, § 1 (Supp. 1978-1979).

²⁸ In the original case, *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976), plaintiffs included Mrs. Feeney and three female, Massachusetts resident attorneys: Carol A. Anthony, Kathryn Noonan, and Betty A. Gittes. The female attorneys' claims were rendered moot by an amendment to MASS. GEN. LAWS ANN. ch. 31, § 5 providing: "No rule made by the [Civil Service] commission shall apply to the following: . . . counsels, attorneys-at-law, including attorneys designated as counsel or counsellors-at-law, city solicitors, town counsels, and assistant town counsels." MASS. GEN. LAWS ANN. ch. 31, § 48, *added by* 1975 Mass. Acts ch. 134. 442 U.S. at 259 n.30.

²⁹ 42 U.S.C. 1983 (1976) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state . . . subjects . . . any citizen of the United

United States District Court for the District of Massachusetts.³⁰ The Massachusetts Civil Service Commission and the Director of Civil Service were named as defendants.³¹ Plaintiff's complaint alleged that the Massachusetts absolute veterans' preference discriminated against her in the area of public employment on the basis of gender in violation of both the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.³²

Mrs. Feeney asserted that the exclusionary impact of the statute's operation should be measured in combination with the pre-existing military regulations and quotas, which have severely limited the number of women who could enter the armed forces.³³ Thus, she argued, since only 2% of Mas-

States or other person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

Id. Plaintiff was precluded from bringing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976), since section 2000e-11 of that Act provides 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."

³⁰ *Anthony v. Massachusetts*, 415 F. Supp. 485 (D. Mass. 1976).

³¹ The original defendants included the Commonwealth of Massachusetts, the Division of Civil Service, the Director of the Civil Service, and the Massachusetts Civil Service Commission. Both the Commonwealth of Massachusetts and the Division of Civil Service were found not to be "persons" within the meaning of § 1983, and the case was dismissed as to them. *Anthony v. Massachusetts*, 415 F. Supp. at 487 n.2. After this litigation commenced, the office of the Director of the Civil Service was eliminated and its responsibilities were assigned to the Personnel Administrator of the Commonwealth. 1974 Mass. Acts ch. 835, §§ 51, 57-65.

³² *Anthony v. Massachusetts*, 415 F. Supp. at 490, 499 n.15. See also Complaint, *Anthony v. Massachusetts*, at ¶ 45, United States District Court for the District of Massachusetts, C.A. No. 75-1991-T, compiled at p. 56 in, Appendix, Supreme Court of the United States, October Term, 1978, No. 78-233.

³³ In 1948, the Women's Armed Services Integration Act, 62 Stat. 356-75, gave permanent status to women in the four services. The law, however, set a 2% quota on the number of women who could enter the armed forces. See 10 U.S.C. §§ 3209, 3215, 5410, 8208, 8215, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130, §§ 1(19)(E), 1(9)(H), 1(16), 1(26)(C), 1(26)(E), (F). In 1967, Public Law 90-130 lifted the 1948 quota. The Army, however, continued to maintain a 2% limit by regulation until 1978. 32 C.F.R. § 580.4(b), *repealed by* Pub. L. No. 95-485, § 820, 92 Stat. 1627.

In addition to this initial entry limitation, women have been subjected to more stringent enlistment and advancement requirements than have similarly situated men. See *Anthony v. Massachusetts*, 415 F. Supp. at 489. While men could enlist at age seventeen, women were barred until age eighteen. *Id.* Men were free to enlist without parental consent after age eighteen, while women were required to have their parents' permission until age twenty-one. *Id.* at 489-90. Women were subjected to higher mental aptitude tests and more strenuous physical tests than were men. *Id.* Women with minor children were prohibited from enlisting. *Id.* Women have also been restricted to a top rank of lieutenant colonel. See generally Landrum & Zanica, *Women in the Military*, 5 WOMEN'S WORK 17, 17 (Sept.-Oct. 1979) [hereinafter cited as Landrum & Zanica]. While many of these restrictions may have operated to prevent or discourage plaintiff from enlisting in the armed forces, see note 20 *supra*, the 2% ceiling on female personnel within the military was never reached. Landrum & Zanica, *supra*.

sachusetts women could ever attain the preferred veteran status, the preference statute excluded most women from the best civil service positions.³⁴ Plaintiff sought to permanently enjoin the continued enforcement of this absolute preference formula.³⁵

A special three-judge session of the United States District Court for the District of Massachusetts recognized the worthy state purpose of assisting veterans, but found that the absolute ranking formula, controlled as it was by the federal military enrollment policies, permanently foreclosed the public employment opportunities of most women and thereby deprived them of equal protection of the laws in violation of the fourteenth amendment.³⁶ The Attorney General of the Commonwealth of Massachusetts, under the authority of state law, appealed this decision directly to the United States Supreme Court without the consent and over the express objections of the defendants.³⁷ The Court, without opinion, vacated the federal district court's judgment and remanded the case for reconsideration in light of the intervening decision of *Washington v. Davis*.³⁸ Under *Davis*,³⁹ a facially neutral statute is not unconstitutional solely because of its disproportionate impact.⁴⁰ On re-

³⁴ *Anthony v. Massachusetts*, 415 F. Supp. at 490. Plaintiff limited her challenge to the "best civil service positions" since women, in fact, have access to lower-level, lower-paying civil service jobs. This result is partially caused by a now defunct procedure of requesting only women for these positions, and partially produced by the fact that few men apply for these secretarial and clerk jobs. *Id.* at 488. See note 49 *infra*.

³⁵ *Anthony v. Massachusetts*, 415 F. Supp. at 487.

³⁶ *Id.* at 499. Judge Campbell filed a concurring opinion in which he emphasized the limited reach of the court's holding. According to Judge Campbell, a state may enact a more limited hiring preference which merely gives the veteran applicants "credit and even a headstart over other jobseekers." The absolute means by which Massachusetts rewards its veterans, however, "goes too far" since it also permanently excluded "women from a major sector of employment." *Id.* at 501 (Campbell, J., concurring). Judge Murray dissented from the court's holding since he found that the "Commonwealth's choice of means to implement the purpose [of rewarding veterans] does not invidiously discriminate against women." *Id.* at 507 (Murray, J., concurring in part, dissenting in part).

³⁷ *Feeney v. Commonwealth*, 373 Mass. 359, 361, 366 N.E.2d 1262, 1264 (1977). Two days after the lower court's decision was issued, the Massachusetts Civil Service Commission voted to ask the Attorney General not to appeal. *Id.* The Personnel Administrator also opposed the appeal. *Id.* The Massachusetts legislature, however, urged the Attorney General to continue. *Id.* When the Attorney General filed notice of appeal with the United States Supreme Court, these nominal defendants advised the Court of their opposition. *Id.* The Court subsequently certified a question of state law to the Massachusetts Supreme Judicial Court, asking whether Massachusetts law authorized the Attorney General to appeal over the express objections of the defendants. *Massachusetts v. Feeney*, 429 U.S. 66 (1976). The Supreme Judicial Court answered the question affirmatively. *Feeney v. Commonwealth*, 373 Mass. 359, 368, 366 N.E.2d 1262, 1267 (1977), and the Attorney General appealed directly to the United States Supreme Court pursuant to 28 U.S.C. § 1253. 442 U.S. at 261.

³⁸ 434 U.S. 884 (1977).

³⁹ 426 U.S. 229 (1976).

⁴⁰ *Id.* at 244-45. Note that in *Davis* the alleged discrimination was racial. The importance of this is discussed in text and notes at notes 190-218 *infra*.

mand, the district court, with one judge concurring and one judge dissenting, reaffirmed its prior holding, finding that the Massachusetts legislature had intentionally sacrificed the employment opportunities of women in order to benefit its veterans.⁴¹

The Attorney General again appealed to the United States Supreme Court.⁴² A seven-justice majority reversed, remanded, and HELD: An absolute lifetime veterans' preference does not discriminate against women in violation of the equal protection clause of the fourteenth amendment.⁴³ In reaching this decision, the Court initially determined that the Massachusetts preference statute was gender-neutral in that it distinguished not between men and women, but merely between veterans and non-veterans.⁴⁴ The Court also held that no discriminatory purpose had shaped the veterans' preference legislation.⁴⁵ In a dissenting opinion, Justice Marshall, joined by Justice Brennan, argued that Massachusetts' choice of an absolute preference did evidence purposeful gender discrimination in violation of the equal protection clause of the fourteenth amendment.⁴⁶

The significance of the *Feeney* decision is twofold. *Feeney* is the first case following *Washington v. Davis* in which the Court has considered the constitutionality of a facially neutral statute which results in a disproportionate impact on women rather than on a racial group. Hence, in applying the *Davis* holding to *Feeney*, the Court established that gender discrimination cases based on disproportionate impact claims will be subject to the same discriminatory purpose requirement previously applied only in race discrimination cases. Second, in differentiating allowable from unconstitutional legislative motivation, the *Feeney* Court explicitly defined the level of intent required under *Davis*'s purposeful discrimination standard. In defining discriminatory intent, however, the Court avoided deciding whether a state legislature can knowingly and needlessly sacrifice the employment opportunities of one identifiable group in order to grant preferential treatment to another.

This casenote first will discuss the Court's treatment of the *Feeney* case. Next, a critique of the Court's analytical approach will be offered. A close analysis of the steps necessary in uncovering the existence of a covert classification will demonstrate that the *Feeney* Court misformulated and misapplied its two-step inquiry. The application of the *Washington v. Davis* decision to *Feeney* will be considered next. It will be submitted that the Court inappro-

⁴¹ *Feeney v. Massachusetts*, 451 F. Supp. 143, 150 (D. Mass. 1978). Judge Campbell filed a concurring opinion in which he asserted that the Massachusetts veterans' statute did not actually "fall within [the] ambit" of the *Davis* decision, since the preference was not truly gender-neutral. *Id.* at 150-51 (Campbell, J., concurring). Judge Murray, dissenting from the court's holding, argued that the veterans' statute was neutral, and that its enactment was not motivated by a legislative intent to harm women. *Id.* at 152-53 (Murray, J., dissenting). Under this analysis, Judge Murray would have sustained the Massachusetts veterans' preference. *Id.* at 156.

⁴² The Attorney General appealed pursuant to 28 U.S.C. § 1253 and the Court noted probable jurisdiction. 439 U.S. 891 (1978).

⁴³ 442 U.S. at 271-81.

⁴⁴ *Id.* at 275.

⁴⁵ *Id.* at 280.

⁴⁶ *Id.* at 281-82 (Marshall and Brennan, JJ., dissenting).

proportionately extended *Davis's* discriminatory purpose standard to the issue of gender discrimination involved in *Feeney*. Finally, the Court's definition of the level of intent that is required to satisfy *Davis's* discriminatory purpose standard will be discussed. After examining the special facts of *Feeney*, it will be suggested that the Court should have included within its definition of discriminatory intent legislative disregard concerning the occurrence of discrimination, as well as positive legislative desire to discriminate.

I. THE SUPREME COURT'S ANALYSIS IN *FEENEY*

A. *The Majority's Analytical Approach*

Guided by two prior race discrimination cases,⁴⁷ the *Feeney* majority reasoned that since the Massachusetts veterans' preference was neutral on its face⁴⁸ but disproportionate in its impact on women,⁴⁹ a two-step inquiry was necessary.⁵⁰ Under this approach, the Court first considered whether the statutory classification was indeed both overtly and covertly gender-neutral.⁵¹ If so held, the Court would then determine whether the adverse effect of the statute reflected invidious gender discrimination.⁵²

1. First Inquiry: Overt or Covert Classification

In considering whether the Massachusetts act established an overt or covert classification, the Court questioned whether the distinction between veterans and non-veterans drawn by the language of the statute was a mere pretext for gender discrimination.⁵³ In answering this question, the Court initially relied upon two admissions by the plaintiff.⁵⁴ Noting Mrs. Feeney's

⁴⁷ *Washington v. Davis*, 426 U.S. 229 (1976) (a neutral law's disproportionate impact must be traced to an underlying purpose to discriminate); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (reaffirmed *Davis's* discriminatory purpose standard; suggested an objective method of proving the existence of purposeful discrimination).

⁴⁸ The Massachusetts veterans' preference was deemed facially neutral because the language of the statute distinguishes only between veterans and non-veterans. 442 U.S. at 274-75.

⁴⁹ Between 1963 and 1973, while Mrs. Feeney was involved in the civil service selection system, 47,005 appointments were made. Of this total, 26,794 (57%) were men and 20,211 (43%) were women. Of these appointees, 14,476 (54%) of the men were veterans, while only 374 (1.8%) of the women had veteran status. *Anthony v. Massachusetts*, 415 F. Supp. at 488. While this 57%-43% ratio seems fairly equal, it is misleading in that it does not describe the actual impact which was at the heart of the plaintiff's claim. Plaintiff contended that the absolute veterans' preference operated to exclude women from the best civil service positions, not from all civil service jobs. See note 34 *supra*. Thus, as the district court found, the more revealing comparison is between the lower-level and upper-level appointments. "Female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied. Few, if any, females have ever been considered for the higher positions in the state Civil Service." *Id.* at 498.

⁵⁰ 442 U.S. at 274.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 274.

⁵⁴ *Id.*

concession that the Massachusetts veterans' law was neutral on its face, the Court seemed to imply that the statutory classification was itself overtly gender-neutral.⁵⁵ Further, the Court stated that since the plaintiff had limited her constitutional challenge to the absolute form of the Massachusetts veterans' preference, she implicitly had acknowledged that other types of veterans' preferences were valid.⁵⁶

Finding therefore that the overt classification made by the Massachusetts preference was gender-neutral, and reasoning that other states' limited hiring preferences were not automatically invalid, the Court narrowed the question before it to whether Massachusetts' choice of an absolute and permanent preference was a pretext for gender-based discrimination.⁵⁷ Determining that no such pretext existed, the Court emphasized two central findings of the district court.⁵⁸ The lower court had found that the veterans' preference served worthy and legitimate purposes.⁵⁹ More specifically, the district court had determined that the absolute preference had not been enacted for the purpose of discriminating against women.⁶⁰ The *Feeney* Court reasoned that both the plaintiff's concessions and the district court's findings dictated the conclusion that the distinction drawn by the Massachusetts veterans' statute was not a pretext for gender-based discrimination.⁶¹

Turning from classification to impact, the Court supported this conclusion by demonstrating that the act's adverse effect on women could be explained on neutral grounds.⁶² Initially, the Court noted that the statutory definition of the term "veteran" was itself gender-neutral.⁶³ More importantly, the Court stated that Massachusetts had consistently defined veteran status to include women who had served in the military.⁶⁴ Hence, the Court observed that the actual veteran class was not uniquely male, nor was the non-veteran class completely female.⁶⁵ In fact, the Court emphasized, too many male non-veterans are themselves disadvantaged by the preference to allow explaining the statute as simply a pretext for preferring men over women.⁶⁶ Instead, reasoned the Court, the correct explanation of the statute's

⁵⁵ *Id.* at 274-75.

⁵⁶ *Id.* at 274.

⁵⁷ *Id.* at 274-85.

⁵⁸ *Id.* at 274.

⁵⁹ *Id.*; *Anthony v. Massachusetts*, 415 F. Supp. at 496.

⁶⁰ 442 U.S. at 274; 415 F. Supp. at 495.

⁶¹ 442 U.S. at 274-75.

⁶² *Id.* at 275.

⁶³ *Id.* MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 43 defines the term "veteran" as "any person, male or female"

⁶⁴ 442 U.S. at 275. MASS. GEN. LAWS ANN. ch. 31, § 21A provides a definition of persons having veteran status.

⁶⁵ 442 U.S. at 275.

⁶⁶ *Id.* Here, the Court has caught itself in a statistical inconsistency. By emphasizing that the veteran class is not uniquely male, the Court places great significance on the 2% of the armed forces personnel which is female. Yet by stressing that men, as a group, are significantly disadvantaged by the preference, the Court places little importance on the fact that 47% of Massachusetts men are veterans, whereas only 0.8% of Massachusetts women have veteran status. See 442 U.S. at 286 n.3 (Marshall, J., dissenting).

adverse impact is not that women are excluded from civil service positions because they are females, but because they are non-veterans.⁶⁷

Shifting again from impact to purpose, the Court suggested that the statute's worthy goal provided the surest vindication of its adverse impact on women.⁶⁸ The Court reasoned that even though "impact alone can [at times] unmask an invidious classification," the legitimate purpose of rewarding veterans, by itself, excluded the possibility that a gender classification was concealed within the Massachusetts preference statute.⁶⁹ The Court concluded that the statute simply distinguished between veterans and non-veterans, not between men and women.⁷⁰ Having dispensed with this initial analysis, the Court next considered the more crucial question posed by its two-fold inquiry—whether the adverse effect of the veterans' preference act reflected invidious gender discrimination.⁷¹

2. Second Inquiry: Existence of Purposeful Gender Discrimination

Assured that the Massachusetts absolute veterans' preference did not contain a gender classification, the Court turned to the heart of its analysis and evaluated the statute in accordance with its holding in *Washington v. Davis*.⁷² In *Davis*, the Court announced that a neutral statute could not be deemed unconstitutional solely because of its disproportionate impact.⁷³ Instead, the Court developed a purposeful discrimination standard, requiring that a law's disparate results be traced to an actual purpose to discriminate against the group adversely affected.⁷⁴ In evaluating whether a gender-based discriminatory purpose had so influenced the Massachusetts preference legislation, the Court considered two arguments advanced by the plaintiff. One concerned the inherently non-neutral nature of the preference;⁷⁵ the other focused on the inevitability of the statute's exclusionary impact on women.⁷⁶

Based in part on Judge Campbell's concurring opinion in the district court's decision,⁷⁷ plaintiff argued that the inherent nature of the veterans' preference distinguished it from the truly neutral law before the *Davis* Court.⁷⁸ The veterans' preference statute, according to the plaintiff, was structurally gender-biased because it benefitted a pre-established group, defined by the federal military enrollment quota to be 98% male.⁷⁹ In the view

⁶⁷ *Id.* at 275.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 276.

⁷² 426 U.S. 229 (1976).

⁷³ *Id.* at 244.

⁷⁴ *Id.* at 245-47.

⁷⁵ 442 U.S. at 276.

⁷⁶ *Id.*

⁷⁷ *Feeney v. Massachusetts*, 451 F. Supp. at 151 (Campbell, J., concurring).

⁷⁸ 442 U.S. at 276.

⁷⁹ Brief for the Appellee at 31, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). This portion of plaintiff's argument actually involves the issue whether Massachusetts veterans' preference establishes a covert classification, the issue considered by the Court in its initial inquiry. See text and notes at notes 176-86 *infra*.

of Judge Campbell, the military's dividing line between 98% men and 2% women was "built in" to the Massachusetts preference legislation,⁸⁰ a factor sufficient to remove the statute from the scope of the *Davis* opinion.⁸¹

The Supreme Court rejected both the plaintiff's contention and Judge Campbell's conclusion.⁸² Although recognizing that the veterans' preference was by design not neutral, the Court viewed the statute as being biased simply in favor of veterans, upon whom it conferred a "deserved . . . competitive head start."⁸³ Having found this goal to be valid, and the basic distinction between veterans and non-veterans to be legitimate, the *Feeney* Court concluded that the Massachusetts veterans' preference was not sufficiently distinguishable from the neutral law in *Davis* to merit a different treatment.⁸⁴

Having reaffirmed its position that the veterans' statute must be analyzed under *Davis*'s purposeful discrimination standard, the Court next considered plaintiff's alternative argument, which again was based on the inherent structure of the preference legislation.⁸⁵ In plaintiff's view, even if the non-neutral design of the veterans' preference were insufficient to distinguish it from *Davis*, the deliberate incorporation of the military's discriminatory policies into the veterans' act evinced purposeful gender discrimination attributable to the Massachusetts legislature.⁸⁶ The *Feeney* Court rejected plaintiff's incorporation argument for three reasons. While recognizing that two of its prior cases had acknowledged that certain military procedures may well have been unconstitutional,⁸⁷ the Court emphasized that the military's alleged discrimination

⁸⁰ *Feeney v. Massachusetts*, 451 F. Supp. at 151 (Campbell, J., concurring).

⁸¹ *Id.* at 150-51.

⁸² 442 U.S. at 276.

⁸³ *Id.* The Court noted that the Massachusetts statute was "unusual" in that by overtly preferring veterans it was designed to be non-neutral. *Id.* This partiality, recognized the Court, made the Massachusetts statute technically different than the truly neutral personnel test at issue in the *Davis* case. 426 U.S. at 245-46. Since the Massachusetts law was biased simply in favor of veterans, and not in favor of men, however, the Court determined that *Davis* was controlling. 442 U.S. at 277-78.

⁸⁴ 442 U.S. at 277-78.

⁸⁵ *Id.* at 276.

⁸⁶ Brief for Appellee at 31, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256. This portion of plaintiff's argument more clearly involves the question central to the Court's second inquiry, whether the adverse effect of the veterans' statute reflects invidious gender discrimination. Compare text and note at note 79 *supra*, where plaintiff uses the inherently non-neutral argument to allege that the veterans' law contains a gender classification.

⁸⁷ In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a majority of the Court struck down an Air Force statute which required servicewomen to demonstrate that their husbands were dependent upon them for over one-half their support before the servicewomen could qualify for certain allowances and benefits. Servicemen, on the other hand, were not required to establish the dependency of their spouses in order to qualify for these fringe benefits. In declaring this statute unconstitutional, the Court held that male and female members of the armed forces could not be accorded different treatment solely for the purpose of achieving administrative convenience. *Id.* at 690-91. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), the Court, however, upheld a statute which provided female naval officers a thirteen year period to attain tenure, while male naval officers were given only nine years. Instead, noting the Navy's historical restrictions on the opportunities of female officers, the Court reasoned that the statute was an attempt to offer Navy women "fair and equitable career advancement program[s]." *Id.* at 508.

against women was not on trial in the *Feeney* case.⁸⁸ Further, the Court stated, any presumption that the Massachusetts legislature had intentionally incorporated existing military gender-based practices into its veterans' act was rebutted by the district court's finding that the state had not established the preference for the purpose of discriminating against women.⁸⁹ Moreover, the Court stressed, the plaintiff's claim of discriminatory incorporation was inconsistent with her concession that a more limited hiring preference was permissible.⁹⁰ Discriminatory intent, said the Court, is not measured by degree, but rather by the fact that it exists at all.⁹¹ Thus, the Court reasoned, if a discriminatory desire had influenced the legislative choice, it would have affected the Massachusetts preference legislation from the outset, and the subsequent form of that preference, whether absolute or limited, would make no constitutional difference.⁹²

Apart from identifying these problems with the plaintiff's argument, the Court criticized the district court's superficial analysis of the issue.⁹³ On remand, the lower court had been instructed to examine the cause of the statute's adverse impact on women in light of *Davis*, not merely to reconsider the effect of that cause.⁹⁴ The district court's reaffirmation of its finding that the veterans' preference was not enacted for the purpose of discriminating against women was, in the Court's opinion, a correct beginning.⁹⁵ But to reason from that initial conclusion to a finding of purposeful discrimination because the statute was inherently non-neutral was, in the Court's view, not only illogical, but unsupported.⁹⁶ Such an analysis, stressed the Court, merely restated the fact of the statute's adverse impact without ever evaluating whether a discriminatory purpose had produced that result.⁹⁷ Dissatisfied with the lower court's insufficient analysis, the *Feeney* Court next considered the plaintiff's assertion that such a discriminatory purpose should be inferred from the awareness of the Massachusetts legislators that the absolute veterans' preference would foreclose the public employment opportunities of most women.⁹⁸

In her final and most convincing attempt to establish the existence of purposeful discrimination, Mrs. Feeney asserted that the statute's adverse impact on women was too inevitable to have been unintended.⁹⁹ Specifically, she argued that the legislature should be held to have intended the necessary and

⁸⁸ 442 U.S. at 278.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 277.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See text and notes at notes 38-40 *supra*.

⁹⁵ 442 U.S. at 277. The Court stated that this finding by itself compelled the conclusion that Massachusetts had "intended nothing more than to prefer 'veterans.'" *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 278.

⁹⁹ *Id.*

foreseeable consequences of its actions.¹⁰⁰ In the plaintiff's view, the statute's exclusionary impact on the job opportunities of women was sufficiently foreseeable to impute a discriminatory intent to the Massachusetts legislature.¹⁰¹

Although the validity of inferring a discriminatory purpose from such objective evidence had been acknowledged previously,¹⁰² the *Feeney* Court rejected the plaintiff's inevitability argument. Apparently concerned that such foreseeability considerations could be more misleading than probative, the Court explicitly defined the level of intent required under *Davis's* purposeful discrimination standard.¹⁰³ Initially, the Court acknowledged that the statute's adverse impact was foreseeable and intended in that the Massachusetts legislature knowingly chose a method of benefitting veterans that also disadvantaged women.¹⁰⁴ In the Court's view, however, purposeful discrimination entails more than an awareness of the probable consequences of a legislative choice.¹⁰⁵ Rather, the Court emphasized, it implies that the legislature made a particular decision "at least in part 'because of' not merely 'in spite of' its adverse effects on an identifiable group."¹⁰⁶ Through this definition the Court demanded from the plaintiff evidence that the Massachusetts legislature originally had enacted, or subsequently preserved, the veterans' preference not merely *in spite of* its adverse impact on women, but specifically *because* it would so discriminate against them. Such a differentiation necessarily involves determining the decisionmakers' subjective states of mind when acting on the preference legislation. Hence, in using this because of—in spite of distinction, the *Feeney* Court not only defined the level of intent required under *Davis's* discriminatory purpose standard, but also adopted a subjective intent method as the means of proving the existence of such purposeful discrimination.¹⁰⁷

¹⁰⁰ *Id.* Plaintiff's argument is based on a concept, common to both civil and criminal law, that "[i]ntended consequences include those which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire)." Brief for the Appellee at 33-34 (citing Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905, 911 (1939)).

¹⁰¹ 442 U.S. at 276. See note 49 *supra* for a statistical breakdown of the statute's disproportionate impact.

¹⁰² Justice Stevens, concurring in *Washington v. Davis*, had suggested that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." 426 U.S. at 253. See also *Monroe v. Board of Comm'rs*, 391 U.S. 450, 459 (1969) (applying the inevitability rule in school segregation cases).

¹⁰³ Although the *Davis* Court imposed a discriminatory purpose standard, the Supreme Court has never defined the exact level of legislative intent required by *Davis's* holding. See text and notes at notes 219-31 *infra*.

¹⁰⁴ 442 U.S. at 278.

¹⁰⁵ *Id.* at 279.

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ In footnote twenty-four the Court seems to place a limitation on the applicability of this subjective intent method of proof by stating that "proof of discriminatory intent must necessarily *usually* rely on objective factors . . ." *Id.* at 279 n.24.

Reviewing the additional evidence contained in the record,¹⁰⁸ the Court concluded that the plaintiff had been unable to meet this burden of proof, since "nothing in the record demonstrat[ed]" that the veterans' preference was enacted because it would keep women "in a stereotypic and predefined place in the Massachusetts Civil Service."¹⁰⁹ Rather, the Court reiterated, the Massachusetts statute merely preferred veterans of either sex over non-veterans of either sex as a means of accomplishing the worthy state goal of rewarding people for their service in the armed forces.¹¹⁰ Under the rational-basis test¹¹¹ as applied by the Court, the validity of this goal and the appropriateness of the statute's means were more than sufficient to protect the absolute, lifetime preference from constitutional challenge.¹¹²

Justice Stevens, joined by Justice White, filed a concurring opinion in which he agreed with the Court's holding, but expressed confusion over the majority's formulation of its two-fold inquiry.¹¹³ When reviewing a law that is neutral on its face but disproportionate in its impact, Justice Stevens agreed that it was appropriate to ensure the absence of any overt classification. Having determined this issue, however, he found it unnecessary to question whether the statute contained a covert classification, since this inquiry was no different than asking whether the adverse impact of the statute reflected invidious discrimination.¹¹⁴ Irrespective of the question's phrasing, Justice Stevens considered the number of male non-veterans disadvantaged by the Massachusetts veterans' preference sufficiently large to rebut any claim of gender discrimination. This view was specifically rejected by Justices Marshall and Brennan, in their dissent.¹¹⁵

¹⁰⁸ *Id.* at 279-80. Again the Court stated that the statutory history of the veterans' preference demonstrated that any person who was a veteran enjoyed the benefit of the act, and that the definition of the veteran class had been expanded to include women who had served in the military. *Id.* at 270. See text and note at note 64 *supra*. Additionally, the Court briefly addressed plaintiff's contention that the legislative and administrative history revealed that discriminatory assumptions about the suitable roles of women had influenced the legislative choice of providing an absolute, lifetime preference. The Court summarily dismissed this argument by stating that the history of the statute defeated such a claim by demonstrating that Massachusetts had both included military women within the scope of the preference and recognized the contribution of women to the nation's military efforts. *Id.* at 280 n.27.

¹⁰⁹ *Id.* at 279.

¹¹⁰ *Id.* at 280.

¹¹¹ See text and note at note 146 *infra*.

¹¹² 442 U.S. at 280-81.

¹¹³ *Id.* at 281 (Stevens, J., concurring).

¹¹⁴ *Id.*

¹¹⁵ *Id.* Justice Stevens reasoned that the number of males (1,867,000) disadvantaged by the Massachusetts veterans' preference was sufficiently close to the number of females (2,954,000) disadvantaged by the statute to "refute the claim" of gender discrimination. *Id.* (Stevens, J., concurring). Although recognizing the relevance of the substantial number of men disadvantaged by the veterans' preference, Justices Marshall and Brennan thought it equally important to note that only 0.8% of women are veterans; whereas, 47% of Massachusetts men achieve veteran status. *Id.* at 286 n.3 (Marshall and Brennan, JJ., dissenting). Because of this disparity, the dissenters contended that the number of men denied a preference could not be dispositive of whether gender discrimination had influenced the Massachusetts legislation. *Id.*

B. *The Feeney Dissent*

Justice Marshall, joined by Justice Brennan, dissented on four grounds from the holding that the legislative choice of an absolute, lifetime veterans' preference did not reflect gender-based discrimination.¹¹⁶ As a starting point, Justice Marshall disagreed with the majority's logic that the primary benevolent purpose of the veterans' statute foreclosed the possibility of a subsidiary objective to disadvantage women.¹¹⁷ In support of this view, Marshall relied upon the Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,¹¹⁸ which acknowledged that legislators frequently seek to accomplish multiple goals and are rarely motivated by a single concern.¹¹⁹ Given this reality, Justice Marshall reasoned that the presence of a dominant, legitimate purpose could not, by itself, exclude the possibility of an unconstitutional subsidiary objective. Justice Marshall stressed that the appropriate inquiry was not whether an illicit consideration was *the* causative reason for enacting the statute, but rather whether it was *a* motivating factor in shaping otherwise legitimate legislation.¹²⁰

Finding the majority's analysis incomplete, the dissenters attempted to discern whether a collateral discriminatory purpose had influenced the Massachusetts preference legislation. In conducting this inquiry, Justice Marshall criticized a second aspect of the majority's opinion—the requirement of establishing the legislators' "because of" subjective intent.¹²¹ Warning that evidence of a decisionmaker's subjective intentions was neither reliable nor available, Justice Marshall underscored the necessity of relying on inferences obtained from objective evidence.¹²² For this reason Justice Marshall stated, the Court had typically considered the "degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available" when evaluating the purposes underlying a facially neutral law.¹²³ Applying this analysis to the facts of *Feeney*, the dissent contended that the exclusionary impact of the absolute preference followed not just foreseeably but "inexorably" from the military's enrollment and advancement restrictions.¹²⁴ Hence, relying on the Court's recent decision in *Castaneda v. Partida*,¹²⁵ Justice Marshall argued that the foreseeable adverse result, caused by preferring a group pre-defined as 98% male, shifted the burden to the state to establish that no gender-based consideration had influenced the legislative choice.¹²⁶ The state would be unable to meet this burden, Justice Marshall reasoned, since the statutory history of the veterans' act revealed that the law's operation had

¹¹⁶ *Id.* at 281-82 (Marshall and Brennan, JJ., dissenting).

¹¹⁷ *Id.* at 282.

¹¹⁸ 429 U.S. 252 (1977).

¹¹⁹ *Id.* at 265.

¹²⁰ 442 U.S. at 282-83.

¹²¹ *Id.* at 283.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ 430 U.S. 482 (1977).

¹²⁶ 442 U.S. at 284.

been exempted from jobs "especially calling for women."¹²⁷ This exemption, coupled with the absolute preference itself, resulted in a two-tier civil service system with women occupying lower-level secretarial jobs and men holding more responsible and remunerative positions.¹²⁸ Given the state's attempt to mitigate the statute's impact only with respect to traditional female jobs, Justice Marshall criticized the majority's holding that "nothing in the record evinces a collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service."¹²⁹ Instead, he concluded that the statutory scheme of the veterans' preference reflected and perpetuated the very kind of discriminatory assumptions about the role of women which the Court previously had held invalid.¹³⁰

Concluding that the relegation of women to traditional subservient positions would prevent the state from rebutting the presumption of gender discrimination, the dissenters would have subjected the veterans' statute to an intermediate level of review.¹³¹ Under this standard, the veterans' act could be sustained only if the means by which it benefitted veterans were substantially related to important governmental objectives.¹³² While acknowledging the validity of the statute's three stated goals, Justice Marshall argued that the absolute form of the veterans' preference was not substantially related to any of these objectives.¹³³ With respect to the first goal, easing a veteran's transition to civilian life,¹³⁴ he contended that the lifetime preference was clearly too broad, since it benefitted all veterans irrespective of their date of discharge.¹³⁵ The statute's second objective, encouraging military enlistment,¹³⁶ was even less plausible since there was no showing that the possibility of obtaining a civil service position upon discharge actually induced people to enter the armed forces.¹³⁷ Even the statute's last goal, rewarding veterans,¹³⁸ was insufficient to justify the statute's absolute and permanent form, since alternative, more limited hiring preferences could accomplish this same purpose

¹²⁷ *Id.* at 284-85.

¹²⁸ *Id.*

¹²⁹ *Id.* at 285-86.

¹³⁰ *Id.* at 285.

¹³¹ *Id.* at 286.

¹³² *Id.* Statutes that reflect gender-based discrimination are subjected to a more relaxed judicial scrutiny than are statutes suspected of discrimination on the basis of race, alienage, or national origin. See text and note at note 152 *infra*. In *Craig v. Boren*, 429 U.S. 190 (1976), the Court established that "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to those objectives." *Id.* at 197.

¹³³ 442 U.S. at 286.

¹³⁴ In support of the absolute preference, Massachusetts advanced three governmental objectives: (1) assisting veterans in their readjustment to civilian life; (2) encouraging patriotic service [military enlistment]; and (3) rewarding those who have sacrificed in the service of their country. See Brief for the Appellants at 24, *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979). See generally *Hutcheson v. Director of Civil Serv.*, 361 Mass. 480, 281 N.E.2d 53 (1972).

¹³⁵ 442 U.S. at 286.

¹³⁶ See note 134 *supra*.

¹³⁷ 442 U.S. at 287.

¹³⁸ See note 134 *supra*.

without foreclosing the public employment opportunities of women.¹³⁹ For these reasons, the dissent concluded that the Massachusetts absolute veterans' preference violated the equal protection clause of the fourteenth amendment.¹⁴⁰ Before considering whether this conclusion is indeed correct, the following critique will examine the validity of the majority's analytic approach.

II. CRITIQUE OF THE SUPREME COURT'S ANALYSIS

Since the Massachusetts veterans' preference was neutral on its face but disproportionate in its impact, the *Feeney* Court formulated a two-step inquiry. The Court thought it necessary to question first whether the law was truly neutral in the sense that it contained neither an overt nor a covert gender classification. If the Court held the statute to be neutral in fact, then it would analyze the law in accordance with the analysis and holding in *Washington v. Davis*.¹⁴¹ Under this second inquiry, the *Feeney* Court questioned whether the statute's disproportionate impact on women reflected an invidious discriminatory purpose.

Focusing on the issue of classification, the following critique questions the validity of the Court's two-step inquiry. The nature and function of overt and covert classifications first will be discussed. It will be submitted that a three-step analysis is necessary to determine the existence of these classifications. Applying this three-step test to the Massachusetts veterans' preference, it will be demonstrated that the identification of a covert classification is itself dependent upon a determination of discriminatory purpose. Finally, since the subject of the Court's first inquiry—covert classifications—is itself dependent upon the topic of the second inquiry—discriminatory purpose—it will be concluded that the *Feeney* Court misformulated its two-step analysis.

A. First Inquiry: Overt or Covert Classification

1. Traditional Equal Protection Analysis

The fourteenth amendment to the United States Constitution guarantees each individual equal protection under the law.¹⁴² While this guarantee may be stated simply, it becomes complicated in practice since laws must categorize

¹³⁹ 442 U.S. at 287-88. Specifically, Justice Marshall mentioned the limited point preferences used by the majority of the states and the federal government. As an alternative, Justice Marshall suggested limiting the Massachusetts absolute, lifetime preference to a specific duration of time so that veterans might still be rewarded, but women would not be excluded from the best civil service positions. *Id.*

¹⁴⁰ 442 U.S. at 288.

¹⁴¹ 426 U.S. 229 (1976).

¹⁴² The fourteenth amendment states in pertinent part that "No state shall . . . deny to any person in its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. A law is equal when it treats similarly situated persons in the same manner. There is, however, no requirement that a law identically treat persons in dissimilar positions. Hence, while equal protection under the laws is guaranteed by the fourteenth amendment, equal results from the laws is not. See generally *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

individuals, distinguishing between those within and without their reach. Given this reality, the Supreme Court has stated that the equal protection clause of the fourteenth amendment does not strip the states of their power to classify individuals;¹⁴³ rather it commands that these statutory classifications be reasonable.¹⁴⁴ Evaluating the reasonableness of a challenged classification is, therefore, the central aim of the traditional equal protection analysis.¹⁴⁵

Under this analysis, most classifications rationally related to a reasonable governmental objective are presumed valid.¹⁴⁶ If, however, a law involves identifiable minority groups traditionally the targets of discrimination and disadvantage, the Court is far more skeptical of the statute's purported purpose.¹⁴⁷ Hence, any statute explicitly distinguishing individuals on the basis of their race,¹⁴⁸ alienage,¹⁴⁹ national origin,¹⁵⁰ or gender¹⁵¹ is said to erect an

¹⁴³ See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam).

¹⁴⁴ The reasonableness of a classification is measured by a means-end analysis. See generally G. GUNTHER, *CONSTITUTIONAL LAW* 665-90 (1975). If the statutory classification, or means, is sufficiently related to the law's purpose, or end, then the classification is deemed reasonable. *Id.* Since the degree of congruence actually required varies with respect to the group being classified, the Court has developed three standards of review, or "means tests," by which to measure the validity of a challenged classification. See text and notes at notes 146-52 *infra*. For the classic discussion of the doctrine of reasonable classification, see Tussman and tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949) [hereinafter cited as Tussman and tenBroek].

¹⁴⁵ See generally Tussman and tenBroek, *supra* note 144.

¹⁴⁶ See generally G. GUNTHER, *CONSTITUTIONAL LAW* 665-90 (1975). While wholly arbitrary overt classifications are forbidden under this basic test, any overt classification rationally related to a reasonable governmental objective is sustained. In *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), the Court discussed this minimal rationality standard as follows: "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify, . . . but admits of the exercise of a wide scope of discretion in this regard, and avoids what is done only when it is without any reasonable basis and therefore purely arbitrary." *Id.* at 78.

¹⁴⁷ *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (Justice Stone forecast in 1938 that a stricter judicial scrutiny would be required if a "discrete and insular" minority were the target of legislative discrimination).

¹⁴⁸ See *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (racial segregation held invalid); *Loving v. Virginia*, 388 U.S. 1 (1968) (state miscegenation laws held unconstitutional). When originally adopted, the primary aim of the fourteenth amendment was the elimination of racial discrimination. Hence, an explicit statutory distinction based on race is the paradigm suspect classification.

¹⁴⁹ In *Graham v. Richardson*, 403 U.S. 365 (1971), Justice Blackmun announced that "aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened solicitude is appropriate." *Id.* at 372. See also *Sugarman v. Dougall*, 413 U.S. 634 (1973). While classifications based upon alienage made by state governments are considered suspect, such classifications made by the federal government are not. *Cf. Mathers v. Diaz*, 426 U.S. 67, 79-80 (1976) (upholding a federal medicare statute giving some aliens benefits and denying them to others).

¹⁵⁰ See, e.g., *Oyama v. California*, 332 U.S. 633, 646 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

¹⁵¹ See, e.g., *Orr v. Orr*, 440 U.S. 268, 278-79 (1979) (since a statutory scheme provides that different treatment be accorded individuals on the basis of their sex, "it

overt discriminatory classification. Since these overt classifications are presumed to result from purposeful discrimination, each triggers a heightened standard of review under which the state must establish the validity of its purpose and the reasonableness of its classification.¹⁵²

Although the most obvious equal protection violations involve overt classifications, the Court has recognized that discriminatory classifications can also be concealed within the law itself.¹⁵³ Unfortunately, however, the Court has never explicitly defined the role which these "covert" classifications play in the equal protection analysis. Nevertheless, close analysis of *Guinn v. United States*,¹⁵⁴ reveals that an important difference exists between the function of an overt classification in creating a presumption of discrimination and the role of a covert classification, which can itself be identified only after purposeful discrimination has been established.

thus establishes a classification subject to scrutiny under the Equal Protection Clause."). See also *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁵² Classifications based on race, alienage, or national origin are, in the Court's view, suspect and presumptively discriminatory. The mere presence of an overt suspect classification triggers strict judicial scrutiny. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court announced:

[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public policy may sometimes justify the existence of such restrictions; racial antagonism never can.

Id. at 216. Under this standard of review, the state can rebut the presumption of discrimination only by establishing that the statute furthers a compelling state interest by the least restrictive alternative.

Like minority groups, women have also been the victims of historical discrimination. Justice Brennan, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), compared the 19th-century position of women in the United States to that of blacks under the pre-Civil War slave codes:

Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardian of their own children. . . . [A]nd although blacks were guaranteed the vote in 1870, women were denied even that right—which is itself "preservative of other basic and civil and political rights"—until adoption of the Nineteenth Amendment half a century later.

Id. at 685. A majority of the Court, however, while recognizing that explicit gender classifications should trigger some heightened standard of review, has never agreed that such classifications are suspect and, thus, deserving of the strictest judicial scrutiny. Instead, the Court has developed a third, intermediate standard of review to measure the validity of gender-based distinctions. As *Craig v. Boren*, 429 U.S. 190 (1976), firmly established, "classifications by gender must serve important governmental objectives and must be substantially related to those objectives." *Id.* at 197. See also *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁵³ See *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (the fifteenth amendment "nullifies sophisticated as well as simple-minded modes of discrimination."). Cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (discovering the existence of covert discrimination, not covert classification); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (discriminatory application).

¹⁵⁴ 238 U.S. 347 (1915).

In *Guinn*, the Court considered the validity of a 1909 amendment to Oklahoma's state constitution.¹⁵⁵ This amendment, while imposing a literacy test as a condition to voting, contained a "grandfather" clause which exempted from the literacy requirement any person, or "lineal descendant of such . . . person who was, on January 1, 1866, or anytime prior thereto, entitled to vote."¹⁵⁶ The Court's evaluation of this provision entailed three distinct steps. Initially, in considering the explicit language of the amendment, the Court stated that there were "no express words" classifying people on the basis of race.¹⁵⁷ The Court thus concluded that the Oklahoma amendment did not erect an overt racial classification. Turning next to the amendment's actual operation, the Court observed that the grandfather clause "inherently brings that result into existence" since it related back to January 1, 1866, a period of time when most blacks did not have the right to vote.¹⁵⁸ Hence, the Court reasoned, while the amendment seemingly imposed a literacy test on all persons, the grandfather clause exempted whites from this requirement, and, thus, applied the literacy standard only to blacks.¹⁵⁹ Having uncovered a classification incorporated within the Oklahoma amendment, the Court next searched for the purpose behind choosing the 1866 date. "Unable to discover . . . the slightest reason for basing the classification upon a period of time prior to the enactment of the Fifteenth Amendment," the Court concluded that the real purpose of Oklahoma's state amendment was to deny blacks the right to vote.¹⁶⁰

By unmasking this intentionally concealed discriminatory purpose, the Court revealed that the Oklahoma amendment contained a covert racial classification, and thus violated the fifteenth amendment to the United States Constitution.¹⁶¹ Unlike overt classifications, which are immediately apparent from the statutory language, the *Guinn* Court's identification of a covert classification depended in part upon its determination that the purpose underlying the amendment was discriminatory. This critical difference in analysis between identifying an overt classification and discovering a covert classification

¹⁵⁵ *Id.* at 356-57.

¹⁵⁶ The amendment provided:

No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at anytime prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

Id. at 357.

¹⁵⁷ *Id.* at 364.

¹⁵⁸ *Id.* at 364-65.

¹⁵⁹ *Id.* at 365.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* The fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

defines the role which each classification plays in the equal protection analysis. Easily apparent overt classifications provide a starting point for the Court's equal protection inquiry by creating a presumption of purposeful discrimination. In contrast, a finding of purposeful discrimination is first necessary to uncover the existence of a covert classification. Hence, rather than marking the starting point of the Court's search for purposeful discrimination, the identification of a covert classification instead signals the end of the Court's analysis. Although the distinction between the function of an overt classification and the less significant role of a covert classification may seem unimportant, the following suggested analysis of the Massachusetts veterans' preference reveals that the differentiation at times can be critical.

2. The Three-Step Analysis Applied

A specific three-step test can be derived from the *Guinn* Court's analysis of the Oklahoma constitutional amendment. First, the Court examined the express statutory language to determine if the amendment established an overt racial classification.¹⁶² Next, the Court scrutinized the inherent structure of the amendment to determine if it contained a concealed classification.¹⁶³ Finally, the Court questioned whether this classification had been purposefully incorporated within the amendment.¹⁶⁴

Applying the *Guinn* Court's three-step analysis to the Massachusetts absolute preference reveals distinct similarities and differences between the veterans' statute and the Oklahoma amendment. Initially, it is apparent from a consideration of the explicit language used in the veterans' act that the Massachusetts law contains "no express words" distinguishing men from women. The statute merely provides that veterans shall be given preference over non-veterans in attaining civil service positions.¹⁶⁵ Thus, like the Oklahoma amendment, the veterans' preference does not establish an overt classification. The absence of an overt classification does not, however, preclude the possibility that the Massachusetts statute contains a concealed gender classification. In fact, just as the grandfather clause incorporated the results of prior discrimination against blacks, so does the absolute preference by its necessary operation embody the military's past discrimination against women.¹⁶⁶ The military's enrollment quota resulted in an armed forces personnel consisting of 98% men and 2% women.¹⁶⁷ As Judge Campbell correctly observed, this classification was necessarily built into the absolute preference since only those

¹⁶² 238 U.S. 347, 364 (1915).

¹⁶³ *Id.* at 364-65.

¹⁶⁴ *Id.* at 365.

¹⁶⁵ See note 2 *supra*.

¹⁶⁶ Since the Massachusetts veterans' preference is both absolute and permanent, the results of the military's discrimination are actually "frozen" into the statute, thus eliminating women from consideration for civil service positions. Under the limited hiring techniques, although the military's past practices preclude women from being preferred, many female applicants still have access to civil service positions by virtue of their high composite test scores.

¹⁶⁷ See note 33 *supra*.

allowed entrance to the military could attain the preferred veteran status and, thus, be considered for appointment to the best civil service positions.¹⁶⁸

Although the concealed classification formed by the interaction of the Massachusetts veterans' statute with the military's discriminatory practices is technically neutral in that a few women can attain the preferred veteran status, this formal neutrality should make no difference for equal protection purposes.¹⁶⁹ The equal protection clause commands that classifications be reasonable.¹⁷⁰ If the handful of women allowed entry to the military could equalize an otherwise discriminatory classification, the equal protection guarantee would be meaningless. Thus, the Massachusetts veterans' preference should be deemed, like the Oklahoma amendment, to contain an inherent concealed classification.

Finally, the question whether this concealed classification was purposefully incorporated within the Massachusetts veterans' preference must be considered. At this final point of inquiry, the veterans' law and the Oklahoma amendment critically differ. While not even the "slightest [valid] reason" could be discerned for choosing the 1866 literacy standard,¹⁷¹ the Massachusetts absolute preference does promote a primary, legitimate purpose—rewarding veterans.¹⁷² Hence, a plausible rationale for adopting an absolute form of hiring preference that freezes the military's past discrimination into Massachusetts law can be advanced. Nevertheless, as dissenting Justices Marshall and Brennan observed, the mere existence of a dominant legitimate purpose cannot, by itself, foreclose the possibility of a collateral discriminatory objective.¹⁷³ Thus the dispositive question becomes whether the Massachusetts legislature attempted to benefit its veterans by accomplishing the subsidiary objective of discriminating against women. On one hand, if such a discriminatory purpose influenced the Massachusetts legislation, the veterans' statute will be deemed to contain a covert gender classification.¹⁷⁴ If, on the other hand, no discriminatory purpose affected the Massachusetts decision-makers' choice, the actual incorporation of the military's past discrimination against women will be deemed a mere incident of accomplishing a worthy state objective. Absent purposeful discrimination, therefore, the veterans' preference, although embodying an inherent gender classification, will be held not to contain a covert gender classification under the *Guinn* three-step test.

Presumably because purposeful discrimination dictates whether a concealed classification is covert or not, Justice Stevens, concurring in *Feeney*, stated that no real difference existed between asking whether the Massachusetts veterans' preference contained a covert gender classification and

¹⁶⁸ *Feeney v. Massachusetts*, 451 F. Supp. at 151. See also text at notes 80-81 *supra*.

¹⁶⁹ See Fleming & Shanor, *supra* note 4, at 21-22.

¹⁷⁰ See text and notes at notes 142-55 *supra*.

¹⁷¹ See text at note 160 *supra*.

¹⁷² See note 134 *supra*.

¹⁷³ See text at notes 117-20 *supra*.

¹⁷⁴ See text at notes 160-61 *supra*.

questioning whether the statute resulted from purposeful discrimination.¹⁷⁵ As will be seen, the *Feeney* majority's apparent failure to understand this similarity when formulating its two-step inquiry led, in part, to the Court's repetitive and disorderly opinion.

3. The Two-Step Approach in *Feeney*

Contrasting the foregoing three-step analysis with the *Feeney* majority's two-step inquiry reveals defects implicit in the Court's formulation of its analytical approach. Unlike the three-step analysis, the analytical approach formulated by the *Feeney* majority contained only two independent inquiries. The *Feeney* Court first considered whether the veterans' statute contained an overt or a covert classification.¹⁷⁶ Only after answering this question did the Court deem it necessary to consider whether a discriminatory purpose had influenced the veterans' preference legislation.¹⁷⁷ The formulation of this twofold inquiry contains two misleading defects. By isolating the covert classification question in the first inquiry from the role of purposeful legislative discrimination in the second inquiry, the Court indicated that these issues could be determined independently. Yet as already demonstrated,¹⁷⁸ uncovering a covert classification necessarily depends upon a finding of purposeful discrimination. Conversely, by coupling the overt and covert issues within the same inquiry, the Court implied that these classifications perform similar functions within the equal protection analysis. As previously discussed, however, overt classifications create a presumption of discrimination, thus signaling the starting point of the Court's heightened scrutiny.¹⁷⁹ In contrast, covert classifications are not finally identified until the end of the Court's analysis, after a discriminatory purpose has been uncovered. A statute

¹⁷⁵ 442 U.S. at 281 (Stevens, J., concurring). See text and notes at notes 113-15 *supra*. If extended, Justice Stevens' observation could bring necessary clarity to the untraditional equal protection analysis applied to facially neutral laws which result in disparate impacts. As the *Feeney* decision demonstrates, undue significance is currently placed on the discovery of covert classifications. See text and notes at notes 176-87 *infra*. This result may be the product of two factors. First, as previously discussed, the importance of overt discriminatory classifications in the traditional equal protection analysis has led to the misformulation of the function of covert classifications in the disproportionate impact context. See text and notes at notes 142-61 *supra*. Further, and perhaps the major source of confusion, the courts have failed to realize that a statute containing a covert classification is simply a facially neutral law whose disproportionate impact is produced by a discriminatory purpose. Once this fact is realized, the fundamental judicial inquiry, when examining a facially neutral statute, will be forcefully identified as a search for discriminatory purpose and not the discovery of a covert classification. Moreover, in conducting this analysis, it should become apparent to the courts that the catalytic role of overt classifications in creating a presumption of discrimination is most closely approximated, not by that of covert classifications, but by the function which disproportionate impact performs in providing the "important starting point" for the search of purposeful discrimination. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

¹⁷⁶ 442 U.S. at 274. See text at notes 47-52 *supra*.

¹⁷⁷ 442 U.S. at 274.

¹⁷⁸ See text at notes 160-61 *supra* and text following note 161 *supra*.

¹⁷⁹ See text following note 161 *supra*.

containing a covert classification, therefore, may be characterized as simply a facially neutral law whose disproportionate impact is produced by a discriminatory purpose. For this reason the *Feeney* Court was mistaken in formulating its two-step approach since it considered the question of covert classification independently from the issue of discriminatory purpose.

Compounding the confusion created by these conceptual inaccuracies, the *Feeney* Court misapplied its own analytical formula. By positing its two-step approach as two independent and alternative inquiries, the Court indicated that it would consider the classification questions first, and then, if necessary, would discern the purposes underlying the preference legislation.¹⁸⁰ In application, however, the Court did the opposite. In conducting the first phase of its analysis, the *Feeney* Court questioned whether the veterans' statute contained a covert gender classification.¹⁸¹ Rather than examine the inherent operation of the absolute preference, however, the Court discussed the statute's purpose and its impact.¹⁸² Presumably, these considerations were more appropriate in the second phase of its two-step inquiry.¹⁸³

Apart from the disjointed nature of this inquiry, the Court's analysis itself was superficial. Satisfied that the legitimacy of the act's primary purpose foreclosed the possibility of a covert gender classification, the Court never addressed the dispositive issue of whether a collateral discriminatory purpose had influenced the legislature's choice of means. In order to explain the statute's adverse impact in a neutral fashion, the Court merely restated the fact that women comprised only 2% of armed forces personnel. This, however, begged the real question of whether the absolute preference contained a purposefully concealed covert classification by virtue of its interaction with the military's enrollment quota.¹⁸⁴

¹⁸⁰ 442 U.S. at 274. Specifically, Justice Stewart stated: "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination." *Id.*

¹⁸¹ *Id.*

¹⁸² Initially, the Court determined that the veterans' preference contained no express words [being neutral on its face] distinguishing between men and women, and thus did not erect an overt gender classification. *Id.* at 274. Then, relying in part on the district court's two central findings that the Massachusetts preference served a worthy purpose, and was not established for the purpose of discriminating against women, the Court concluded that the veterans' statute was "not a pretext for gender discrimination." *Id.* at 274-75. Having noted the primary legitimate purpose of the veterans' statute, the Court next turned to the law's impact, explaining that the adverse effect on women could actually be explained on neutral grounds. *Id.* at 275. Finally, the Court concluded that the legitimate purpose of the veterans' act provided the "surest explanation for its impact." *Id.* See text at notes 54-71 *supra*.

¹⁸³ See note 180 *supra*.

¹⁸⁴ 442 U.S. at 275. The Court noted that Massachusetts' definition of veteran was neutral as to gender. Since the military's enrollment quota had already established an armed forces personnel ratio of 98% men and 2% women, however, the actual neutrality of Massachusetts' definition of veteran is not dispositive of whether the veterans' statute contains a discriminatory classification.

Having never truly investigated whether the Massachusetts statute contained a covert classification, the Court next turned to the second part of its two-step inquiry, and considered whether a discriminatory purpose had shaped the preference legislation.¹⁸⁵ Ironically, the first question addressed and rejected by the Court involved plaintiff's contention that the veterans' act was inherently non-neutral,¹⁸⁶ an argument more appropriately analyzed under the Court's first inquiry. By considering the purpose underlying the absolute preference in its first inquiry, and the inherent structure of the veterans' statute in the second, the *Feeney* Court not only misapplied its two-step analysis, but also reversed the logical order of determining the existence of covert classification as already demonstrated through explanation of the *Guinn* Court's three-step treatment. The *Feeney* Court's misformulation and misapplication of its analytical approach resulted in a seemingly illogical and incomplete opinion, since the Court continually appeared to be using the wrong analysis to determine whether the Massachusetts statute contained a covert gender classification. This result may have been caused by the Court's failure to truly appreciate the hybrid nature of a covert classification. It is more likely, however, that the superficial treatment given the classification issue stems from a belief that the veterans' statute is simply a neutral law with a disproportionate impact, thus deserving analysis in accordance with the purposeful discrimination standard developed in *Washington v. Davis*.¹⁸⁷

B. Second Inquiry: Existence of Purposeful Gender Discrimination

The Supreme Court in *Feeney* treated the Massachusetts absolute preference as a neutral law which disproportionately excludes women from public employment positions. This treatment entailed a two-step extension of the *Washington v. Davis* holding. First, the Court extended the purposeful discrimination requirement developed in the racial context of *Davis* to the gender issue raised in *Feeney*.¹⁸⁸ Second, in fashioning a subjective "because of—in spite of" distinction to differentiate allowable from unconstitutional legislative motivation, the *Feeney* Court explicitly defined the level of intent required under *Davis*'s discriminatory purpose standard.¹⁸⁹ Focusing on both aspects of the Court's two-step extension, the following critique first questions the applicability of *Davis*'s purposeful discrimination standard to the gender issue involved in the *Feeney* case. An examination of the holding and rationale of the *Davis* decision will demonstrate that in measuring the constitutionality of the veterans' statute the *Feeney* Court should have applied a two-prong

¹⁸⁵ 442 U.S. at 276.

¹⁸⁶ *Id.* at 276-78. The plaintiff had argued that the absolute veterans' preference statute incorporated the military's historical discrimination against women and, therefore, was structurally non-neutral. See text and notes at notes 77-81 *supra*. Under the alternative analysis suggested in this casenote, at text and notes at notes 162-75 *supra*, this contention represents a question of classification, inherent to the statute itself. If such a classification is found "concealed" within the statute, then the appropriate inquiry involves whether this result was purposefully or coincidentally produced.

¹⁸⁷ 426 U.S. 229 (1976).

¹⁸⁸ 442 U.S. at 273-74.

¹⁸⁹ *Id.* at 279.

standard. Initially the Court should have asked whether the law's adverse impact reflected purposeful discrimination. Additionally, the Court should have determined whether the adverse effect resulted from the influence of archaic gender assumptions on the legislative decision to adopt and preserve the absolute veterans' preference. After concluding that the Court improperly extended *Davis's* holding to the *Feeney* case, the final section of this casenote will critique the Court's definition of the level of intent required to satisfy *Davis's* discriminatory purpose standard.

1. Extension of *Davis's* Discriminatory Purpose Standard

In *Washington v. Davis*, the Court considered the constitutionality of a written personnel test administered by the District of Columbia Police Department to screen prospective police officers.¹⁹⁰ Although neutral on its face, the personnel test excluded a disproportionate number of black applicants, and thus was challenged as discriminating on the basis of race.¹⁹¹ Although acknowledging that "disproportionate impact [was] not irrelevant,"¹⁹² the *Davis* Court stated that impact alone was insufficient to trigger a heightened standard of review.¹⁹³ Rather, the Court announced that the disproportionate impact of an otherwise neutral law must be traced to an underlying "purpose or intent" to discriminate.¹⁹⁴ If established, this purposeful discrimination would require strict judicial scrutiny.¹⁹⁵

In adopting this discriminatory purpose standard, the *Davis* Court appears to have been concerned with protecting from invalidation wholly innocent laws which "in practice . . . benefit or burden one race more than another."¹⁹⁶ The Court warned that if the validity of such statutes were measured by a result standard, rather than by a standard requiring evidence of illicit legislative intent, "a whole range of tax, welfare, public service, regulatory, and licensing statutes" could be declared unconstitutional.¹⁹⁷ Presumably to avoid this result, the Supreme Court has emphasized that the equal protection clause guarantees equality under the law, but not equal results from the

¹⁹⁰ 426 U.S. 229, 232 (1976).

¹⁹¹ *Id.* at 236.

¹⁹² *Id.* at 242.

¹⁹³ *Id.* Justice White stated:

[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of the government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id.

¹⁹⁴ *Id.* at 240.

¹⁹⁵ See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-66 (1977).

¹⁹⁶ 426 U.S. 229, 248 (1976).

¹⁹⁷ *Id.*

law.¹⁹⁸ The basic concept expressed through this construction, and implicit in the *Davis* Court's protective rationale, is that a condition offensive to the constitution—including, but not necessarily limited to, purposeful discrimination—must be established before a neutral statute with unequal results deserves a heightened standard of review. This rationale is broad enough to justify heightened judicial scrutiny of a statute with disproportionate results produced by *any* unconstitutional consideration. The holding in *Davis* was limited to a discriminatory purpose because, in the racial context, that was the single consideration which violated the constitution.¹⁹⁹ As the *Davis* Court emphasized, a purpose or intent to discriminate is the one "differentiating factor" between allowable and impermissible state action.²⁰⁰ Consequently, the *Davis* Court developed a single discriminatory purpose standard and held that the racially disproportionate impact of a facially neutral law must be traced to an underlying discriminatory purpose.²⁰¹

The extent to which this single discriminatory purpose standard should be transferred from the racial context of *Davis* to the gender context of *Feeney*, depends on whether a legislative discriminatory purpose is the *only* condition which constitutes invidious gender discrimination, thus violating the constitution. Gender discrimination, however, has been found to include more than a conscious legislative intent to discriminate against women.²⁰² The Supreme Court previously has recognized that women are caught in a circular trap.²⁰³ Their history of subordination in this country has fostered false presumptions concerning the suitable role of women in society. This inaccurate role stereotyping has perpetuated the exclusion of women from many business, professional, and employment positions.²⁰⁴ These exclusions in turn reinforce the archaic notions about the role of women. Writing for a plurality of the Court in *Frontiero v. Richardson*,²⁰⁵ Justice Brennan observed that "as a result" of this process "our statute books [are] laden with gross, stereotyped distinctions between the sexes [which] . . . often have the effect of invidiously relegating the entire class of females to inferior legal status."²⁰⁶ For this reason, the Court has held in several cases that a statutory classification based on overbroad and

¹⁹⁸ In *Jefferson v. Hackney*, 406 U.S. 535, 548 (1972), the Court rejected a claim of racial discrimination based solely on a law's disparate results because the acceptance of this "theory would render suspect each difference in treatment among the grant classes, however lacking in racial motivation and however otherwise rational the treatment might be." *Id.* See also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977).

¹⁹⁹ See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973), where the Court stated that the "essential element" of unconstitutional segregation is "intentional state action." *Id.*

²⁰⁰ 426 U.S. 229, 240 (1976).

²⁰¹ *Id.* at 239-45.

²⁰² See text and notes at notes 203-14 *infra*.

²⁰³ See Justice Brennan's discussion, in *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973), of the 19th-century position of women, at note 152 *supra*.

²⁰⁴ See generally Blumberg, *supra* note 3, at 52-56; Fleming & Shanor, *supra* note 4, at 36-42.

²⁰⁵ 411 U.S. 677 (1973).

²⁰⁶ *Id.* at 685-87.

archaic assumptions about the dependent role of women constitutes invidious gender discrimination.²⁰⁷

In *Reed v. Reed*,²⁰⁸ for example, the Court rejected the contention "that women still are not engaged in politics, the professions, business or industry to the extent that men are,"²⁰⁹ and invalidated an Idaho statute which gave preference to men over women in the appointment of an estate administrator.²¹⁰ Similarly, in *Frontiero v. Richardson*,²¹¹ the Court invalidated a statute which required only servicewomen to establish the dependency of their spouses before receiving fringe benefits.²¹² Finally, in *Weinberger v. Wiesenfeld*,²¹³ the Court struck down a provision of the Social Security Act which was based on a presumption that women would not contribute to their families' financial support. The Court emphasized that such "archaic and overbroad generalizations [can] not [be] tolerated under the Constitution."²¹⁴ Consequently, while a legislative purpose to discriminate is the one, specific condition which violates the constitution in a racial context, the Court has defined both intentional discrimination and the influence of overbroad gender assumptions as factors offending the constitution in gender cases. Given these dual conditions, *Davis's* single discriminatory purpose standard is an insufficient measure of unconstitutional gender considerations since it would determine only if the legislature had acted with a purpose to discriminate against women, and would not uncover whether inherently discriminatory assumptions about the role of women had shaped the challenged legislation.

This specific shortcoming is clearly demonstrated by the facts of *Feeney*. The most unbiased reconstruction of the legislative state of mind when the Massachusetts veterans' preference was enacted in 1896 would reveal not an intent to disadvantage women, but rather a presumption that women either would not or should not compete with men for civil service positions. This nineteenth century view of women's proper place is reflected in the following excerpt of Justice Bradley's concurring opinion in the 1873 decision of *Bradwell v. State*:²¹⁵

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . as well as the nature of things indicates the domestic sphere as that properly belongs to the domain and functions of womanhood. The harmony . . . of interests and views which belong . . . to the family institution is repugnant to the idea of a woman adopting a distinct and independent career . . .²¹⁶

²⁰⁷ See text and notes at notes 208-14 *infra*.

²⁰⁸ 404 U.S. 71 (1971).

²⁰⁹ See the Supreme Court discussion of *Reed v. Reed*, 404 U.S. 71 (1971), in *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973).

²¹⁰ 404 U.S. 71, 76-77 (1971).

²¹¹ 411 U.S. 677 (1973).

²¹² 411 U.S. 677, 690-91 (1973).

²¹³ 420 U.S. 636 (1975).

²¹⁴ *Id.* at 643. See also *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975).

²¹⁵ 83 U.S. 130 (1872).

²¹⁶ *Id.* at 141.

The view that women are suited for only certain types of jobs is also reflected in *Brown v. Russell*,²¹⁷ an 1896 decision in which the Massachusetts Supreme Judicial Court sustained an early form of the absolute veterans' preference and stated "[w]hen women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done."²¹⁸ Since these discriminatory assumptions probably shaped the Massachusetts legislative choice in adopting an absolute veterans' preference, their perpetuation alone would be sufficient, under a two-prong standard, to produce a gender classification which then triggers a heightened standard of review. Under the single discriminatory purpose standard as applied by the *Feeney* Court, however, such assumptions have no independent significance. Rather, as the Court's opinion demonstrates, these prior assumptions were considered only as evidence of a specific legislative intent to discriminate against women. Although this result was neither mandated by the rationale of *Davis*, nor consistent with the conditions which constitute invidious gender discrimination, the *Feeney* Court extended the holding of *Davis* without alteration or explanation.

Through this first extension, the *Feeney* Court diminished the independent significance of the role which discriminatory gender assumptions played in shaping the Massachusetts preference legislation. As will be seen in the following sections, the *Feeney* Court subsequently eliminated their probative value completely. Although the *Davis* Court explicitly adopted a discriminatory purpose standard, it did not specify the exact level of intent which would be deemed purposeful under this requirement. The *Feeney* case presented the Court with an opportunity to discuss, and for the first time to define, the precise levels of intent necessary to meet *Davis*'s purposeful discrimination standard. The following analysis initially will examine the specific facts before the Massachusetts legislators when originally enacting and subsequently preserving the Massachusetts veterans' preference. Once these facts have been identified, it will be submitted that the Massachusetts legislators were both aware of and indifferent to the adverse effect of the absolute veterans' preference on the public employment opportunities of most women. Finally, it will be suggested that the *Feeney* Court should have adopted a level of intent under which indifference would not be condoned.

2. Development of an Explicit Intent Rule

Initially, as the *Feeney* Court acknowledged, the Massachusetts legislators could not have been "unaware that most veterans are men."²¹⁹ Thus, when originally enacting and subsequently preserving the Massachusetts absolute

²¹⁷ 166 Mass. 14, 43 N.E. 1005 (1896).

²¹⁸ *Id.* at 17, 43 N.E. at 1007.

²¹⁹ 442 U.S. at 278. The Court stated:

And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

Id.

preference, the legislators knew they were also foreclosing the public employment opportunities of most women.²²⁰ Further, because of the widespread use of the more moderate point and tie-breaking preferences,²²¹ the legislators must also have known of these less drastic alternatives which, by virtue of their limited form, would not have eliminated women from consideration for civil service positions. Moreover, as Justice Marshall demonstrated in his dissenting opinion, these alternative hiring preferences, by offering veterans a competitive headstart, accomplished the three traditional goals underlying the preference statutes.²²²

Consequently, the exclusionary impact on women resulting from the absolute preference was not only appreciated by the Massachusetts legislators,²²³ but was also an unnecessary consequence of furthering the statute's objectives.²²⁴ Hence, by choosing and preserving an absolute and permanent veterans' preference in lieu of a more limited preferential technique, the Massachusetts legislature knowingly and needlessly excluded women from the best civil service positions. The immediate question posed by this legislative action is not necessarily whether the Massachusetts decisionmakers subjectively desired to discriminate against women, but rather whether the legislature's deliberate indifference to the devastating impact of an absolute preference on women should be deemed a sufficient level of intent to satisfy *Davis's* purposeful discrimination standard.

The Court has recognized in other areas of law that differing levels of intent should be treated the same for purposes of assigning legal responsibility. In *New York Times v. Sullivan*,²²⁵ for example, the Court held that either actual knowledge of falsity or a reckless disregard for the truth provided a basis for imposing liability in a defamation action.²²⁶ Similarly, for the purpose of assigning criminal responsibility, the courts have made no substantial distinction between a subjective wish to cause harm and a total disregard as to whether such harm occurs.²²⁷

A similar rule of intent, which does not differentiate between a subjective wish to cause harm and a total disregard as to whether such harm occurs, seems particularly appropriate in the *Feeney* context. Since the fourteenth

²²⁰ *Id.*

²²¹ See text and notes at notes 3-8 *supra*.

²²² 442 U.S. at 286-88 (Marshall, J., dissenting).

²²³ Commenting on the exemption of job requisitions "especially calling for women," Justice Marshall reasoned that "the legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations." *Id.* at 284 (Marshall, J., dissenting).

²²⁴ As Justice Marshall demonstrated in his dissent, the Massachusetts absolute veterans' preference was not substantially related to the achievement of the statute's three stated goals. Rather, Marshall suggested that either a point preference or a time-limited absolute preference was sufficient in advancing the legitimate objective of rewarding veterans. *Id.* at 286-88 (Marshall, J., dissenting).

²²⁵ 376 U.S. 254 (1964).

²²⁶ *Id.* at 279-80.

²²⁷ See 1 BISHOP, CRIMINAL LAW § 20 (9th ed. 1939).

amendment guarantees individuals the protection of equal laws,²²⁸ it should make no difference in determining the validity of a challenged statute whether a state legislature enacted a law because of a subjective desire to discriminate or from indifference as to whether such discrimination will result. Specifically, with respect to the Massachusetts absolute veterans' preference, it should make no difference for the purpose of satisfying *Davis's* intent requirement whether the exclusion of women from a major sector of public employment was a product of a legislative desire to exclude women or of indifference to that result. Unfortunately, the *Feeney* Court, by fashioning a "because of—in spite of" distinction to define purposeful discrimination, never directly considered whether a legislative disregard satisfied *Davis's* intent standard.

Although never addressing whether legislative indifference should be deemed purposeful discrimination, the Court in *Feeney* defined at least one level of intent inherent in *Davis's* discriminatory purpose standard. In utilizing the "because of—in spite of" distinction, the Court stated that "discriminatory purpose implies . . . that . . . a legislature, selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of' its adverse effects upon an identifiable [minority] group."²²⁹ Viewed in the abstract, this distinction appears to be valid. The term "because of" connotes a specific, subjective desire on the part of a state legislature to discriminate, an intent obviously prohibited by the equal protection clause. The term "in spite of" connotes a "forced" choice between two competing policy considerations, a task specifically delegated to the legislature by the separation of powers doctrine.²³⁰

Further, this distinction maintains its validity when applied to the basic policy decision to reward veterans by granting them a competitive headstart in attaining public employment. When making this decision, the legislature is confronted with only two choices, both supported by competing policy considerations. Knowing that few women will ever be able to utilize the veterans' preference, the legislature must evaluate whether the policy furthered by rewarding veterans outweighs the handicap inflicted upon women. If the legislature deems this policy to be more important, it will establish a preference in spite of the adverse effect upon women.

Once this basic policy decision is made, however, the "because of—in spite of" distinction loses its applicability since the legislature no longer is forced to choose between only two alternatives. When the Massachusetts legislature decided to adopt the absolute veterans' preference, it was free to choose among many alternative forms of hiring preferences. Hence, its choice of a preference which would permanently exclude women from civil service positions cannot fairly be characterized as one made "in spite of" this adverse effect, but rather must be viewed as a legislative decision made with indifference to the discriminatory impact upon women.

²²⁸ See note 142 *supra*.

²²⁹ 442 U.S. at 279.

²³⁰ See generally P. BREST, *PROCESS OF CONSTITUTIONAL DECISIONMAKING* 351-435 (1975).

Precisely for these reasons, Mrs. Feeney limited her constitutional challenge to the absolute form of the Massachusetts preference, and acknowledged the validity of more limited veterans' preferences.²³¹ The *Feeney* Court, however, by applying its "because of—in spite of" distinction, avoided deciding whether the Massachusetts legislature, through indifference, can knowingly and needlessly sacrifice the employment opportunities of women in order to benefit veterans. To the extent that the Court intended its distinction to implicitly condone such legislative indifference, the protection guaranteed by the fourteenth amendment is diminished since such a decision permits a legislature to knowingly sacrifice the opportunities of one identifiable group in order to grant preferential treatment to another.²³²

CONCLUSION

Although the decision in *Washington v. Davis* laid the foundation for the Court's later determination in *Feeney*, the Court's two-step extension of the *Davis* holding was not required. Concerned with protecting wholly legitimate statutes, the *Davis* Court followed the accepted principle that the fourteenth amendment guarantees equal laws, not equal results, and held that the racially disparate impact of a facially neutral law must be traced to an underlying discriminatory purpose. By extending this holding without properly considering the *Davis* Court's rationale, the Court in *Feeney* ignored the Massachusetts statute's perpetuation of discriminatory gender assumptions. In addition, by requiring the plaintiff to prove that the Massachusetts legislature enacted the absolute veterans' preference specifically because it would discriminate against women, the Court eliminated the significance of these assumptions com-

²³¹ 442 U.S. at 274.

²³² The protection afforded by the equal protection clause is further diminished by the subjective intent requirement adopted by the *Feeney* Court. See text and note at note 107 *supra*. The adoption of this standard could erect an insurmountable barrier for any plaintiff, since establishing the subjective intentions of a legislative body is beyond the realm of practical proof. See text and notes at notes 121-23 *supra*. This difficulty is created by four interrelated factors. First, absent an admission, it is nearly impossible for a plaintiff to determine, much less to prove, the subjective reasons underlying an individual legislator's decision. See Miller, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 HARV. C.R.-C.L. L. REV. 725, 733 (1977). Additionally, legislators are rarely motivated by a single concern. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Hence, even if an illicit consideration could be determined, the plaintiff would be unable to establish the extent to which this one factor influenced the decisionmaker's overall choice. Third, and similarly, since every statute is a product of many different decisionmakers, each acting for separate subjective reasons, it is impossible for a plaintiff to assign an actual intent to the legislative body itself. See Miller, *supra* at 733. Finally, even if the plaintiff could overcome these evidentiary hurdles, the government could easily produce self-serving recitations of its own honorable intentions, thus rebutting any showing of purposeful discrimination. In short, direct evidence of subjective intent is often neither available to the plaintiff, nor reliable from the defendant. For an excellent discussion of a flexible model to be used by the courts in ascertaining legislative intent, see Collotta, *The Role of Circumstantial Evidence in Proving Discriminatory Intent: Developments Since Washington v. Davis*, 19 B.C. L. REV. 795 (1978).

pletely, and allowed the legislature to consciously disregard the occurrence of needless gender discrimination.

This combined effect following the *Feeney* Court's two-step extension of *Davis* serves perhaps as the most compelling reason for choosing a different approach. By ignoring the influence of discriminatory gender assumptions and by requiring the plaintiff to establish the specific subjective intent of the Massachusetts legislature, the *Feeney* Court actually transformed *Davis*'s original objective to protect wholly innocent statutes from invalidation into a shield, sheltering illicit considerations from a heightened standard of review. Realistically, this result should not be viewed as a development of constitutional doctrine, since the equal protection clause commands the Court to scrutinize, not to ignore, discriminatory factors. Nor, for this same reason, should the two-step extension used by the *Feeney* Court be applied to other gender discrimination cases. Rather, *Feeney* should be isolated as a veterans' preference case, and the Court's superficial review of the evidence should be viewed as a product of its decision that the legislature and not the courts should control the method by which veterans are rewarded for their service.²³³

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²³³ In his concluding statement in *Feeney*, Justice Stewart remarked: Veterans' hiring preferences represent an awkward—and, many argue, unfair—exception to the widely shared view that merit and merit alone should prevail in the employment policies of government. After a war, such laws have been enacted virtually without opposition. During peacetime, they inevitably have come to be viewed in many quarters as undemocratic and unwise. Absolute and permanent preferences, as the troubled history of this law demonstrates, have always been subject to the objection that they give the veteran more than a square deal. . . . The substantial edge granted to veterans by [the Massachusetts absolute preference] may reflect unwise policy. The appellee, however, has simply failed to demonstrate that the law in any way reflects a purpose to discriminate

442 U.S. at 280-81.