CONSTITUTIONAL LAW—EQUAL PROTECTION—VETERANS' PREFERENCE STATUTE NOT UNCONSTITUTIONAL DESPITE SEXUALLY DISPARATE IMPACT—*Personnel Administrator of Massachusetts v. Feeney*, 99 S. Ct. 2282 (1979).

Like most states[1] and the federal government,[2] Massachusetts grants a preference to veterans[3] seeking public employment. Unlike most states, however, the Massachusetts veterans' preference is "absolute;"[4] veterans who qualify for state civil service positions must be

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[1] The majority of states grant a veterans' preference in connection with public employment appointments, although the form of the preference varies greatly. Anthony v. Mass., 415 F. Supp. 485, 502 n.2 (D. Mass. 1976). Most states grant "point preferences" which allow veterans to add a statutory number of points to the grade received on civil service examinations. Fleming & Shanor, *Veterans Preferences in Public Employment: Unconstitutional Gender Discrimination?* 26 EMORY L.J. 13, 16-17 (1977). *See e.g.*, IND. CODE ANN. § 4-15-2-18 (Burns 1976); N.Y. CIV. SERV. LAW § 85 (McKinney 1973 & Cum. Supp. 1979).

Other states grant a tie-breaking preference to veterans who score equally with nonveterans on civil service examination. *See, e.g.*, COLO. REV. STAT. § 31-30-210 (Cum. Supp. 1973); TEX. REV. CIV. STAT. ANN. art. 4413 (31) §§ (1) & (3) (Vernon 1976).

Only seven states grant a so-called "absolute preference" which requires that veterans who pass the examination be considered for appointment before qualified nonveterans. Fleming & Shanor at 16-17. *See* MASS. ANN. LAWS ch. 31, § 26 (Michie/Law. Co-op 1979); N.J. STAT. ANN. § 11:27-4 (West 1976) (affording absolute preference to veterans certified as among three candidates of highest standing); 51 PA. CONS. STAT. ANN. § 7104 (Purdon 1976); S.D. COMP. LAWS ANN. § 3-3-1 (1974); UTAH CODE ANN. § 34-30-11 (1977); VT. STAT. ANN. tit. 20, § 1543 (1968); WASH. REV. CODE ANN. § 73.16.010 (1978).

[2] *See* Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2286 n.6 (1979).

[3] MASS. ANN. LAWS ch. 31, § 26 (Michie/Law. Co-op. 1979). The statute provides:

> The names of persons who pass examinations for appointment to any position in the official service shall be placed on eligible lists in the following order: (1) disabled veterans, in the order of their respective standings; (2) veterans, in the order of their respective standings; (3) widows or widowed mothers of veterans who were killed in action or died from a service connected disability incurred in wartime service, in the order of their respective standings; (4) all others, in the order of their respective standings. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the [civil service] rules.

Id.

MASS. GEN. LAWS ANN. ch. 4, § 7, cl. 43 (West 1976) defines "veteran" as

> any person, male or female, including a nurse, (a) whose last discharge or release . . . 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. . . .

Id.

Traditionally, veterans' preference laws have been enacted to reward veterans for the sacrifice of military service, to compensate for the disruption of personal life, to ease reentry into civilian life, to encourage military service, and to attract patriotic, disciplined persons to public office. Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2288 (1979).

[4] *See* note 3 *supra*.

considered for employment before qualified non-veterans.[5] The preference may be invoked repeatedly by a veteran,[6] and operates overwhelmingly to the benefit of males.[7]

Helen B. Feeney, a non-veteran citizen of Massachusetts, was employed in the state civil service system for twelve years[8] prior to her dismissal in 1975.[9] During that time, she passed nine civil service examinations.[10] In each instance, because of the veterans' preference, she was ranked behind male veterans, most of whom had lower scores than she. Consequently, Feeney was never certified nor considered for the positions sought.[11]

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[5] Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2287 (1979).

To be appointed to a permanent position in the classified official service, an applicant must pass an examination designed to evaluate relative ability to perform the job for which the examinaton is given. Brief for Appellee at 5, Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282 (1979) [hereinafter cited as Brief for Appellee]. Grades are based on a formula which gives weight to training and experience as well as to test results. Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2287 (1979). Candidates who pass examinations are ranked according to their scores on an "eligible list." *Id.*

When a public agency has a vacancy, it requests a list of candidates from the state personnel division. A group of applicants from the top of the eligible list are "certified" as eligible for the position. The appointing agency must choose from among these applicants, *id.* at 2288, although it need not choose the highest-scoring applicant. Brief for Appellee at 6.

In the case of more desirable, nonclerical positions, which offer higher grades and higher salaries, the absolute veterans' preference operates to concentrate veterans at the top of the eligible list. *See* note 3 *supra*. "[A]lthough the veterans' preference does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well-nigh absolute advantage." Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2288 (1979).

[6] Brief for Appellee, *supra* note 5, at 7.

[7] Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2285 (1979). When the legislation was enacted, "over 98% of Massachusetts veterans were male [while] only 1.8% were female." *Id.* at 2291. From 1963 to 1973, when Feeney was active in the civil service, 43% of those appointed to permanent positions were women. Virtually all of the female appointees, however, held lower grade, low paying secretarial or other clerical positions of little interest to male applicants. Anthony v. Mass., 415 F. Supp. 485, 498 (D. Mass. 1976).

[8] Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2288 (1979). Feeney entered the Massachusetts civil service system in 1963 after successfully competing for the position of Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. Four years later, she was promoted to Federal Funds and Personnel Coordinator within that Agency. *Id.*

[9] *Id.* The Massachusetts Civil Defense Agency was dissolved in 1975. *Id.*

[10] Brief for Appellee, *supra* note 5, at 8.

[11] Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2288 (1979). Although Feeney received very high scores on several examinations, her efforts to secure an administrative position were constantly frustrated by the operation of the veterans' preference. *Id.* In 1971, Feeney was tested for appointment as Assistant Secretary, Board of Dental Examiners. Her score of 86.68 would have placed her second on the eligible list and assured her of certification. However, five lower-scoring veterans were placed ahead of her and a lower-scoring veteran was eventually appointed. Brief for Appellee, *supra* note 5, at 9. In 1973, Feeney was tested for appointment as Head Administrative Assistant, Solomon Mental Health Center. Twelve male veterans, eleven of whom had lower scores, were placed ahead of her on the eligible list. But for the preference, Feeney would have placed third. *Id.*

Feeney brought suit in federal district court,[12] seeking a permanent injunction against the Massachusetts veterans' preference statute.[13] She alleged that the absolute preference "inevitably operated to exclude women from consideration" for high level civil service positions and thus violated the equal protection clause of the fourteenth amendment.[14] The district court agreed that the challenged statute was unconstitutional and enjoined its operation.[15] Finding no purposeful discrimination against women,[16] the district court called the state's goal of rewarding veterans "worthy."[17] Nevertheless, the law's impact on women was held to be so severe that the Constitution required a more limited form of preference.[18]

The Massachusetts Attorney General appealed directly to the United States Supreme Court. The Supreme Court vacated the judgment[19] and remanded it for further consideration in light of *Washington v. Davis*,[20] an intervening decision. In *Davis*, the Supreme Court had held that a neutral law does not necessarily violate the equal protection clause simply because it results in a "racially disproportionate impact;" the impact must be linked to a purposeful discrimination.[21]

In May of 1974, Feeney was examined for several administrative assistant positions. Although her score would have tied her for 17th, application of the veterans' preference relegated her to 70th place. *Id.*

[12] *See* note 9 *supra*.

[13] Anthony v. Mass., 415 F. Supp. 485, 487 (D. Mass. 1976). Feeney brought the action pursuant to 42 U.S.C. § 1983 (1970), against the Commonwealth of Massachusetts, its Division of Civil Service, the Director of Civil Service and the members of the Massachusetts Civil Service Commission. Brief for Appellee, *supra* note 5, at 2. No claim was brought under Title VII of the Civil Rights Act of 1964 due to the presence of a saving clause exempting veterans' preference laws from operation of Title VII. *See* 42 U.S.C. § 2000e-11 (1970).

Feeney's case was consolidated with a similar action brought by Carol Anthony, an attorney whose efforts to secure a civil service position had been blocked by operation of the preference. Anthony v. Mass., 415 F. Supp. 485, 488-90 (D. Mass. 1976).

[14] Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282, 2285 (1979).

[15] Anthony v. Mass., 415 F. Supp. 485, 495 (D. Mass. 1976).

[16] *Id.* at 496.

[17] *Id.* at 499.

[18] *Id.* Soon after the case was decided, chapter 31, § 23 was passed, establishing an interim point preference which would operate until Feeney's case was decided by the Supreme Court. MASS. GEN. LAWS ANN. ch. 31, § 23 (West Cum. Supp. 1978-1979).

[19] Feeney v. Mass., 434 U.S. 884 (1977).

[20] 426 U.S. 229 (1976).

[21] *Id.* at 238-39. The Supreme Court held that a law is not "unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239. "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 strictest scrutiny. . . ." *Id.* at 242.

On remand, a divided district court reaffirmed its holding for Feeney.[22] In his majority opinion, Judge Tauro held that the Massachusetts legislature had "intentionally sacrific[ed] the career opportunities of its women in order to benefit veterans."[23] He reasoned that the consequences of the law were too inevitable to have been unintended.[24]

The Massachusetts Attorney General again appealed[25] directly to the Supreme Court. In *Personnel Administrator of Massachusetts v. Feeney*,[26] Justice Stewart held that the Massachusetts absolute veterans' preference did not unconstitutionally discriminate against women.[27] Justice Stewart ruled that Feeney had failed to demonstrate that a gender-based discriminatory purpose had shaped the Massachusetts veterans' preference legislation "at least in some measure."[28]

When considering claims brought under the equal protection clause of the fourteenth amendment, the Court has attached importance to both discriminatory intent[29] and discriminatory impact.[30] It was not until the 1976 Supreme Court decision in *Washington v. Davis*[31] that the impact/intent standards were linked. In *Davis*, re-

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[22] Feeney v. Mass., 451 F. Supp. 143, 150 (D. Mass. 1978). Judge Murray dissented, reiterating his belief that the Massachusetts veterans' preference statute is facially neutral, unmotivated by discriminatory intent. *Id.* at 152-53 (Murray, J., dissenting).

[23] *Id.* at 150. In his concurrence, Judge Campbell wrote: "The veterans' preference law prefers an already established class which, as a matter of historical fact, is 98% male. . . . The law was sexually skewed from the outset. . . ." *Id.* (Campbell, J., concurring).

[24] *Id.* at 150. According to Judge Campbell, the law's exclusionary impact on "women was not merely predictable but absolutely inescapable and 'built-in.' " *Id.* (Campbell, J., concurring). He attributed to the legislature an intent to disadvantage women in the course of aiding veterans. "[T]he cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down." *Id.* (Campbell, J., concurring).

[25] Personnel Adm'r of Mass. v. Feeney, 99 S. Ct. 2282 (1979). The appeal was taken pursuant to 28 U.S.C. § 1253 (1976).

[26] 99 S. Ct. 2282 (1979).

[27] *Id.* at 2292-93, 2297.

[28] *Id.* at 2294, 2297.

[29] In Louisiana v. United States, 380 U.S. 145 (1965), a decrease in the number of registered black voters following introduction of an "interpretation" test was held to indicate discriminatory intent on the part of the legislature. *Id.* at 151. The Court recognized that the test "was part of a successful plan to deprive" blacks of the franchise. *Id.* And in Keyes v. School District, 413 U.S. 189 (1973), the Court ruled that the petitioners bore the burden of proving that segregation "was brought about or maintained by intentional state action." *Id.* at 198.

[30] Weighing the constitutionality of a school redistricting plan in Wright v. City Council of Emporia, 407 U.S. 451 (1972), Justice Stewart said, "[w]e have focused upon the effect—not the purpose or motivation—of [the] school board's action." *Id.* at 462. *See also* Gaston County v. United States, 395 U.S. 285 (1968) (drop in number of black voters result of unequal educational opportunities).

[31] 426 U.S. 229 (1976).

jected black applicants to the District of Columbia police department claimed that a written test used to evaluate applicants was racially discriminatory and violative of the due process clause of the fifth amendment.[32] They asserted that the test was unrelated to job performance and operated to exclude a disproportionately high number of blacks.[33]

Rejecting this contention, the Court held that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of invidious discrimination forbidden by the Constitution. Standing alone, [disproportionate impact] does not trigger . . . the strictest scrutiny."[34] To invalidate the challenged statute, it would be necessary to show discriminatory intent.[35]

One year later, in *Arlington Heights v. Metropolitan Housing Corporation*,[36] Justice Powell expanded upon the *Davis* opinion by discussing factors relevant to demonstrating discriminatory intent. A black plaintiff challenged the refusal of Arlington Heights to alter zoning ordinances to permit the building of low and middle income housing.[37] The Supreme Court reversed a holding for plaintiff and remanded in light of *Davis*.[38] Recognizing the necessity for "a sensitive inquiry,"[39] Justice Powell discussed "historical background," "legislative history" and the "sequence of events leading up to the challenged action" as factors relevant to a determination of discriminatory intent.[40]

These factors could prove revealing in examining the effect of state veterans' preference legislation and military policy on women. The number of women eligible for benefits under veterans' preference laws is directly related to military policies concerning female recruits.[41] Traditionally, opportunities for women in the armed forces have been severely limited by an extensive body of restrictions.[42] Although they have served in the armed forces in auxiliary capacities since World War I, women were not granted veteran status

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[32] *Id.* at 232-33.
[33] *Id.* at 233.
[34] *Id.* at 242.
[35] *Id.*
[36] 429 U.S. 252 (1977).
[37] *Id.* at 264.
[38] *Id.* at 265, 271.
[39] *Id.* at 266.
[40] *Id.* at 267.
[41] *See* note 3 *supra*.
[42] *See generally* Beans, *Sex Discrimination in the Military*, 67 MIL. LAW REV. 19 (1977); Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533 (1973).

until 1948.[43] From that date until very recently, the number of female recruits was limited to two percent of total enlistment.[44]

Certain inroads have been made towards equalization of opportunity for servicewomen. The military, however, has maintained a tradition of inhospitality toward women.[45] Few women have been able to achieve the status required to take advantage of veterans' benefits,[46] including those available under veterans' preference laws.

The Massachusetts veterans' preference statute not only incorporates the range of military sex-discriminatory policies, but has consistently treated men and women differently. The law has been revised repeatedly to bring within its ambit veterans of successive wars and conflicts.[47] Each time the statute was presented for reconsideration, the legislature manifested its intent that men and women be treated differently with regard to job opportunities by reenacting the preference in absolute, sex-specific form. Statutory language which required that, "[u]pon receipt of a requisition not especially calling for women, names [would] be certified" from eligible lists,[48] remained on the books until 1971.[49] The absolute nature of the preference, however, was never altered. The largely male class of veterans continued, and still continues, to displace the largely female class of nonveterans from desirable civil service positions.

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[43] The Women's Armed Services Integration Act of 1948, Pub. L. No. 625, 62 Stat. 356-375, permanently established the women's services and granted servicewomen full veteran status.

[44] 99 S. Ct. at 2291 n.22. The 2% quota was lifted in 1967. Act of Nov. 8, 1967, Pub. L. No. 90-130, § 1(b), 81 Stat. 376. The Army continued to maintain a 2% limitation on the number of female enlistees until the Women's Army Corps was abolished in October, 1978. Pub. L. No. 95-485, § 820, 92 Stat. 1627 (1978).

[45] Until 1967, the Women's Armed Services Integration Act placed ceilings on the ranks attainable by female volunteers. Members of the Women's Army Corps (WAC's) could progress no higher than lieutenant colonel. Pub. L. No. 625, 62 Stat. 358 (1948). Women in the Navy and Marine Corps were limited to the ranks of lieutenant commander. *Id.* at 62 Stat. 364. Members of the Women's Air Force (WAF's) were restricted to a maximum rank of lieutenant colonel. *Id.* at 62 Stat. 371.

[46] When litigation in *Personnel Adm'r of Mass. v. Feeney* commenced, only 1.8% of all Massachusetts veterans were women. 99 S. Ct. at 2291. The federal district court in Anthony v. Mass., 415 F. Supp. 485 (D. Mass. 1976), considered the total exclusion of women from the armed services until 1918, the exclusion of all women except nurses from the military after World War I until 1942, and the limitation of servicewomen to 2% of the armed forces from 1948 until 1967 and concluded that "[f]ew women will ever become veterans." *Id.* at 489-90.

[47] *See* 1943 Mass. Acts, ch. 194; 1949 Mass. Acts, ch. 642. § 2 (World War II); 1954 Mass. Acts, ch. 627 (Korea); 1968 Mass. Acts, ch. 531 § 2 (Vietnam).

The general Massachusetts Civil Service Law was recodified on January 1, 1979, and is now found at MASS. ANN. LAWS, ch. 31, § 26 (Michie/Law. Co-op. Cum. Supp. 1979).

[48] 99 S. Ct. at 2289 n.14.

[49] *Id.*

The *Feeney* Court was heavily influenced by *Davis* and *Arlington Heights*. Although discriminatory intent must be linked to disparate impact,[50] the Court interpreted the latter two cases as permitting an inference that "when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may . . . be at work."[51]

Faced with a neutral statute challenged as having a disparate effect on women, the *Feeney* Court used a two-fold test to arrive at an appropriate standard of review.[52] First, the Court considered whether the statute was truly neutral in that it was not overtly or covertly gender-based. If found to be neutral, the second inquiry was whether the adverse effect on women reflected invidious gender-based discrimination.[53]

Dealing summarily with the first arm of the test, the majority accepted the lower court's finding and Feeney's concession that the statute was neutral on its face.[54] Satisfied that the statute was indeed gender-neutral, the Court declared that too many males were ineligible for the preference to force the conclusion that the statute was a pretext for favoring males over females.[55] However, the Court admitted that the statute exhibited an undeniably adverse impact on women.[56] Consequently, the second arm of the test commanded more detailed analysis, as the Court sought to determine whether Feeney had shown that "a gender-based discriminatory purpose ha[d] at least in some measure shaped the Massachusetts veterans' preference statute."[57] Speaking for the majority, Justice Stewart rejected Feeney's contention that the law was gender-based and inherently non-neutral.[58] To accept her arguments, the Court reasoned, would be to hold that Massachusetts had intentionally absorbed into its civil service legislation "the panoply of sex-based and assertedly discriminatory federal laws"[59] that have precluded all but 1.8% of Mas-

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[50] 426 U.S. at 242.

[51] 99 S. Ct. at 2293.

[52] *Id.*

[53] *Id.*

[54] *Id.* at 2294. Feeney acknowledged that the veterans' preference statute and the hiring practices conducted pursuant to it were not invalid per se; she challenged only the absolute lifetime preference as violative of the equal protection clause. *Id.* at 2293-94.

[55] *Id.* at 2294. In their concurring opinion, Justices Stevens and White reported that 1,867,000 males were disadvantaged by the preference as compared to 2,954,000 females. *Id.* at 2297. The opinion is silent as to the date and source of these statistics.

[56] *Id.* at 2285.

[57] *Id.* at 2294.

[58] *Id.*

[59] *Id.* at 2294. Some commentators are convinced that veterans' preference laws are, by their very nature, extensions of federal laws dealing with the military. According to Fleming

sachusetts women from achieving veteran status.[60] Instead, the Court declared that the veterans' preference statute "must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group."[61]

The *Feeney* Court was fully aware of the history of the federal and Massachusetts laws.[62] Nevertheless, the Court recognized the Massachusetts legislature's apparent attempt to bring as many military women as possible within the purview of the veterans' preference statute.[63] It was conceded that the statute operated "overwhelmingly to the benefit of males."[64] The Court, however, noted that Massachusetts defined the term "veteran" in gender-neutral language.[65] The majority found it significant that "[w]omen who have served in official . . . military units during wartime . . . have always been entitled to . . . the preference."[66] Although he admitted that few women actually benefitted from the preference due to exclusionary military policies and exemption from the draft,[67] Justice Stewart declared that "discrimination against women in the military is not on trial in this case."[68]

Turning to the nature of discriminatory purpose, Justice Stewart rejected the foreseeability standard urged by Feeney in favor of a much narrower definition.[69] The Court did not deny that foreseeability of the consequences of legislative action was relevant to a finding of discriminatory intent: "[c]ertainly, when the adverse conse-

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and Shanor, "veterans' preference statutes by definition incorporate a long history of express gender discrimination in the military. In that sense, such statutes are essentially no more gender-neutral than would be a pre-nineteenth amendment statute granting public employment references to registered voters." Fleming & Shanor, *supra* note 1, at 25-26. Blumberg commented:

> The difference in numbers between male and female veterans is directly attributable to federal government discrimination in the armed forces . . . . The effect of prior de jure discrimination on the operation of the preference will persist until all those women denied equal armed services opportunity have departed from the labor force.

Blumberg, *DeFacto and DeJure Sex Discrimination under the Equal Protection Clause; A Reconsideration of the Veterans' Preference in Public Employment*, 26 BUFFALO L. REV. 1, 46-47 (1977). *See also* Anthony v. Mass., 415 F. Supp. 485, 499 (D. Mass. 1976).

[60] 99 S. Ct. at 2291.

[61] *Id.* at 2295.

[62] *Id.* at 2290-92.

[63] *Id.* at 2296.

[64] *Id.* at 2285.

[65] *Id.* at 2296.

[66] *Id.* at 2290.

[67] *Id.* at 2290-91.

[68] *Id.* at 2295.

[69] *Id.* at 2296.

quences of a law . . . are as inevitable as the gender-based consequences of ch. 31 § 23, a strong inference that the adverse effects were desired can reasonably be drawn."[70] The majority, however, held that the inference did not constitute proof where the impact is an "unavoidable consequence" of a legitimate legislative policy.[71] Thus, Justice Stewart declared that " 'discriminatory purpose' " implied a conscious choice by the legislature of a particular course of action selected " 'because of' " not " 'in spite of,' " its adverse impact on a particular group.[72] In the Court's opinion, Feeney failed to introduce evidence sufficient to link the veterans' preference statute to a discriminatory legislative purpose as required by *Davis*.[73] In upholding the Massachusetts veterans' preference law, Justice Stewart stated that "[t]he distinction made by [the Massachusetts statute] is . . . quite simply between veterans and nonveterans, not between men and women."[74]

In a dissent joined by Justice Brennan, Justice Marshall argued that the legislature's selection of such a severely restrictive scheme could not reasonably be considered gender-neutral[75] and that the articulated governmental objectives were insufficient to justify the statute's effect on women.[76] Pointing out that veterans are permitted to invoke the preference repeatedly throughout working life, Justice Marshall concluded that the statute was clearly overinclusive since it makes benefits available to veterans whose need for readjustment assistance has dissipated.[77] Similarly, the state's interest in encouraging military service was unconvincing. Not only was the benefit extended to draftees as well as volunteers, but there was no evidence showing that enlistees were motivated by the possibility of obtaining the veterans' preference.[78] Finally, the state's interest in rewarding veterans was insufficient to justify the price exacted from "a class long . . . subject to employment discrimination."[79] Justice Marshall ad-

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[70] *Id.* at 2296 n.25. The majority held that an inference was only a "working tool, not a synonym for proof." *Id.* Marshall, dissenting, contended that when a Court is probing the subjective motivations of a legislature, inference is generally the only tool available. *Id.* at 2298. He pointed out that the Court had often examined "the degree, inevitability, and foreseeability of any disproportionate impact as well as the alternatives reasonably available." *Id.*

[71] *Id.*

[72] *Id.* at 2296.

[73] *Id.* at 2297.

[74] *Id.*

[75] *Id.* at 2299.

[76] *Id.* at 2300.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 2300-01.

vocated the adoption of a less discriminatory means of rewarding veterans which would not exclude women from upper level civil service positions.[80]

Although the *Feeney* majority chose to take a simplistic view of the facts, *Davis* does not preclude a more detailed analysis of the issues. In *Davis*, the Court stated that a discriminatory purpose must be shown;[81] however, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[82]

The *Feeney* Court defined "discriminatory purpose" so narrowly[83] that nothing less than an explicit declaration of discriminatory intent by the legislature would meet the definition. In so doing, the Court declined to make the "sensitive inquiry"[84] into objective evidence of discriminatory intent which was suggested by *Davis* and held to be proper in *Arlington Heights*. The adoption of a "singularly myopic view"[85] of the facts enabled the majority to avoid applying a standard of review consistent with *Arlington Heights*.

The Court's reliance on *Davis* appears to be misplaced, for that case can be distinguished from *Feeney* on several points. In *Davis*, the police department actively sought black applicants, and the percentage of black police recruits was approximately equivalent to the proportion of blacks in the general population.[86] In *Feeney*, no affirmative efforts to recruit women for civil service jobs traditionally held by men were noted. More significantly, the written test used in *Davis* was relevant to the legitimate purpose of selecting police recruits with a requisite degree of verbal skill.[87] In contrast, veteran status has not been demonstrated to be a valid indicator of a candidate's fitness for a civil service position. Therefore, the inclusion of veteran status in merit selection for civil service positions has little relevance to the objective of obtaining the most qualified applicants.

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[80] *Id.*

[81] 426 U.S. at 242.

[82] *Id.* The *Feeney* majority dismissed the utility of any inference which might be drawn from objective factors, holding that the "inference simply fail[ed] to ripen into proof." 99 S. Ct. at 2296 n.25.

[83] *Id.* at 2296.

[84] 429 U.S. at 266.

[85] 99 S. Ct. at 2299.

[86] When the *Davis* case arose, 44% of new police recruits were black. This figure was proportional to the number of blacks on the police force, and equivalent to the number of 20-29 year old blacks within the area from which recruits were drawn. 426 U.S. at 235.

[87] *Id.* at 246. The *Davis* Court held that Washington, D.C. was constitutionally permitted to upgrade the abilities of police officers to communicate orally and in writing where such skills were necessary to the job. *Id.*

Even though the "history of discrimination against women in the military [was] not on trial,"[88] the Court erred by failing to view the Massachusetts veterans' preference statute in context. Discriminatory policies which mandated the almost total exclusion of women from the armed forces,[89] coupled with the preference,[90] permanently deprived all but a handful of females of the opportunity to obtain civil service jobs of interest to male veterans.[91] Military policies which prevent most females from attaining veteran status, and civil service policies which reward veteran status cannot be considered separately, for the latter incorporates the former. "The preference's relation back to explicitly sex-based [military] classifications indicates that the preference itself should be treated as a sex-based classification . . . ."[92]

In *Feeney*, the Court abandoned the intolerance of sex-based generalizations which it had demonstrated since 1971.[93] Reflecting the perceptions of a large segment of our society,[94] the Justices have held repeatedly that gender discrimination is unjustifiable in light of current social realities. In particular, the Court has had little patience with classifications based on stereotypic gender roles and has struck down laws which perpetuate "archaic and overbroad generalizations" about women and their roles.[95]

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[88] 99 S. Ct. at 2295.

[89] *See* notes 51-55 *supra* and accompanying text.

[90] *See* note 3 *supra* and accompanying text.

[91] As of August 2, 1979, data compiled by the Massachusetts Civil Service indicated that for all grades above six (except for nine) males outnumbered females significantly. In the highest grades, 30 to 33, there were 23 males, but only 3 females. In the much lower grade of three, however, there were 37 males and 521 females. Standard Metropolitan Statistical Abstract, Massachusetts Civil Service (generated August 2, 1979).

[92] Blumberg, *supra* note 68, at 51.

[93] *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979); Craig v. Boren, 429 U.S. 190, 198-99 (1976); Frontiero v. Richardson, 411 U.S. 677, 684-85 (1973); Reed v. Reed, 404 U.S. 71, 77 (1971).

[94] Consciousness of the unfairness of sex discrimination is reflected in the passage of Title VII of the Civil Rights Act of 1974, 42 U.S.C. § 2000e to 2000e-15 (1970), and the proposal of the Equal Rights Amendment.

Ironically, the pendency of the Equal Rights Amendment in several states appears to have had a dampening effect on the Court's willingness to apply strict scrutiny in sex discrimination cases. "The obvious reluctance of the Supreme Court to decide whether or not to categorize sex as 'inherently suspect' apparently originates from an unwillingness to intrude into that area while the Equal Rights Amendment is pending ratification by the States." Wiesenfeld v. Secretary of HEW, 367 F. Supp. 981, 989 (D.N.J. 1973), *aff'd*, 420 U.S. 636 (1975).

[95] Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). Justice Blackmun stated in Stanton v. Stanton, 421 U.S. 7 (1975):

> No longer is the female destined solely for the home and the rearing of the family. . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice.

Id. at 14-15.

By allowing the Massachusetts veterans' preference statute to stand, the Court has sanctioned a legislative policy which is manifestly insensitive to the condition of modern women and which perpetuates stereotypic assumptions about gender roles. The preference operates to maintain patterns of sex segregation in employment by blocking women's access to jobs of interest to men. Consequently, opportunities for women in the Massachusetts civil service will continue to be largely restricted to low paying, nonprestigious jobs traditionally held by women.

The *Feeney* Court should have delved more deeply into the facts of the controversy and analyzed the preference's impact according to the *Arlington Heights* standards.[96] Specifically, the Court should have searched for the discriminatory purpose by examining the relevant "historical background," the "specific sequence of events leading up to the challenged decision," and the "legislative or administrative history" of the preference.[97] Indeed, Justice Powell's majority opinion in *Arlington Heights* advocated calling legislators to the witness stand to "testify concerning the purpose of official actions."[98] Had the *Feeney* Court applied these standards, it would have been impossible to ignore the history of discrimination against women in the military[99] and in the Massachusetts civil service.[100] The preference's long legislative history, with its obvious perpetuation of sex-role stereotypes, would not have escaped the Court's scrutiny. Had the Court acted according to the *Arlington Heights* standards, it seems likely that it would have found the requisite discriminatory purpose—and likely that it would have ruled for Feeney.

Mechanical application of the *Davis* intent[101] standard, unaccompanied by a bona fide attempt to glean intent from the facts, does nothing to rectify injustices either against women who are denied equal employment opportunities or against Massachusetts citizens who are deprived of civil servants of demonstrated competence. The application of an intermediate standard of review according to the *Arlington Heights* standards[102] would have been more consistent with prior decisions than the *Feeney* Court's cursory glance at the facts.

The Court would have done a service to Massachusetts women and rectified an injustice by striking down the Massachusetts vet-

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[96] 429 U.S. at 267-68.

[97] *Id.*

[98] *Id.* at 268.

[99] *See* notes 51-55 *supra* and accompanying text.

[100] *See* note 3 *supra* and accompanying text.

[101] *See* notes 40 & 41 *supra* and accompanying text.

[102] 429 U.S. at 267-68.

erans' preference statute. Unless finders of fact can penetrate the thought processes of lawmakers, it is almost inevitable that outward manifestations of intent—such as those discussed in *Arlington Heights*—be considered.[103]

It is also difficult to accept Massachusetts' justification for the preference in light of Justice Marshall's reasoning. Under his scrutiny, the preference in its present form emerges as the anachronism it is.[104] Plainly, the state's articulated purposes in enacting the statute are insufficient to justify the effect wrought on Massachusetts women.

By upholding an absolute veterans' preference, the *Feeney* Court sanctioned the male-dominated hierarchy as it exists in the Massachusetts civil service, and as it will continue to exist unless altered by legislative action. It is surely a worthy state purpose to reward veterans and to ease their transition into civilian life. Less drastic means, however, are available to accomplish this purpose.[105] The method chosen by Massachusetts and sanctioned by the Supreme Court exacts too high a price from female citizens.

Lynn Williams Dischler

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[103] 99 S. Ct. at 2300.

[104] *See* notes 77-80 *supra* and accompanying text.

[105] In his dissent, Justice Marshall suggests replacing the absolute preference with "a point preference system . . . or an absolute preference for a limited duration." 99 S. Ct. at 2300.