Duquesne Law Review

Volume 18 | Number 3 Article 10

1980

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Recommended Citation
Pat Labbadia III, *Veterans' Preference Statutes: Do They Really Discriminate against Women*, 18 Duq. L. Rev. 653 (1980).
Available at: https://dsc.duq.edu/dlr/vol18/iss3/10

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The Veterans' Preference Statutes: Do They Really Discriminate Against Women?

I. INTRODUCTION

Recently, the United States Supreme Court, in *Personnel Administrator of Massachusetts v. Feeney*,[1] upheld the constitutionality of a state statute giving veterans a preference over non-veterans in the procedure for selecting civil service employees. This decision theoretically ends the controversy concerning veterans' preference statutes and their impact upon the job-seeking endeavors of women.[2] However, prior to the Supreme Court's decision, the three-judge federal district panel hearing the case at the trial level had held that the pervasive and disparate impact of the veterans' preference statute discriminated against women in violation of the equal protection clause of the fourteenth amendment.[3] Although it was in line with the trend of increasing judicial sensitivity toward official sex discrimination,[4] the federal court decision was inconsistent with prior and subsequent decisions in which courts have ruled that veterans' preference provisions are permissible enactments of legislative policy.[5] Indeed, such statutes have been accepted as matters of historical fact since some form of

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1. 442 U.S. 256 (1979) (upheld absolute lifetime preference because there was no showing of intent to discriminate).

2. There has been much scholarly concern with the constitutionality of preferring veterans for public employment positions while ignoring the statistically substantiated adverse impact upon women. *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 (1976) [hereinafter cited as Blumberg]; Fleming & Shanor, *Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?* 26 EMORY L.J. 13 (1977) [hereinafter cited as Fleming & Shanor]; Comment, *Veterans' Public Employment Preference as Sex Discrimination*, 90 HARV. L. REV. 805 (1977) [hereinafter cited as *Veterans' Public Employment Preference*].

3. Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976) (found violation of equal protection clause where impact of the statute was to absolutely and permanently deprive women of significant public employment opportunities).

4. Fleming & Shanor, *supra* note 2, at 14-15.

5. Cases decided prior to *Anthony* include Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973) (upheld Pennsylvania's ten point bonus preference); Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973) (upheld Minnesota's absolute preference for initial hiring and five point bonus preference for promotion). Cases decided subsequent to *Anthony* included Bannerman v. Department of Youth Auth., 436 F. Supp. 1273 (N.D. Cal. 1977) (upheld California's ten point bonus preference); Branch v. Du Bois, 418 F. Supp. 1128 (N.D. Ill. 1976) (upheld Illinois' point bonus preference formula allowing seven-tenths of a point for each month, or portion thereof, of service); Ballou v. State, Dep't of Civil Serv., 148 N.J. Super. 112, 372 A.2d 333 (App. Div. 1977), *aff'd*, 75 N.J. 365, 382 A.2d 1118 (1978) (upheld New Jersey's absolute preference).

veterans' preference for public employment is utilized by the federal government and by virtually all of our states.[6] Thus, the effects of veterans' preference provisions are felt throughout this country.

This comment will evaluate the constitutionality of veterans' preference statutes when challenged by charges of sex discrimination in violation of the equal protection clause of the fourteenth amendment.[7] In doing so, the newly developing trend of handling subtle, more sophisticated discrimination in facially neutral laws will be explored, with a focus upon the rivalry of intent versus impact as the relevant test. To achieve this purpose, the comment will study and analyze the Supreme Court's decision in *Personnel Administrator of Massachusetts v. Feeney*, paying specific attention to the conflict between case law and scholarly viewpoints on sex-based challenges to veterans' preference statutes.[8]

II. PERSONNEL ADMINISTRATOR OF MASSACHUSETTS V. FEENEY

A. *Procedural History*

Helen B. Feeney, a female non-veteran, brought an action in 1975 challenging the constitutionality of the Massachusetts Veterans' Preference Statute.[9] That statute gives veterans who pass the civil service test an absolute preference over non-veterans for ranking on civil service eligibility lists. The top ranked applicants are then certified to an appointing agency, which chooses its employees from among those so certified regardless of their relative test scores or veteran status.[10] Under the Massachusetts statute, there is no limit to

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6. Fleming & Shanor, *supra* note 2, at 16-17 nn.12 & 13. They list forty states employing some type of bonus point system and seven states utilizing the preference in its absolute form. Note also that the federal government and some of the states in the point preference category do, to some degree, supplement their basic system with an absolute preference for certain positions, for disabled veterans, or for both. *Id.* at 17 n.13.

7. It is useful to note at this point that veterans' preference provisions are specifically excluded from challenge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976). Section 712 of that statute 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." *Id.* § 2000e-11. *See* Fleming & Shanor, *supra* note 2, at 15-16 n.9. *See also* 442 U.S. at 259 n.2.

8. *See* notes 2 & 5 *supra*.

9. MASS. GEN. LAWS ANN. ch. 31, § 23 (West 1966).

10. *Id.* As long as the veteran passes the test, he is automatically placed at the top of the eligible list, even ahead of non-veterans with far superior test scores. Actually, the particular provisions of the statute dictate that those applicants who pass the test will be placed on the eligible lists in the following order: (1) disabled veterans according to their respective scores; (2) other veterans according to their respective scores; (3) widows of veterans and widowed mothers of veterans according to their respective scores; (4) all other applicants according to their respective scores. *Id.* For a collection of early cases in-

the number of times a veteran can exercise the preference, and he can use it anytime during his lifetime.[11]

Because of the operation of this statute, Feeney failed to obtain certification for several positions with the state government, despite the adequacy of her test scores.[12] Noting that a substantial number of women lack veteran status, Feeney asserted that the preference provision has a disparate effect upon her and most of the commonwealth's women in violation of the equal protection clause of the fourteenth amendment.[13]

A divided three-judge federal district court ruled, in *Anthony v. Massachusetts,* that the absolute and permanent nature of this veterans' preference formula had a drastically negative impact upon the opportunities of women to obtain significant civil service appointments, and, therefore, deprived them of the equal protection of law.[14]

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validating statutes granting a preference to veterans regardless of whether they received a passing grade or possessed the minimum qualifications necessary to the discharge of the public duties involved, see Annot., 161 A.L.R. 494 (1946).

11. 442 U.S. at 261-62.

12. 415 F. Supp. at 492. Ms. Feeney applied for three different civil service positions within the Division of Office Services. Each time she received a test score high enough to be certified for the vacant position. Nonetheless, the operation of the statute caused her to be ranked behind veterans, mostly male, who had predominantly lower scores.

13. Ms. Feeney claimed that there was a pattern of exclusion established by the preference, which had a disparate impact not only upon her own job-seeking endeavors, but also upon those of all the commonwealth's women. Statistics indicated that only one and eight-tenths percent of female appointments to the Division of Office Services are veterans. *Id.* at 488. The breakdown of the 47,005 total appointments in the Division of Office Services, where Feeney sought positions, for the ten year period from July 1, 1963, to June 31, 1973, was as follows:

Male appointments	26,794	57% of all appointments
—veterans	14,476	54% of all male appointments
Female appointments	20,211	43% of all appointments
—veterans	374	1.8% of all female appointments

Furthermore, although forty-three percent of these civil service appointments were females, a closer look indicates that they were mainly appointments to lower grade positions in which men were traditionally not interested. *Id.* Such statistics seem to have reflected several federal statutes and regulations which limited the number of women who can serve in the armed forces. *Id.* at 489. The fact that women are not drafted, in conjunction with past absolute percentage limitations and more stringent enlistment criteria, has resulted in the situation where only two percent of Massachusetts' veterans are women. *Id.* at 489-90. Thus, few women have qualified or will ever qualify to receive the preference.

14. *Id.* at 499. Court of appeals Judge Campbell, in his concurring opinion, stated that it is one thing to give veterans a head start, but quite another to give them an absolute entitlement to the state's most desirable civil service positions. Thus, he opined, the Massachusetts statute has gone too far—there are other less drastic means of aiding and prefering veterans. *Id.* at 501 (Campbell, J., concurring).

District Judge Murray, however, refused to speculate regarding alternative means. He

In focusing on the practical consequences of the scheme,[15] District Judge Tauro, writing for the *Anthony* majority, observed that the clear intent of the statute was to benefit veterans even at the expense of women.[16] Additionally, he noted that job-related criteria were relegated to a secondary position[17] and that less drastic reasonable alternatives were available to achieve the state's desired objective.[18] Thus, Judge Tauro ruled that although the goal of benefiting veterans was a laudable one,[19] the means utilized were not sufficiently related to that purpose.[20]

On appeal to the United States Supreme Court,[21] the judgment was vacated and the case remanded[22] for further consideration in light of the Court's intervening decision in *Washington v. Davis*.[23] In *Davis*, the Supreme Court had held that absent proof of discriminatory intent, mere discriminatory impact alone is not sufficient to constitute a violation of the equal protection clause.[24] Thus, while disproportionate impact is not irrelevant, intent to discriminate becomes the focal point of an equal protection inquiry.[25]

On remand,[26] the same divided three-judge district panel again ruled

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reasoned that courts should not inquire into the wisdom of legislative policy. According to Judge Murray, the question was whether there is a demonstrable rational basis for the classification. In his view, characterizing the absolute and permanent preference as being too great was irrelevant to the question of constitutional permissibility. Thus, he rejected the means/end calculus of the majority and would have held that the statute is neither gender-based nor invidiously discriminatory against women. *Id.* at 501-07 (Murray, J., concurring in part and dissenting in part).

15. *Id.* at 497. The court stated that "[i]n the context of the Fourteenth Amendment, '[t]he result and not the specific intent is what matters.'" *Id.*

16. *Id.* at 496.

17. *Id.* at 497.

18. *Id.* at 499.

19. *Id.* at 496.

20. *Id.* at 495.

21. There is a direct appeal by right to the United States Supreme Court from the decision of a three-judge federal district court. 28 U.S.C. § 1253 (1976).

22. Massachusetts v. Feeney, 434 U.S. 884 (1977) (per curiam).

23. 426 U.S. 229 (1976) (upheld the constitutionality of a facially neutral literacy test administered by the District of Columbia police department as a prerequisite to employment).

24. *Id.* at 242.

25. *Id.* According to one author, this case attempts to clarify the apparent inconsistency between the impact and intent cases which previously coexisted in this area of the law. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1031-32 (1978). Professor Tribe points out that some Supreme Court decisions contradict each other by alternatively stressing intent in one situation and impact in another. *Id.* at 1025-32. *Compare* Jefferson v. Hackney, 406 U.S. 535 (1972) (racial motivation was the crucial missing element) *with* Palmer v. Thompson, 403 U.S. 217 (1971) (absence of a discriminatory effect offsets a clearly discriminatory motive).

26. Feeney v. Massachusetts, 451 F. Supp. 143 (1978).

that neither *Davis*, nor the Supreme Court's opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[27] required an alteration of their original decision in *Anthony*.[28] The majority opinion, again written by District Judge Tauro, looked to the "totality of relevant facts"[29] so as to make an inference of discriminatory intent in satisfaction of the *Davis* requirement. Citing two concurring opinions of Justice Stevens,[30] the majority stressed the "natural, foreseeable and inevitable" consequences of the statute when considered in conjunction with the federal military scheme.[31] Since they assumed that the legislature was aware of the restrictive federal military regulations and could easily have foreseen the inevitable discriminatory effect of the preference,[32] the panel majority treated such impact as one of the factors relevant to a showing of discriminatory intent.[33] In conjunction with this foreseeability test, the court pointed to available statistical evidence in order to find a clear pattern of women being excluded from competitive civil service positions.[34] In light of these two factors, the majority concluded that the requirement of discriminatory intent had been satisfied.[35]

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27. 429 U.S. 252 (1977) (denial of application for rezoning to build racially integrated, low and moderate income housing was not a violation of equal protection since there was no proof that discriminatory intent was a motivating factor).

28. 451 F. Supp. at 144.

29. *Id.* at 147. The Supreme Court in *Davis* indicated that intent can be shown by reference to all of the relevant facts and circumstances, one of which was discriminatory impact. 426 U.S. at 242. *Arlington Heights* expanded upon this by listing other relevant factors: the historical background of the decision, the prior sequence of events, the departure from normal procedures, and the contemporaneous statements of the decisionmakers. This was not intended or considered, however, to be an exhaustive summary. 429 U.S. at 266-68.

30. 451 F. Supp. at 146-47.

31. *Id.* at 147-48. The majority wrote: "In *practical application*, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that *absolutely* and *permanently* forecloses, on average, 98% of this state's women from obtaining significant civil service appointments." *Id.* at 148 (quoting from *Anthony*, 415 F. Supp. at 498) (emphasis added). *See also* note 13 *supra*.

32. 451 F. Supp. at 148. The court implicitly based this upon the tort concept that an actor is presumed to know and to intend the natural and foreseeable consequences of his actions. *See* W. PROSSER, LAW OF TORTS § 8 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 8A (1965).

33. 451 F. Supp. at 147 n.7. *See also* note 29 *supra*.

34. *See* notes 13 & 31 *supra*.

35. 451 F. Supp. at 150. Further, the court factually distinguished *Davis* from *Feeney*, focusing upon the commonwealth's failure to make affirmative efforts to recruit minorities, the lack of a relationship between the preference and job qualifications, and the lack of facial neutrality. According to Judge Tauro, these factors, which were not present in *Davis*, are among those relevant to making an inference of discriminatory intent. *Id.* at 149 n.15 (absence of efforts to recruit minorities); *id.* at 148 (lack of relationship); *id.* at 147 n.7 (lack of neutrality).

The majority then determined that the laudable end of benefiting veterans did not justify the means—an intentional subordination of women in their attempts to secure desirable public employment.[36] Again noting the availability of less drastic means to attain the purpose of aiding veterans, including a bonus point system or a time limitation provision,[37] the court held that the legislature made a "constitutionally impermissible value judgement." Therefore, the *Feeney* majority concluded that its prior decision of unconstitutionality in *Anthony* was correct, despite the subsequent Supreme Court remand.[38] The case was again appealed to the Supreme Court and this time a substantial decision was rendered.

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36. *Id.* at 149-50.

37. *Id.* at 150. The majority cited its previous decision in *Anthony* which suggested two alternatives—namely, giving veterans a fixed number of bonus points, or limiting the period within which a veteran can exercise his preference. The bonus point system and the time limitation were considered reasonable ways to aid veterans, which would not absolutely and permanently disadvantage women. *Id.* at 499.

38. In a brief concurring opinion, Judge Campbell recognized the disparate impact of the law, yet noted the persuasiveness of the argument that the statute was neutral on its face and was not motivated by a discriminatory purpose. He reasoned, however, that the neutrality of the statute and its lack of discriminatory motive were rendered illusory by the "inevitability of exclusionary impact" which affords women no opportunity to correct the situation. He stated that the cost of benefiting veterans is being disproportionately borne by women. Thus, he concluded that although *Davis* and its progeny required the acceptance of unequal impact in some salutary programs, to accept such grossly disparate and inevitable consequences as "neutral" and "unintended" would render the equal protection clause a mere "hollow pretense." *Id.* at 150 (Campbell, J., concurring).

In a strong dissent, Judge Murray determined that the statute was neither gender-based nor intentionally discriminatory. He posited that the statutory classification was neutral with merely the effects of its operation being uneven. To illustrate the statute's neutral operation, he pointed out that a substantial number of male non-veterans share the disfavor of the statute along with female non-veterans. In addition, he noted that a small number of women do acquire the benefit of the statute. Thus, he concluded that it was erroneous to categorize the statute as facially non-neutral. *Id.* at 152-53 (Murray, J., dissenting). Similarly, he found the majority's analysis insufficient to make an inference of legislative intent. In his opinion, the purpose of the legislature was not to harm women, but rather to aid veterans. Furthermore, Judge Murray noted that there was a lack of proof that the classification was a "mere pretext" to accomplish an invidiously discriminatory purpose. Thus, he determined that the majority's finding of discriminatory intent was likewise mistaken. *Id.* at 155-56 (Murray, J., dissenting). For him the only difference between *Davis* and *Feeney* was that the Massachusetts statute had a greater impact upon the relevant group. Indicating that impact alone is not determinative, Judge Murray asserted that the majority's attempts to distinguish *Feeney* from *Davis* were fruitless. Since, in his analysis, Ms. Feeney had failed to prove discriminatory intent, Judge Murray concluded that the statute was constitutional. *Id.* at 153-55 (Murray, J., dissenting).

B. *The Supreme Court's Decision*

In *Personnel Administrator of Massachusetts v. Feeney*,[39] the Supreme Court finally put an end to its long volley with the Massachusetts district court panel. In reversing and remanding the latest district court judgment, the Supreme Court held that the Commonwealth of Massachusetts had not violated the equal protection clause of the fourteenth amendment when it granted an absolute lifetime preference to veterans. Although noting the standardized rationale in support of veterans' preference statutes,[40] the Court determined that "any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification."[41] A caveat, however, was added that the equal protection clause is the guarantor of equal laws, not equal results.[42] Thus, the Court embarked upon a two-fold inquiry: (1) whether the classification is either overtly or covertly gender-based, and (2) whether the statute reflects invidious gender-based discrimination.[43]

The first question was somewhat easy for the Court. Using the factual findings made by the district court, that the statute served legitimate ends and was not established for the purpose of

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39. 442 U.S. 256 (1979). Justice Stevens wrote a short concurring opinion to make one major point that he felt was dispositive: the number of males disadvantaged by the statute (1,867,000) was sufficiently large and sufficiently close to the comparable number of females (2,954,000) to refute the claim of a gender-biased intent. *Id.* at 281 (Stevens, J., concurring). Justice Marshall dissented from the majority's conclusion that purposeful gender-based discrimination was not shown. Although the statute may have been passed with an intent to benefit veterans, Justice Marshall reasoned that an intent to disadvantage women had an appreciable role in motivating the passage of the statute. He opined that the impact of the statute was so disproportionate as to warrant a shift of the burden to the commonwealth to affirmatively show the absence of sex-based considerations in the decisionmaking process. Since Justice Marshall deemed the statutory classification both overinclusive and not carefully tuned to alternative considerations, he concluded that the classification was not substantially related to important governmental objectives, and hence, was unconstitutional. *Id.* at 282-86 (Marshall, J., dissenting).

40. *Id.* at 265 & n.12. Among those listed were: (1) rewarding veterans for past services, (2) easing the veteran's transition to civilian life, (3) encouraging patriotic service by providing an incentive for entering, and (4) attracting loyal and well-disciplined people to public employment. *Id.* (citing cases, an article and an annotation). It should be noted, however, that although the Court cited Professor Blumberg's article, it is not clear that Professor Blumberg does, in fact, accept such justifications as being adequate rationales for upholding absolute lifetime preferences. *See* Blumberg, *supra* note 2, at 68-73.

41. 442 U.S. at 273. This is how the Court paraphrased its standard for sex discrimination cases as prescribed under Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidated a statute forbidding the sale of beer to males under twenty-one and females under eighteen). *See also* notes 60-61 *infra*.

42. 442 U.S. at 273.

43. *Id.* at 274.

discriminating against women, Justice Stewart, speaking for the majority, determined that the distinction between veterans and non-veterans was not a "mere pretext" for gender-based discrimination.[44] In fact, he reasoned that since some women share in the benefit of the statute and many men are disadvantaged by the statute, it is not a law that can be rationally explained as a gender-based classification: the distinction is simply based upon the presence or absence of veteran status.[45]

The second question, involving invidious gender-based discrimination, was more complex, and the Court dealt with it in terms of two of the plaintiff's contentions. The first of these was that the statute favoring veterans should be viewed in conjunction with assertedly discriminatory federal laws which severely curtail the opportunities of women to become veterans.[46] Justice Stewart rejected this argument on three grounds: first, it contradicted the district court finding that the statute was not passed for a discriminatory purpose;[47] second, it was irreconcilable with the district court's assumption that a less severe preference for veterans would be acceptable;[48] and third, it mistakenly presumed that the past discrimination of women in the military was at issue in *Feeney*.[49]

The Court dealt next with Feeney's second contention that the adverse impact upon women was a natural, foreseeable, and inevitable consequence of the legislative policy, and that such adverse impact should therefore be presumed to have been known and intended by the legislature.[50] This argument was also rejected by Justice Stewart. He reasoned that "discriminatory purpose" requires more than intent as volition or awareness of consequences: it requires that a certain policy

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44. *Id.* at 274-75. This was the argument made by the district court in attempting to utilize the door left open by *Davis* and *Arlington Heights*. 451 F. Supp. at 148-50. *See Veterans' Public Employment Preference*, *supra* note 2, at 809 (*Davis* left open the question of whether disproportionate impact can be conclusive evidence of intent).

45. 442 U.S. at 275. *See also id.* at 281 (Stevens, J., concurring) (since number of males disadvantaged is sufficiently large and sufficiently close to number of disadvantaged females, claim of intent to benefit males over females is refuted).

46. *Id.* at 276. Basically, this argument maintains that although the statute is not itself gender-based, it intentionally incorporates federal military policies which are gender-based and, therefore, should be treated as being gender-based. *Id. See also* Blumberg, *supra* note 2, at 46, 51 ("relation back" argument); Fleming & Shanor, *supra* note 2, at 26 (pool of eligible veterans becomes pool of eligibles consisting of not more than three percent females).

47. 442 U.S. at 276.

48. *Id.* at 277 & n.23.

49. *Id.* at 277-78. *Contra*, Blumberg, *supra* note 2, at 46 ("[p]reference ought not to be viewed *in vitro*").

50. 442 U.S. at 278. *See also* note 32 *supra*.

be advanced "because of" and not "in spite of" its impact upon the relevant group.[51] Thus, the *Feeney* majority concluded that because the classification of veterans and non-veterans was neither overtly nor covertly gender-based, and since the goal of benefiting veterans is a worthy one, the veterans' preference statute must be accepted as any other neutral law which has a greater adverse impact upon women than upon men.[52] Stating that it is beyond the scope of the judiciary to smooth out the uneven effects of unwise legislative policies, the majority concluded that the lack of any showing of discriminatory purpose put the statute within constitutionally permissible boundaries.

III. The Applicable Standard of Equal Protection Review For Gender-Based Challenges to Veterans' Preference Statutes

A. *Historical Background*

The historical development of equal protection doctrine provides valuable insight into a proper understanding of the significance of *Personnel Administrator of Massachusetts v. Feeney.* In the doctrine's timid and precarious origin,[53] the only requirement was that courts be able to conceive of a rational basis for differentiating between similarly situated individuals.[54] The doctrine was later molded into an interventionist sword with which the Warren Court carved out its high ideals:[55] when government action created or affected a suspect class, or impinged upon a fundamental interest, a strict scrutiny standard was applied which called for the state to show a compelling interest for the

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51. 442 U.S. at 279-80.

52. *Id.* The Court recognized that the natural, foreseeable and inevitable consequences of a facially neutral law raises a strong inference that the adverse effects were intended. The Court, however, also noted that "an inference is a working tool, not a synonym for proof." *Id.* at 279 n.25. In certain circumstances the inference simply does not ripen into proof. *Id.*

53. Justice Holmes called it "the usual last resort of constitutional arguments." Buck v. Bell, 274 U.S. 200, 208 (1927). *See also* Tussman & tenBroek, *The Equal Protection of Laws*, 37 CAL. L. REV. 341, 380 (1949) ("where the clause is held to govern, its application is halting, indecisive and unpredictable") [hereinafter cited as Tussman & tenBroek].

54. *See generally* Tussman & tenBroek, note 53 *supra.* Historically, this standard was easily satisfied. In fact, frequently the only basis required for gender-based classifications was a stereotypical notion about a woman's role in society: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) (upheld a state rule of court forbidding women to practice law).

55. *See* Cox, *The Supreme Court, 1965 Term—Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) ("[o]nce loosed, the idea of Equality is not easily cabined") [hereinafter cited as Cox].

classification it established;[56] in other cases, involving no suspect classification or fundamental interest, the rational basis test was utilized.

The Burger Court, however, has recast the sword of intervention into a staff of moderation by implicitly refusing to make further extensions of the strict scrutiny standard into the fringe areas that the Warren Court had not yet reached.[57] But in striking a balance between judicial activism and virtually complete legislative deference,[58] the Court has now developed an intermediate standard of review for certain "quasi-suspect"[59] classifications such as sex.[60] Essentially, this standard requires a close and substantial relation between the statutory classification and an important governmental interest.[61] In *Craig v. Boren*[62] this intermediate standard was applied to a classifica-

56. *See* Note, *Developments in the Law: Equal Protection*, 82 HARV. L. REV. 1065, 1087-1133 (1969) [hereinafter cited as *Developments*].

57. *See* Gunther, *The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 48 (1972) (equal protection as "the preferred ground for intervention by a less interventionist Court") [hereinafter cited as Gunther].

58. *See* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee: Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071, 1092-94 (1974) (intermediate standard of review for "neutral classifications" so as to reconcile the extreme nature of the strict two-tier approach) [hereinafter cited as Nowak].

59. Fleming & Shanor, *supra* note 2, at 36.

60. Under this standard, "a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that persons similarly circumstanced should be treated alike." Reed v. Reed, 404 U.S. 71, 75-76, (1971) (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). *See also* Califano v. Goldfarb, 430 U.S. 199 (1977) (invalidated social security benefits for widows, but not for widowers of deceased insured workers); Schlesinger v. Ballard, 419 U.S. 498 (1975) (upheld military regulation allowing promotion of men after shorter periods of service than required of women); Geduldig v. Aiello, 417 U.S. 484 (1974) (upheld exclusion of pregnancy from state insurance program); Kahn v. Shevin, 416 U.S. 351 (1974) (upheld tax exemption for widows but not for widowers). *But see* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality of court held sex to be a suspect classification and so invalidated a presumption of dependency for service person's wife but not for husband). The explicit recognition of this intermediate standard for gender-based classifications was articulated in Craig v. Boren, 429 U.S. 190 (1976), which invalidated a statute forbidding the sale of beer to males under the age of twenty-one and females under the age of eighteen.

61. Craig v. Boren, 429 U.S. 190, 197 (1976). After the *Craig* decision, the old rational basis test had a "new bite," Gunther, *supra* note 57, at 20, and stereotypical attitudes about the woman's role in society were no longer sufficient, Stanton v. Stanton, 421 U.S. 7, 14 (1975). Compare this view with the early attitude cited in note 54 *supra*. One writer, however, feels that in actual application this standard is not much different from the strict scrutiny standard of review. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1055 (1979) (difference is "more rhetorical than real") [hereinafter cited as *Modern Equal Protection*].

62. 429 U.S. 190 (1976). *See* notes 60-61 and accompanying text *supra*.

tion which made a distinction expressly on the basis of gender. The Supreme Court had the opportunity in *Feeney*[63] to expand upon the application of its newly created intermediate standard by merging it with the precedent dealing with facially neutral classifications.[64] However, since the Court did not find sufficient evidence of a covert classification, a heightened scrutiny standard of review was not employed.[65] Nevertheless, after *Feeney*, it seems clear that in a proper case this extension of the application of the intermediate standard of review will be made for challenges to facially neutral policies on the basis of sex.[66]

The *Feeney* decision theoretically provides another avenue of attaining a heightened scrutiny standard of review for covert classifications based on sex. It did for sex discrimination what *Davis* did for racial discrimination. This background should be kept in mind as the intricacies of *Feeney* and the intent requirement are explored.

B. *The Intermediate Standard of Review and the Davis Test*

In order to apply the intermediate standard for sex discrimination claims, the classification in question must either deal expressly in terms of gender, or must be intended to distinguish between men and women despite its apparent neutrality.[67] These are alternative methods of triggering a heightened scrutiny standard of review.[68] If neither of these alternative triggering requirements are met, the rational basis standard of review must be applied to the classification of veterans and non-veterans.[69]

Basically, this is the position advanced by the Supreme Court in *Feeney*.[70] However, the *Feeney* opinion confuses the matter when it explains its two-fold inquiry for a *facially neutral* statute,[71] which is actually a three-pronged attack for an allegedly *gender-based* statute; that is, (1) whether the statute is explicitly gender-based, (2) whether

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63. 442 U.S. at 272-73.

64. *See* notes 23-25, 27 & 29 and accompanying text *supra*.

65. 442 U.S. at 274-75.

66. Had the Court in *Feeney* made a finding of "discriminatory purpose," an intermediate standard of review would have been applied. In two recent school desegregation cases, the Court held that the *Davis* test was satisfied. *See* Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979); Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979).

67. Blumberg, *supra*, note 2, at 35-51 ("Alternative Paths to a Heightened Standard of Equal Protection Review").

68. *Id.*

69. *See* note 97 and accompanying text *infra*.

70. 442 U.S. at 272-73. *See also* note 41 and accompanying text *supra*.

71. 442 U.S. at 274. *See also* text accompanying note 43 *supra*.

the statute is covertly gender-based, and (3) whether the statute is invidiously (purposefully, but not expressly) gender-based. To state each of the segments in this manner is to make it quite clear that the second and third parts are merely two ways of saying the same thing![72] Also, the Court failed to explain clearly that obtaining an affirmative answer to any one of these questions does not automatically result in a violation of the equal protection clause, but instead triggers the implementation of a stricter scrutiny standard against which the statute will be weighed.[73] There is, however, some early authority for the proposition that once a "discriminatory purpose" is shown, the statute is *ipso facto* unconstitutional.[74] At the time this theory was advanced, the term "discriminatory purpose" had an entirely different meaning: the connotation was that of a malicious type of purpose having no relation whatsoever to any type of legitimate justification.[75] Thus, the Court made an unfortunate choice of words in *Davis* when it labeled its new test "discriminatory purpose."[76] This has not only prompted the Court to undertake a clarification of the doctrine on several occasions,[77] but has also caused scholars to expect the Court's continued invocation of its power of judicial review to elucidate further the types of factual situations in which an inference of intent is appropriate.[78]

72. Purposefully making a non-explicit gender-based classification is the equivalent of creating a statutory classification which is covertly gender-based. See Justice Stevens' concurring opinion in *Feeney* in which he states: "If a classification is not overtly based on gender, I am inclined to believe the question of whether it is covertly gender-based is the same as the question whether its adverse effects reflect invidious gender-based discrimination." 442 U.S. at 281 (Stevens, J., concurring). *See also* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376, 1390 (1979) [hereinafter cited as *Assessment After Feeney*].

73. Blumberg, *supra* note 2, at 35-51. *See* notes 67-69 and accompanying text *supra*. It should be noted that the presence or absence of a sufficient relationship between the purpose of a law and its classification is the heart of an equal protection inquiry. *See generally* Tussman & tenBroek, note 53 *supra*. Although the Court's language appears to be clear when it states the applicable legal precedent, the Court on the same page quotes a decision in which it was stated that "purposeful discrimination is 'the condition that offends the Constitution.'" 442 U.S. at 274. This gives the mistaken impression that once purposeful discrimination is shown, unconstitutionality results.

74. *See* Tussman & tenBroek, *supra* note 53, at 366.

75. *Id.* at 358.

76. According to one scholar, "[t]he 'discriminatory purpose' terminology used in *Washington* and elsewhere, however, is misleading . . . 'discriminatory purpose' refers to the deliberate use by government of race as a criterion of selection; if this use is to be sustained it requires a compelling objective that cannot be achieved without the racial criterion." Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 548-49 (1977) [hereinafter cited as *Disproportionate Impact Theory*].

77. *See* notes 166-172 and accompanying text *infra*.

78. *See Assessment After Feeney*, *supra* note 72, at 1402 ("actual clarification of the concept may be possible only through the Court's application of its powers of review to varying fact situations").

The present state of affairs is that commentators have criticized the approach taken by the Supreme Court in its recent equal protection decisions[79] for not following through with the Warren Court's[80] original "principle of moral equality."[81] These commentators have read the Supreme Court's definition of "discriminatory purpose" literally as a "but for" causal link between an intent, which has been defined as "animus" or "desire to harm," and the disproportionate impact of the proferred policy.[82] The result has been a scholarly quest for a more flexible and realistic approach.[83] One proposal is that a balancing process be utilized in an attempt to show a probability that the decisionmaker's actions have been motivated by racial or gender bias.[84] Under this approach, the extent and severity of the disproportionate effect is weighed against the importance of the legitimate purposes for the decision to the decisionmakers themselves.[85] However, this weighing process is strikingly similar to that employed by the equal protection doctrine in general, which measures the relationship between the imposed classification and the legitimate governmental objective.[86]

A categorization of the traditional equal protection doctrine into its several component parts may clarify the above criticism of a balancing approach to the *Davis* intent requirement, and thus render a better perspective for handling the Court's new use of the term "discriminatory purpose." The first component is "discriminatory purpose" in its old "malicious purpose" sense.[87] If this factor can be shown, the statute can be struck down as having an illicit objective: specifically, that the proferred state interest is illegitimate.[88] Next is the notion of "classification," which involves the different treatment of similarly situated individuals.[89] Any system of classification, express or implied, necessarily involves "discrimination" between one group or another.[90] But whether a classification is considered to be a "rational discernment" between groups of individuals or an "unlawful discrimination" of one group of individuals over another is dependent

79. *See* note 77 and accompanying text *supra*.

80. *See* note 55 and accompanying text *supra*.

81. *Modern Equal Protection*, *supra* note 61, at 1042. *See also Assessment After Feeney*, *supra* note 72, at 1397-99.

82. *Assessment After Feeney*, *supra*, note 72, at 1397.

83. *Id.* at 1385; *Modern Equal Protection*, *supra* note 61, at 1040.

84. *Assessment After Feeney*, *supra* note 72, at 1407.

85. *Id.* at 1408. Thus, the key to his thesis is "relative degree of impact." *Id.* at 1410.

86. The degree of "rationality" required differs according to which standard of review is applied. *See* notes 53-61 and accompanying text *supra*.

87. *See* notes 74-75 and accompanying text *supra*.

88. *See* Tussman & tenBroek, *supra* note 53, at 366.

89. *Id.* at 344.

90. *Id.* at 358 n.35 (explains two senses of the term "discrimination").

upon the final component of the equal protection doctrine, which can best be described as the "balancing segment." The pertinent inquiry in this segment is whether there is some type[91] of rational relationship between the classification, be it express or implied, and the legitimate state interest effectuated by the classification.[92] If such a rational relationship exists, the policy withstands constitutional review and the equal protection inquiry is over.

Thus, this review of the component parts in a traditional equal protection inquiry indicates that the suggested proposal to weigh the extent and severity of the statute's disproportionate effect against the importance of its legitimate purpose confuses the "classification segment" with the "balancing segment." According to *Davis*, the term "discriminatory purpose" is not intended to mean a malicious desire to harm, but rather triggers a heightened scrutiny for facially neutral laws, which is not a proper part of the traditional balancing segment. In essence, the *Davis* Court requires a showing of "discriminatory purpose" to determine whether or not a covert classification is made along suspect lines despite the apparent neutrality of the express classifications.[93] In this regard, the *Davis* test is more properly considered part of the classification component mentioned above. This indicates that the Supreme Court's new use of the term "discriminatory purpose" means something less than the malicious desire to do harm, because this is encompassed in the first segment.[94] This explanation illustrates the incongruity of applying a weighing approach to ascertain "discriminatory purpose," because weighing should occur only in the final segment of an equal protection inquiry. The proposed balancing test would "weigh" at the middle stage so as to trigger a stricter balancing test in the final stage. This bootstrapping process undermines the classification stage of the equal protection doctrine and effects a virtual circumvention of the intent requirement.[95]

In short, the *Davis* intent requirement is basically a matter of classification, and should be treated as such. If the overt classification is the one being challenged, then the weighing segment should be ap-

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91. See notes 53-61 and accompanying text *supra* for a discussion of the standards of equal protection review and the varying degrees of relation required.

92. *See generally* Tussman & tenBroek, *supra* note 53, at 344-53.

93. *See* note 82 and accompanying text *supra*.

94. 442 U.S. at 272-75.

95. The proposed balancing method confuses the "classification" and "balancing" segments of equal protection inquiries. This may be the result of the short-lived marriage of the equal protection clause and the Title VII impact standard under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Under the *Griggs* standard, all that need be shown is a statistically proven disproportionate impact. See notes 120-124 and accompanying text *infra*. Thus, intent and classification problems were effectively avoided.

plied without the use of *Davis*.[96] However, if a covert classification is being alleged, then the *Davis* test must be satisfied; otherwise the express classification will be the one used in the balancing segment.[97] Finally, if the *Davis* test has been met for an alleged covert classification, then the covert classification should be analyzed in the balancing segment of the equal protection doctrine.[98] This becomes the salient point when the covert classification calls for a stricter standard of review than does the overt one.[99]

C. *Supreme Court vs. Academia: Application of the Davis Test to the Veterans' Preference Statutes*

Prior to the *Feeney* decision, there existed several divergent views as to how the courts should apply the equal protection clause when handling sex discrimination challenges to a veterans' preference statute.[100] The conflict basically came down to the judges[101] versus the scholars.[102] The Massachusetts district panel's decisions, once in *Anthony*[103] and again in *Feeney*,[104] were the first judicial decisions which gave credence to these scholarly commentaries on the subject. Nevertheless, the Supreme Court reversed these lower court decisions in *Feeney*, thus siding with a majority of its brethren in rejecting sex-based challenges to veterans' statutes.

In determining the constitutional propriety of veterans' preference statutes, it is necessary to consider the pertinent arguments raised on both sides of the controversy. Such a consideration involves essentially three questions. First, it is necessary to determine whether an overtly gender-based classification is created by veterans' preference statutes. The second inquiry focuses upon whether a gender-based classification is covertly made by the preference statutes. The final determinaton,

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96. The *Davis* test is only required for laws which are neutral on their face. 426 U.S. at 242.

97. 442 U.S. at 278-80. As stated in *Feeney*, "the law remains what it purports to be: a preference for *veterans* of either sex over *nonveterans* of either sex, not for men over women." *Id.* at 280 (emphasis added).

98. *See* text accompanying notes 91 & 92 *supra*.

99. *Id.* Once the *Davis* test is met, the covert classification is used. Nonetheless, if the classification does not involve a fundamental interest, a suspect class or a quasi-suspect class, the rational basis test will be applied to the covert classification regardless of the showing of intent. *See generally* Blumberg, *supra* note 2, at 35-51. *See also* notes 53-66 and accompanying text *supra*.

100. *See* note 8 and accompanying text *supra*.

101. *See* note 5 and accompanying text *supra*.

102. *See* note 2 and accompanying text *supra*.

103. 415 F. Supp. 485. *See* notes 16-22 and accompanying text *supra*.

104. 451 F. Supp. 143. *See* notes 26-38 and accompanying text *supra*.

which is totally dependent upon the resolution of the first two inquiries, requires the formulation of the appropriate standard of review to be applied to the classification.

1. *Overt Gender-Based Classification*

When a veterans' preference statute is challenged on the basis of an alleged discrimination against women, it must be considered facially neutral because it does not expressly employ a gender-based classification. However, if the same statute were challenged on the basis of non-veteran status, it would not be considered facially neutral since there now exists an express classification on the asserted basis of discrimination.[105] This results in the same statute being treated as facially neutral in one context and as expressly "discriminatory"[106] in the other. The purpose of this part of the inquiry is to ascertain whether there is an express classification on an asserted basis which would trigger a heightened scrutiny standard of review.[107] Thus, if there is an overt gender-based classification, an intermediate standard of review would be applied. However, if the overt classification deals only in terms of veteran status, the rational basis test must be applied absent some showing of a covert gender-based classification. The applicable equal protection standard of review is, therefore, dependent upon the asserted challenge, and it becomes important to initially determine whether or not the statute is neutral on its face.

The more specific question in the veterans' preference context is whether or not the statute can be considered gender-based because it gives a benefit to veterans, a group which is predominantly male, but excludes non-veterans, a group which is comprised of both males and females. Clearly, this classification deals expressly in terms of veteran status alone.[108] However, the argument has been made that the veterans' preference classification should be "related back" to assertedly discriminatory federal military regulations.[109] By incorporating a set of criteria which excludes such a great number of women, the statute is said to be overtly gender-based and not neutral on its face.[110] It is, however, improper to consider the discriminatory ef-

105. *See, e.g.*, Johnson v. Robinson, 415 U.S. 361 (1974) (challenge by conscientious objector who performed alternative service); Rios v. Dillman, 499 F.2d 329 (5th Cir. 1974) (challenge by policemen and firemen).

106. "Discriminatory" in the sense that all classifications discriminate between certain groups of individuals. Tussman & tenBroek, *supra* note 53, at 358 n.35. *See* note 90 and accompanying text *supra*.

107. 442 U.S. at 271-73. *See also* Blumberg, *supra* note 2, at 35-51.

108. 442 U.S. at 276.

109. *See* 451 F. Supp. at 147 & n.7; 415 F. Supp. at 489-90.

110. Professor Blumberg wrote: "The preference ought not to be viewed *in vitro* but

fects of federal military regulations while at the same time refusing to consider their corresponding justifications.[111] In any event, the Supreme Court has indicated that the policies of the federal government toward allowing women to serve in the armed forces are not in question in the veterans' preference situation.[112]

Moreover, the discriminatory proscription procedures in the federal system imposed a burden, not a benefit upon men.[113] In order to alleviate the burden of both compulsory and voluntary military service, virtually all of our states allocate an offsetting benefit through various forms of statutes giving preference to veterans in public employment.[114] That this is a laudable goal is beyond dispute.[115] Therefore, these considerations, when viewed in conjunction with recent decisions holding such preferences to be neutral on their face,[116] lead to the conclusion that it is inappropriate to label such veterans' preference statutes as gender-based.[117]

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should instead be related back to the civil service applicant's capacity to acquire the qualifying criterion—military service sufficient to warrant the preference." Blumberg, *supra* note 2, at 46. *See also* Fleming & Shanor, *supra* note 2, at 26.

111. Blumberg argues that the discriminatory effects of federal military regulations should be considered in an attempt to show that the statute created a gender-based classification. She feels, however, that a *cordon sanitaire* should be drawn around the corresponding justifications for such a federal policy in order to prevent their use in support of a state preference. Blumberg, *supra* note 2, at 51. The inconsistency of such a view is apparent. If an attack is going to be made upon the discriminatory effects of the statute caused by the federal military policies, consistency requires one to also consider their concomitant justifications. Nevertheless, the better position is to take the federal military regulations as a given neutral factor, since the states are not responsible for the acts of the federal government. *See, e.g.*, Branch v. Du Bois, 418 F. Supp. 1128 (N.D. Ill. 1976) (upheld point bonus system of Illinois).

112. 442 U.S. at 276-78.

113. Presumably people do not care to be drafted. *Contra*, Blumberg, *supra* note 2, at 46-47 n.247 (benefit of not being subject to draft is "of questionable value when so many job, health, and welfare benefits hinge upon service").

114. *See* note 6 and accompanying text *supra*.

115. *See* 442 U.S. at 265 & n.12. Even Professor Blumberg considers public jobs to be a limited state resource which may be distributed in a manner calculated to achieve a variety of social goals. Blumberg, *supra* note 2, at 30.

116. *See* 442 U.S. at 274; Bannerman v. Department of Youth Auth., 436 F. Supp. 1273 (N.D. Cal. 1977) (upheld point bonus preference); Branch v. Du Bois, 418 F. Supp. 1128 (N.D. Ill. 1976) (upheld point bonus system); Ballou v. State, Dep't of Civil Serv., 148 N.J. Super. 112, 372 A.2d 333 (App. Div. 1977), *aff'd*, 75 N.J. 365, 382 A.2d 1118 (1978) (upheld absolute preference).

117. The relation back argument really goes to the issue of covert gender-based discrimination; it should not be considered in the initial inquiry to determine whether there is an overtly gender-based classification. *See* 442 U.S. at 276-78. This determination is mainly a factual conclusion, made solely on the basis of the presence or absence of an express classification on the asserted basis of discrimination. The proponents of this argument, however, put it forward at this stage of the inquiry and, therefore, it has been similarly dealt with here.

2. *Intent to Discriminate: Covert Gender-Based Classification*

Since veterans' preference statutes are not overtly gender-based, a second inquiry must be made to determine whether or not there is a covert distinction on the asserted basis of discrimination. It is in connection with this issue that the *Davis* decision becomes important. In order to show covert discrimination, impact alone is not enough; there must be a showing of a purpose to discriminate on the asserted basis.[118] If intent or purpose can be shown, the intended distinction is then treated as if it were an overt classification. For example, if the covert classification involves a suspect classification, such as race, or a fundamental interest, such as voting, the strict scrutiny standard of review should be applied. Also, if the covert classification involves a quasi-suspect classification such as gender, the intermediate standard of review should be applied. However, if the covert classification does not involve any of these triggering factors, the rational basis standard of review should be applied, regardless of the showing of discriminatory purpose. Thus, discriminatory purpose becomes the equivalent substitute for an express classification, and the same standards of review that are applicable to express classifications are also applied to those that are intended but not expressed.[119]

In considering the issue of discriminatory intent, some background is required. In 1971, the Supreme Court, in *Griggs v. Duke Power Co.*,[120] interpreted Title VII of the Civil Rights Act[121] as prohibiting not only intentional discrimination, but also the discriminatory impact of facially neutral employment practices. Although later cases acknowledged this statutory prohibition against employment practices

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Also, in *Feeney*, Justice Campbell's concurring opinion made a similar argument for a gender-based classification because the impact of the statute was the *same as if it were* gender-based. 451 F. Supp. at 152 (Campbell, J., concurring). This is not enough to show an overt gender-based classification. It is simply an attempt to avoid the motive requirement that *Davis* set for facially neutral laws. Because *Davis* held that impact alone is not determinative, this argument attempts to circumvent the *Davis* holding by bootstrapping. It uses impact to argue gender-based classification so that the *Davis* decision will be inapplicable and thus impact will again become determinative. Nonetheless, the question is far simpler than all this. In the veterans' preference situation we have an express classification dealing only in terms of veteran status, not gender. This is all that need be said in the first part of the inquiry. On this basis, it can be concluded that an overtly gender-based classification is not created by veterans' preference statutes.

118. *See* notes 23-25 and accompanying text *supra*.

119. *See* notes 96-99 and accompanying text *supra*.

120. 401 U.S. 424 (1971) (employer's practice of requiring successful job applicants to have high school diploma or to achieve a minimum score on intelligence test, which had a disparate impact upon minority applicants, violates Title VII unless employer is able to demonstrate that those requirements are job-related).

121. 42 U.S.C. 2000e (1976).

and applied it in an equal protection context,[122] *Davis* has expressly rejected this approach. *Davis* maintains that the Title VII statutory standard is totally distinct from equal protection doctrine, which requires that a discriminatory purpose be shown before a facially neutral policy will be struck down.[123] Thus, in relying upon an impact analysis, the district court majority in *Anthony* gave credence to what is now generally considered to be bad case law.[124]

Presently, when courts are faced with a challenge to a facially neutral law, they must either make an inference of intent or render a decision upholding the constitutionality of such statutes.[125] In infering the presence of discriminatory intent, the lower court in *Feeney* held that the statistics evidenced a systematic exclusion of women.[126] For two reasons, this systematic exclusion argument is inapposite in the veterans' preference situation and was, therefore, properly considered not to be determinative by the Supreme Court in *Feeney*.[127] First of all, a showing that as little as two percent of women in the Civil Service are veterans[128] does not warrant the conclusion that women are being substantially deprived of positions by virtue of the preference.[129] A comparison to the relevant applicant pool or at least to the number of women in the state's workforce would more accurately reflect proportions of the actual number of people similarly situated with respect to the purpose of the law[130]—the actual number of people ready, willing and able to fill the vacant positions.

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122. Blumberg, *supra* note 2, at 21-35. *See, e.g.*, Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

123. 426 U.S. at 244 & n.12. The *Davis* Court wrote: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." *Id.* at 239.

124. The *Anthony* court cited two of these impact cases with approval. 415 F. Supp. at 497. *See* Boston Chapter, NAACP v. Beecher, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972). Both of these cases applied the *Griggs* Title VII impact standard in an equal protection context. The *Beecher* case even cited *Griggs*. *See generally* Fleming & Shanor, *supra* note 2, at 23 nn.33 & 34; *Veterans' Public Employment Preference*, *supra* note 2, at 809 n.42.

125. In *Feeney*, the three-judge Massachusetts district panel made an inference of intent. 451 F. Supp. at 149. The Supreme Court reversed, however, and upheld the statute. 442 U.S. at 281.

126. 451 F. Supp. at 149.

127. 442 U.S. at 274-75.

128. *See* note 13 and accompanying text *supra*.

129. Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973) (upheld Pennsylvania's ten point bonus preference despite a showing of statistics very similar to those of Massachusetts: two percent of women in Civil Service were veterans, thirty-five percent of males in Civil Service were veterans, and forty-eight percent of the total civil service workers were women). Compare these statistics with those cited in note 13 *supra*.

130. *See* note 141 and accompanying text *infra*.

Furthermore, District Judge Murray made a good point in his dissent to the *Feeney* majority when he noted that both men and women share the benefit of the statute.[131] Indeed, the converse is also true: a large number of men also share the disfavor of the statute.[132] Thus, the statistics are not of sufficient magnitude to be considered determinative,[133] especially when such a high level of exclusion is required to infer intent.[134]

Even assuming that a proper showing of systematic exclusion has been made, the argument is inapplicable for a second reason. The pattern must not be explainable on grounds other than gender.[135] However, the veterans' preference is explainable on other grounds: it draws a distinction between veterans and non-veterans regardless of their sex.[136] The characteristic of being a veteran is what determines inclusion within the preferred class.[137] Hence, the right to recover must rest upon the plaintiff's membership in the non-veteran class, not in the subcategory of women.[138] In spite of this, comparisons are con-

131. 451 F. Supp. at 152-53 (Murray, J., dissenting).

132. *Id.* In Justice Stevens' concurring opinion in *Feeney*, the determinative factor was that the number of males disadvantaged by the statute (1,867,000) was sufficiently large and sufficiently close to the corresponding number of females (2,954,000). *See* note 41 *supra*.

133. Some commentators argue that *Davis* left open the question of whether a disproportionate impact can be conclusive evidence of intent. *See Veterans' Public Employment Preference*, *supra* note 2, at 809. *See also* note 44 and accompanying text *supra*. However, the Court in *Arlington Heights* indicated that "such cases are rare. Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the court must look to other evidence." 429 U.S. at 266 (footnote omitted). *See also* Geduldig v. Aiello, 417 U.S. 484 (1974) (required only that the asserted classification not be a "mere pretext" for invidious sex discrimination).

134. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (facially neutral law applied in discriminatory manner). In *Yick Wo*, not only were most of the brick laundries owned by Caucasians and most of the wooden ones owned by Chinese, but also, all Chinese owners of wooden laundries were refused licenses while only rarely were such licenses refused to Caucasians. *Id.* at 361-62. *See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (racial gerrymandering along city boundaries in a highly extraordinary shape so as to exclude all but four or five of the city's previous four-hundred black voters).

135. 442 U.S. at 276-78. *Davis* hints at this by stating that "in various circumstances the discrimination is very difficult to explain on nonracial grounds." 426 U.S. at 242. The Court in *Arlington Heights*, however, plainly stated that "a clear pattern, unexplainable on grounds other than race" is prohibited. 429 U.S. at 266. *See also* Casteneda v. Partida, 430 U.S. 482 (1977) (explanation on neutral grounds would have rebutted statistical evidence showing exclusion of Mexican-Americans from juries).

136. 442 U.S. at 276-78. *See also* Ballou v. State, Dep't of Civil Serv., 148 N.J. Super. 112, 125, 372 A.2d 333, 339 (App. Div. 1977), *aff'd*, 75 N.J. 365, 382 A.2d 1118 (1978) (the veterans' preference laws do not make any distinction based on sex).

137. See Tussman & tenBroek, *supra* note 53, at 344-45, for the traditional definition of "classification." *See also* notes 89-90 and accompanying text *supra*.

138. Ballou v. State, Dep't of Civil Serv., 148 N.J. Super. 112, 125, 372 A.2d 333, 339 (App. Div. 1977), *aff'd*, 75 N.J. 365, 382 A.2d 118 (1978).

tinually being made between veterans and non-veteran women.[139] However, the proper analysis, as reflected in recent cases, is that the attendant impact falls upon all non-veterans, male and female alike.[140]

The accuracy of this view is easily seen when one reverts to traditional equal protection doctrine which focuses upon the different treatment of persons who are "similarly situated with respect to the purpose of the law."[141] Since the purpose of this statute is to aid veterans,[142] all veterans should be treated similarly. The same should be done with all non-veterans. Since there is a lack of identity between the classification and gender, the relevant comparison to be made in considering the constitutionality of the statute is between the classifications of all veterans and all non-veterans.[143] Hence, if a non-veteran is alleging an equal protection violation, he/she must make a showing that he/she has been treated differently than other non-veterans.[144]

One commentator has disagreed with this type of analysis, attacking the reasoning of *Koelfgen v. Jackson*[145] by postulating that the relevant

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139. *See, e.g.*, Fleming & Shanor, *supra* note 2, at 50; Blumberg, *supra* note 2, at 59; *Veterans' Public Employment Preference*, *supra* note 2, at 806.

140. *See* cases cited at note 116 *supra*. *See also* Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973) (upholding Pennyslvania's ten point preference); Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973) (upholding Minnesota's absolute preference for initial appointment and five point bonus preference for promotions).

141. Tussman & tenBroek, *supra* note 53, at 246; *Developments*, *supra* note 56, at 1076-82. *See also* the *Reed* line of cases listed in note 60 *supra*.

142. 442 U.S. at 264-65.

143. *See* note 149 *infra*.

144. In 1974, the Supreme Court held that a conscientious objector's claim for relief had to be based on his membership in the class of non-veterans, and not on the subclassification of conscientious objectors. Johnson v. Robinson, 415 U.S. 361, 404-06 (1974) (challenge to federal statute affording benefits to veterans). The analogous relationship between *Johnson* and a veterans' preference sex challenge is apparent. In fact, since the conscientious objector provides substitutive civilian service, he has a stronger argument for being similarly situated with veterans. That is, they have both performed some type of service for the government. Despite this fact, the conscientious objector still lost. Nevertheless, attempts have been made to distinguish *Johnson* from the gender situation. *See* Blumberg, *supra* note 2, at 46-47 n.247 (women never asked to be exempted but conscientious objectors did); Fleming & Shanor, *supra* note 2, at 61 n.218 (federal government's justification of special interest in defense and maintenance of armed forces is not available for the acts of state legislatures). Although such distinctions are questionable, the hypothetical situation of a flat-footed plaintiff effectively avoids Professor Blumberg's contention, while Mr. Fleming's and Professor Shanor's contention is put to rest by the previously mentioned notion that the states do have a valid interest in aiding their veterans and, therefore, need not attempt to adopt rationales of the federal government. 442 U.S. at 274-78.

145. 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973) (upheld absolute preference for hiring and point system for subsequent promotions).

comparison should be between veterans and female non-veterans.[146] The following analogy may indicate why this position is not convincing.[147] If a person with flat feet were to challenge a state's veterans' preference statute, it would not be appropriate to compare the "non-veteran" subclassification of "flat-footed people" with the major classification of "veterans." Clearly, it would be incorrect to do so since the subclassification of "flat-footed people" does not include all persons similarly situated with respect to the purpose of the law.[148] So, just as flat-footed people must be considered as part of the larger class of non-veterans, so must women.[149] Actually, since there are no flat-footed veterans, the argument on behalf of flat-footed people would be even stronger than that for women, because the "veteran" class would include some females but would not include any individuals with flat feet.[150] Thus, the systematic exclusion argument is not sufficient to raise an inference of discriminatory intent: the veterans' preference classification is not a mere pretext for "invidious" sex discrimination.[151]

A second argument utilizing statistical evidence can be made to meet the *Davis* requirement. It has been argued that the natural, foreseeable and inevitable consequences of the statute are relevant factors toward raising an inference of discriminatory intent.[152] An old line of cases held that disproportionate impact, regardless of discriminatory intent, is the crucial factor in deciding equal protection challenges.[153]

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146. Blumberg, *supra* note 2, at 58-59. Analyzing *Koelfgen*, Professor Blumberg wrote:

> By subsuming female non-veterans in the class of all non-veterans, the court avoided any consideration of the sexual-impact issue. It is desirable, therefore, to pose squarely the question of sexual impact by presenting a woman plaintiff deprived by the operation of the preference of a job opportunity she would otherwise have had, and by confining the class she represents to similarly situated female non-veterans.

Id. at 59.

147. Professor Blumberg, as well as Mr. Fleming and Professor Shanor, contend that the remedy of making the preference available to all non-veterans would result in a "windfall" benefit to male non-veterans. The theoretical nature of this problem may be another indication that their asserted classifications are incorrect. *See* Blumberg, *supra* note 2, at 74; Fleming & Shanor, *supra* note 2, at 50.

148. *See* notes 141-144 and accompanying text *supra*.

149. *See* Geduldig v. Aiello, 417 U.S. 484 (1974). In holding that the exclusion of pregnancy from the California disability insurance program was not invidious sex discrimination denying women equal protection of the law, the court noted that although the class of pregnant people is exclusively female, the second group of non-pregnant persons includes members of both sexes. This was said to illustrate lack of identity between gender and the statutory classification. *Id.* at 495 n.19.

150. *Id.* at 495.

151. 442 U.S. at 274-75. *See* note 133 *supra*.

152. 451 F. Supp. at 147. *See* notes 30-35 and accompanying text *supra*.

153. *See* Palmer v. Thompson, 403 U.S. 217 (1971) (since there was no racially discriminatory impact, the decision to close public pools rather than desegregate was

These decisions were later used as authority for reading a "natural and foreseeable consequences" test into the requirement of discriminatory intent.[154] Apparently, Justice Stevens advanced this position in his concurring opinion in *Davis*,[155] to which the lower court in *Feeney* had subscribed.[156]

Now, however, *Davis* has virtually overruled[157] the original impact cases,[158] and doubt has been cast upon the viability of this entire line of development.[159] Nevertheless, a few courts continued to use a showing of natural and foreseeable consequences to raise a presumption of discriminatory intent which shifts the burden of persuasion to the defendant. This then became conclusive proof of intent unless there was an affirmative showing by the defendant that the policy was of neutral motive.[160] Other courts, like the lower court in *Feeney*, used the test as a factor in determining the presence or absence of intent.[161] This was more in line with *Davis* and *Arlington Heights*, since those decisions stressed the totality of relevant facts.[162] Hence, after handing down its decision in *Davis*, the Supreme Court summarily vacated and remanded for reconsideration several cases in which lower courts had applied the presumption,[163] even though some of those cases involved

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upheld despite the existence of discriminatory motive). *See also* Wright v. Council of Emporia, 407 U.S. 451 (1972) (division of school district had the effect of interfering with an outstanding order of a federal court). *See generally* Cisneros v. Corpus Christi Independent School Dist., 467 F.2d 142, 150 (5th Cir. 1972), *cert. denied*, 413 U.S. 920 (1973).

154. Arthur v. Nyquist, 429 F. Supp. 206, 210 n.3 (W.D.N.Y. 1977), *aff'd*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). *See, e.g.*, Hart v. Community School Bd. of Educ., 512 F.2d 37, 50 (2d Cir. 1975). *See also* Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

155. Justice Stevens opined 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." *Davis*, 426 U.S. at 253 (Stevens, J., concurring).

156. 451 F. Supp. at 146-47.

157. 426 U.S. 245 n.12.

158. *See* note 153 *supra*.

159. *See* Arthur v. Nyquist, 429 F. Supp. at 210 nn.3 & 4.

160. *See, e.g.*, United States v. School Dist., 541 F.2d 708, 709 (8th Cir. 1976), *vacated and remanded*, 433 U.S. 667 (1977).

161. 451 F. Supp. at 147 n.7.

162. Arthur v. Nyquist, 429 F. Supp. at 210-11 & n.4. *See also* note 29 and accompanying text *supra*.

163. *See* School Dist. v. United States, 433 U.S. 667 (1977) (per curiam) (vacated and remanded the lower court's holding that the natural and foreseeable consequences of racial imbalance in the school system gives rise to a presumption of segregative intent, which is conclusive if not rebutted); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977) (vacated and remanded a lower court's finding of a "cumulative violation" of the equal protection clause based on several factors indicating segregative impact on the Dayton school system); Austin Independent School Dist. v. United States, 429 U.S. 990 (1976) (mem.)

situations where the disparate consequences were natural, foreseeable and inevitable.[164] However, lower federal courts persisted in clinging to the presumption for making findings of discriminatory intent.[165] This necessitated further action by the Supreme Court in *Feeney*, where the Court stated that foreseeability of consequences creates a "strong inference" of discriminatory intent, but should not be used as a "synonym for proof."[166] Although this language is not as strong as the language used previously,[167] it is apparent that the Court will not accept such evidence as conclusive on the issue of intent.

Nevertheless, subsequent to its *Feeney* decision, the Supreme Court again broached the issue of discriminatory intent, this time in the context of two school desegregation disputes. In *Columbus Board of Education v. Penick*[168] and *Dayton Board of Eduction v. Brinkman*,[169] the Court upheld the imposition of systemwide school desegregation plans on the basis of a showing of discriminatory intent on the part of the two school districts involved.[170] The Court was persuaded that the requisite discriminatory intent was present in both cases, basing its conclusion upon an examination of all of the relevant factors surrounding the operation of the school systems, which significantly included a history of past segregative conduct and a showing that the impact of such conduct and policies was actually being exacerbated rather than abated.[171] The rationale which had been applied by the courts of appeals in *Columbus* and *Dayton* indicated that these courts were still applying a presumption standard in determining whether

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(vacated and remanded in light of *Davis* the district court's holding that segregation was the "natural, foreseeable and inevitable result" of the school district's policy of assigning students to schools closest to their homes). *See also* NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 & n.2, 1047-48 (6th Cir. 1977) (remand in *Austin* signals rejection of the effect approach and affirmance of the de jure approach). For a federal court decision rejecting the foreseeability test as determinative of intent, see United States v. Chicago, 549 F.2d 415, 435 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1978) (police department's awareness of racially disproportionate impact of exams is not a showing of intent under *Davis*).

164. This was the case in *Austin*, 429 U.S. 990. *See* note 163 *supra*.

165. *See, e.g.*, Arthur v. Nyquist, 573 F.2d at 142-43 (view that presumption remains valid after *Davis, Arlington Heights* and *Austin*) (citing Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974)); NAACP v. Lansing Bd. of Educ., 599 F.2d 1042, 1046-47 (6th Cir. 1977) (quoting *Oliver*). *See* cases cited at note 154 *supra*.

166. 442 U.S. at 279 n.25.

167. The Court in the *Davis* and *Arlington Heights* decisions spoke of factors and circumstances relevant to a showing of intent. *See* note 29 and accompanying text *supra*.

168. Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979).

169. Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979).

170. *Columbus*, 99 S. Ct. at 2949-50; *Dayton* 99 S. Ct. at 2980-81.

171. *Columbus*, 99 S. Ct. at 2948; *Dayton*, 99 S. Ct. at 2981.

discriminatory intent was present.[172] Although the Supreme Court upheld the conclusions of the lower courts as to whether discriminatory intent existed, the Court again tried to end the presumption debate by reiterating its position that a showing of natural and foreseeable consequences is only one factor relevant to raising an inference of intent, and does not automatically create a "prima facie case of purposeful racial discrimination."[173]

The different results in *Columbus* and *Dayton* on the one hand, and *Feeney* on the other, are justifiable because the fact situations are distinguishable. In *Columbus* and *Dayton* there was a finding of a past history of discriminatory intent and an affirmative duty to eliminate the discriminatory effects of such past practices.[174] All that is present in the typical veterans' preference situation, as was present in *Feeney*, is a statistical showing of disparate impact and a finding that this was a foreseeable consequence of the decision to enact the statute.[175] The Supreme Court has expressly stated that proof of disparate impact and foreseeable consequences is not a sufficient showing of discriminatory intent to satisfy *Davis*.[176]

Therefore, although the Massachusetts district panel in *Feeney* stated that it was looking to the totality of relevant facts so as to raise an inference of intent,[177] in reality it continued to follow an *Anthony-*

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172. Penick v. Columbus Bd. of Educ., 583 F.2d 787, 802-04 (6th Cir. 1978), *aff'd*, 99 S. Ct. 2941 (1979) (affirmance of district court's decision which arguably used the presumption). *See* Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 253-54 n.3. (S.D. Ohio 1977). *See also* Brinkman v. Gilligan, 583 F.2d 243, 251-52 (6th Cir. 1978) (expressly used the presumption).

173. *Dayton*, 99 S. Ct. at 2978 n.9. The Court wrote as follows:

> We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgment; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants. Of course, as we hold in *Columbus* today . . . proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose, and it may itself show a failure to fulfill the duty to eradicate the consequences of prior purposefully discriminatory conduct.

Id. (citations omitted).

The various concurring and dissenting opinions in these two cases criticize the decisions of the majorities for their use of presumptions, affirmative duty, causality and foreseeability. *See, e.g., Columbus*, 99 S. Ct. at 2952 (Rehnquist, J., dissenting); *Dayton*, 99 S. Ct. at 2981 (Rehnquist, J., dissenting); *Columbus* and *Dayton*, 99 S. Ct. at 2989 (Powell, J., dissenting). The authors of these opinions apparently feel that the distinction between de facto and de jure desegregation is being obscured by the majority's approach.

174. *See* note 171 and accompanying text *supra*.

175. *See* notes 34-35 and accompanying text *supra*.

176. *Columbus*, 99 S. Ct. at 2950.

177. 451 F. Supp. at 147. *See* note 29 and accompanying text *supra*.

type impact analysis.[178] A new twist was added, however, by stacking one statistical impact argument upon another, thus attempting to camouflage a virtual reiteration of the *Anthony* decision. However, such a "cumulative violation" argument was implicitly rejected by the Supreme Court in *Feeney*,[179] and was expressly rejected in *Columbus*.[180]

Since neither the systematic exclusion argument nor the foreseeable consequences argument is individually sufficient to raise an inference of intent, the inference should not be made when they are considered together.[181] This being so, the *Davis* test of invidious discrimination has not been met. Absent a gender-based classification or a showing of discriminatory intent, the intermediate standard of review for quasi-suspect classifications cannot be applied. Thus, by process of elimination, the rational basis standard of review is the only viable alternative for dealing with challenges to veterans' preference statutes on the basis of gender.

3. *The Rational Basis Standard Applied: The Balancing Segment of Equal Protection Review*

In the veterans' preference context once covert gender-based discrimination has been shown, the classification is treated as one which distinguishes between men and women. However, if intent cannot be established to show a covert gender-based classification, the distinction made is simply between veterans and non-veterans regardless of their gender.[182] Because the asserted basis of discrimina-

178. *See* notes 14-20 and accompanying text *supra*.

179. *See* 442 U.S. 256 (1979). *See also* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); NAACP v. Lansing Bd. of Educ., 559 F.2d 1042, 1046 n.2 (6th Cir. 1977).

180. 99 S. Ct. at 2950 ("disparate impact and foreseeable consequences, without more, do not establish a constitutional violation").

181. *Id.* The statistical argument about a clear pattern of exclusion is unconvincing. *See* notes 126-134 and accompanying text *supra*. Nevertheless, it states only half of the standard. A further showing that the pattern is unexplainable on other, non-discriminatory grounds, is required. *See* notes 135-151 and accompanying text *supra*. The contention that the "natural, foreseeable and inevitable consequences" of the statute result in discrimination, in conjunction with the statute's disproportionate impact, is not a sufficient showing of discriminatory intent to constitute an equal protection violation under *Davis*. *See* notes 152-180 and accompanying text *supra*. Furthermore, *Davis* is not distinguishable. It was easily foreseeable that blacks would not do as well as whites on the test. 451 F. Supp. at 153 (Murray, J., dissenting). *See, e.g.*, Boston Chapter, NAACP v. Beecher, 504 F.2d 1017, 1021 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (expert testimony that black and Spanish-surnamed candidates performed poorly on written multiple choice exams). Likewise, the legislature's awareness of the consequences does not satisfy the intent requirement. 451 F. Supp. at 153 (Murray, J., dissenting). Thus, we have two separate impact arguments which do not amount to a showing of intent.

182. 442 U.S. at 276, 278-80.

tion has not been proven either overtly, through an express gender-based classification, or covertly, through a purpose to discriminate against women, the female non-veteran plaintiff has no special status to challenge the statute. Her claim must therefore be treated as that of any other non-veteran challenging the classification between veterans and non-veterans under the rational basis standard of review.[183]

Using the proper, "permissive" standard of review,[184] a court could easily conceive of a rational basis to relate the statutory classifications of veterans and non-veterans to the governmental interest of aiding veterans.[185] Absent a strict scrutiny standard, the legislature is presumed to have acted constitutionally[186] and invidious discriminatory purpose will not be lightly inferred.[187] The courts will not inquire into the wisdom of legislative policies and will only consider whether the statute falls within constitutionally permissible boundaries.[188] This is the meager role of the judiciary in the lower tier of equal protection doctrine. To strike down veterans' preference statutes in the face of a sex-based challenge would be to unjustifiably "cross the Rubicon," for arbitrariness and capriciousness are not in sight.[189]

In both *Anthony* and *Feeney* the Massachusetts district court panel highlighted the availability of less drastic reasonable alternatives, such as a point preference for acheiving the legitimate objective of aiding veterans.[190] It was the absolute and permanent nature of the preference which was said to render the Massachusetts statute constitutionally objectionable, although a point preference or time limit would have been acceptable.[191] In actuality, this is merely another impact-type argument which is not determinative unless other factors

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183. *See* notes 97 & 119 and accompanying text *supra*.

184. *See* note 54 and accompanying text *supra*.

185. The rationales in support of veterans' preference provisions have been standardized and are well accepted. 442 U.S. at 265 & n.12. *See also* cases cited in note 87 *supra*.

186. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (upheld statute setting fifty as mandatory retirement age for uniformed police officers).

187. *See* Dandridge v. Williams, 397 U.S. 471, 486-87 (1970) (no equal protection violation merely because classifications are imperfect).

188. *See* Kahn v. Shevin, 416 U.S. 351, 356 (1974) (upheld statute granting an annual property tax exclusion to widows, but not to widowers).

189. Rios v. Dillman, 499 F.2d 329, 335 (5th Cir. 1974) (court upheld veterans' preference under rational basis test, stating that "our constitutional 'thou shall not' is most limited: we may cross the Rubicon only to search out capriciousness and arbitrariness").

190. 415 F. Supp. at 499; 451 F. Supp. at 150. *See also* 442 U.S. at 281-82 (Marshall, J., dissenting).

191. 415 F. Supp. at 499. *See also* note 31 *supra*.

are present to indicate discriminatory intent.[192] Consequently, the Supreme Court has held that the degree of the preference makes no constitutional difference, and that less drastic reasonable alternatives have no role in the rational basis standard of review.[193] Thus, since the classification of veterans and non-veterans reasonably relates to the purpose of aiding veterans, veterans' preference statutes pass constitutional muster regardless of the availability of other reasonable alternatives.[194]

IV. CONCLUSION

The foregoing analysis has indicated that a veterans' preference statute should be considered neutral on its face when it is challenged

192. 415 F. Supp. at 507 (Murray, J., dissenting) (just another way of saying preference was too great, not that there was no rational basis for the classification); Koelfgen v. Jackson, 355 F. Supp. 243, 254 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973) (the difference is in degree rather than principle); Ballou v. State Dep't of Civil Serv., 148 N.J. Super. 112, 124, 372 A.2d 333 (App. Div. 1977), *aff'd*, 75 N.J. 375, 382 A.2d 1118 (1978) (availability of less drastic means is irrelevant and immaterial). *See also* Blumberg, *supra* note 2, at 80 ("to say . . . that a point system would be less onerous . . . is not a constitutionally adequate reason"). In response to the *Feeney* majority's argument that a point system is acceptable, but an absolute one is not, Judge Murray's dissenting opinion illustrated how the point preference system would also have kept Ms. Feeney from becoming certified. 451 F. Supp. at 509 n.14. (Murray, J., dissenting). Without a gender-based classification or factors indicating intent, the intermediate standard of review should not be applied to our veterans' preference situation. *See* note 67 and accompanying text *supra*. Absent this heightened scrutiny, the availability of less drastic alternatives is meaningless. *See Developments*, *supra* note 56, at 1102 n.154 (strict scrutiny requires the use of less onerous alternatives); Blumberg, *supra* note 2, at 23 n.114 (strict scrutiny requires that less drastic means not be available). It is, therefore, interesting to note that Judge Campbell's concurring opinion in *Anthony* was based solely on this point! 415 F. Supp. 501 (Campbell, J., concurring). *See* note 14 *supra*.

193. 442 U.S. at 277 & n.23.

194. *Contra*, *Feeney*, 442 U.S. at 281-88 (Marshall, J., dissenting). Justice Marshall felt that the intermediate standard of review should be applied to veterans' preference statutes. *Id.* at 282-83 (Marshall, J., dissenting). He then concluded that there is not a substantial relation between the classification and the three state interests involved. *Id.* at 286-88 (Marshall, J., dissenting). More specifically, he determined (1) that the classification was overinclusive when gauging its relation to the state interest in easing veterans back to civilian life because the statute invokes a permanent preference; (2) that the statute was overinclusive when gauging its relation to the state interest of encouraging military service because the statute extends benefits to veterans who had already served during a prior period, and because it benefited men who were drafted as well as those who served voluntarily; (3) that the statute was not "carefully tuned to alternative considerations" when gauging its relation to the state interest of rewarding veterans. *Id.* Although Justice Marshall's points arguably present a closer question when applying the intermediate standard of review, it would nevertheless appear that such close scrutiny is not required under the rational basis standard of review. *See* notes 53, 54, & 184-194 and accompanying text *supra*.

for allegedly violating the equal protection rights of women.[195] From this conclusion, it follows that the requirement of showing a discriminatory purpose is applicable[196] and must be satisfied in order to utilize the heightened scrutiny standard for sex-based classification.[197] However, the theories of "relation back,"[198] systematic exclusion[199] and foreseeable consequences[200] do not afford the courts a sufficient foundation upon which to base an inference of intent.[201] In addition, arguments concerning the availability of less drastic alternatives, which focus on the absolute and permanent nature of some preference provisions such as the one in Massachusetts, are similarly of no help.[202] Although such statutes may have a disparate effect upon a state's population, a typical veterans' preference statute is neutral on its face, is not motivated by any discriminatory purpose, and should therefore be upheld under a rational basis standard of review.[203]

Previously, there was a great deal of debate about the propriety of inquiring into the subjective motivation of decisionmakers when considering contitutional questions.[204] However, the Supreme Court has foreclosed such discussion with its decisons in *Davis*, *Arlington Heights*, and now *Feeney*.[205] Yet, *Davis* and *Arlington Heights* only dealt with the constitutionality of administrative actions.[206] In *Feeney*, the Court was faced with the much more difficult question of dealing with the subjective motivation of an entire state legislature. It is one thing to determine the subjective motivation of a single administrator or even a small group of administrators, but it is quite a different matter to attempt to gauge the subjective motivation of several hundred

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195. *See* notes 109-117 and accompanying text *supra*.

196. *Davis*, 426 U.S. 229 (1976). *See* text accompanying note 117 *supra*.

197. *See* note 73 and accompanying text *supra*.

198. *See* notes 109-117 and accompanying text *supra*.

199. *See* notes 126-151 and accompanying text *supra*.

200. *See* notes 152-180 and accompanying text *supra*.

201. *See* note 181 *supra*.

202. *See* notes 190-194 and accompanying text *supra*.

203. *See* notes 182-194 and accompanying text *supra*.

204. *Compare* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1212-17 (1970) ("The Case Against Considering Motivation") *and* Cox, *supra* note 55, at 116 ("[i]t seems unlikely that much constitutional significance will attach to distinctions in terms of intent") *with* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 134 ("a blanket refusal to inquire into legislative and administrative motivation is not justified").

205. *See Modern Equal Protection*, *supra* note 61, at 1039 ("whatever the particular structure of inquiry into motivation adopted by the Court, it is clear that the Court should not and does not forsake the inquiry"). *See also Columbus*, 99 S. Ct. 2941; *Dayton*, 99 S. Ct. 2971.

206. In *Davis*, 426 U.S. 229 (1976), it was a qualifying test by a police department, and in *Arlington Heights*, 429 U.S. 252 (1977), it was the denial of an application for rezoning.

legislators.[207] Thus, although the Supreme Court had previously made discriminatory intent the focal point for alleged equal protection violations concerning administrative acts,[208] it has, by virtue of its *Feeney* decision, implicitly extended the application of the intent requirement into the area of legislative enactments.

The significance, then, of *Feeney* is in the lesson that the Supreme Court is determined to stand by its earlier mandate set forth in *Davis*, even for the more difficult question of legislative motivation. However, the Supreme Court will probably find it necessary to continue to expound upon its controversial *Davis* test in order for that test to attain its proper role in equal protection inquiries.[209] It is suggested that the Court would do well in this area of law by avoiding its terminology quandary[210] and thinking more in terms of mere pretext and covert classifications.[211] The showing of an intentional covert classification will then presumably be more difficult than intent in the tort sense of volition or knowledge of the consequences, but it will be easier than the showing of a motive to cause harm.[212] But, as the *Davis* test stands now, challenges by plaintiffs such as Helen Feeney will be unsuccessful unless future courts are willing to conclude that legislatures had an improper desire to disadvantage women which in turn motivated the enactment of a veterans' preference statute.[213] It is predicted that this will occur on rare occasion, if at all. Perhaps in this respect, and for this moment in time, the idea of equality has been cabined.[214]

Pat Labbadia, III

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207. Branch v. Du Bois, 418 F. Supp. 1128, 1133 n.4 (N.D. Ill. 1976) (intent of a legislature is much more difficult to ascertain than the intent of an individual, with which both courts and juries are more accustomed to dealing). *See also* Tussman & tenBroek, *supra* note 53, at 359; *Assessment After Feeney*, *supra* note 72, at 1405 & n.190.

208. *See* text accompanying note 117 *supra*.

209. *See* notes 78 & 80 and accompanying text *supra*.

210. *See* note 74 and accompanying text *supra*.

211. *See* notes 87-99 and accompanying text *supra*.

212. *See* De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979), where the court stated:

> The search for sex-discriminatory motivation cannot halt simply upon a demonstrated absence of manifest misogyny. On the other hand, it would be inappropriate and unwise for the courts to attempt to probe the thought processes of every decision-maker with legislative or administrative responsibilities for traces of sexual bias.

Id. at 59.

213. *See* Rhode Island Minority Caucus, Inc. v. Baronian, 590 F.2d 372, 376 (1st Cir. 1979) (necessary to prove that "racial animus" played a part in the decision in order to trigger strict scrutiny). *See also* note 82 and accompanying text *supra*.

214. *But see* Cox, *supra* note 55, at 91 ("[o]nce loosed, the idea of Equality is not easily cabined").