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Sex Discrimination: State Veteran's Preference Statute Declared Unconsitutional under Discriminatory Purpose Rule

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SEX DISCRIMINATION: STATE VETERAN'S PREFERENCE STATUTE DECLARED UNCONSTITUTIONAL UNDER DISCRIMINATORY PURPOSE RULE—*Feeney v. Massachusetts*, 451 F. Supp. 143 (D. Mass. 1978), *pro. juris. noted,* 47 U.S.L.W. 3245.

INTRODUCTION

Military veterans have traditionally been granted special advantages in securing governmental employment.[1] The underlying rationale for such benefits is to promote the governmental interest in rewarding those who have served their country in the military,[2] to aid in the rehabilitation and relocation of veterans whose life style has been disrupted by the military service,[3] and to provide incentives for young men and women to join the armed forces.[4] This form of legislation[5] has been the subject of many constitutional challenges on due process and equal protection grounds.[6] Due to proscriptions limiting the number of women eligible to enter the military,[7] veterans' preference statutes have generally been inaccessible to most women. Accordingly, an increasing number of judicial challenges have been made by women alleging that preference legislation violates the equal protection clause. The statutes have generally been upheld as a rational means of implementing a state's goal of aiding the veteran.[8] Nevertheless, in *Feeney v.*

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1. *See* Note, *Veterans' Preference In Public Employment: The History, Constitutionality, and Effect On Federal Personnel Practices of Veterans' Preference Legislation*, 44 GEO. WASH. L. REV. 623 (1976).

2. H.R. Rep. No. 1289, 78th Cong., 2d Sess. 4-5 (1944).

3. Koelfgen v. Jackson, 355 F. Supp. 243, 251 (D. Minn. 1972).

4. Hutcheson v. Director of Civil Serv., 361 Mass. 480, 486-87, 281 N.E.2d 53, 57 (1972).

5. Such legislation is in two forms. The first form grants veterans an absolute preference without requiring that they compete in a civil service examination. The second gives the veterans "preferences", *i.e.*, bonus points, only after they have passed a civil service examination. The first type of preference has been declared unconstitutional. *See* McNamara v. Director of Civil Serv., 330 Mass. 22, 25-26, 110 N.E.2d 840, 843 (1953); Note, *Veterans' Preferences in Public Employment, supra* note 1 at 631 n.69.

6. U.S. CONST. amends. v, xiv.

7. Act of Aug. 10, 1956, Pub. L. No. 84-1028, §3209(b), 70(a) Stat. 174, repealed by Act of Nov. 8, 1967, Pub. L. No. 90-130, § (9)(E), 81 Stat. 375; Act of Aug. 10, 1956 Pub. L. No. 84-1028, §5410-11, 70(a) Stat. 298 repealed by Act of Nov. 8, 1967, Pub. L. No. 90-130, § 1 (16), 81 Stat. 376; and Act of Aug. 10, 1956, Pub. L. No. 84-1028, §8215, 70(a) Stat. 298, repealed by Act of Nov. 8, 1967, Pub. L. No. 90-130, § 1 (26)(E), 81 Stat. 382. The Army still maintains a two percent limitation by regulation. 32 C.F.R. § 580.4(b) (1977).

8. *See* Koelfgen v. Jackson, 355 F. Supp. 243 (D. Minn. 1972), upholding Minnesota's preference statute giving an absolute preference to veterans when they seek initial appointment to a civil service job. *See also* Feinerman v. Jones, 356 F.

Massachusetts,[9] a three-judge federal district court upheld a challenge to the Massachusetts veterans' preference statute due to its unfair impact on women, causing them to be precluded from that state's higher administrative positions.

The focus of this note is on the rationale applied by the district court, on remand, in reaffirming its earlier decision to declare the veteran's benefit statute unconstitutional. The Supreme Court's holding in *Washington v. Davis*[10] will be discussed and applied to the district court's decision on remand. The district court's finding that the statute disproportionately impacted on women was alone insufficient to support its invalidation of the statute. Under the principles of *Davis*, the district court was required to objectively analyze whether or not the statute served an invidiously discriminatory purpose,[11] an analysis inadequately made by the *Feeney* court.

FACTS AND DECISION

This case was brought as two separate actions by four Massachusetts women, challenging that state's veterans' preference statute.[12] In the first suit, the claims of three of the women, who were seeking positions as attorneys, were declared moot upon passage of an act removing all appointments for state and municipal legal positions from the civil service law.[13] Plaintiff Feeney's claim concerning an adminis-

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Supp. 252 (M.D. Pa. 1973), which sustained Pennsylvania's preference legislation awarding a ten point bonus to any veteran who received a passing grade on the state's civil service examination. The court held that once the classification is found to rationally relate to a legitimate end, it will not be set aside. The stricter equal protection review was not warranted, according to the court, because the classification was found neither to be suspect nor to affect a fundamental interest. For an overview of equal protection analysis, *see* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

9. 451 F. Supp. 143 (D. Mass. 1978), *prob. juris. noted,* 47 U.S.L.W. 3245 (1978).

10. 426 U.S. 229 (1976).

11. *See* notes 17-18 *infra* and accompanying text.

12. MASS. GEN. LAWS ANN. ch. 31, § 23 (West 1966). The statute reads in pertinent part:

> The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:
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> (1) Disabled veterans as defined in section twenty-three A, in order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B [widows or widowed mothers of veterans] in order of their respective standing; (4) other applicants in the order of their respective standing.

The present version of this statute is at MASS. GEN. LAWS ANN. ch. 31, §5 (West Supp. 1979).

13. MASS. GEN. LAWS ANN. ch. 31, § 5 (West 1966). The present version of this statute is at MASS. GEN. LAWS ANN. ch. 31, § 5 (West Supp. 1979).

trative post in the civil service was retained under the name *Anthony v. Massachusetts*.[14]

In 1971, Ms. Feeney received the second highest test score for the position of Assistant Secretary to the Board of Dental Examiners. Nevertheless she was relegated to the sixth position on the list, due to the policy of granting an absolute preference on the eligibility list to veterans who had passed the exam. Two years later, she applied for another administrative post, receiving the third highest test score. This time her ranking was lowered to number fourteen behind twelve male veterans, eleven of whom had lower test scores. Finally, for a third time, Ms. Feeney sought an administrative position and received a score which would have placed her within the top twenty candidates on the eligibility test. Again, her rank was lowered, this time to seventieth, behind fifty male veterans with lower test scores.[15]

Ms. Feeney obtained a temporary restraining order prohibiting the defendants[16] from filling the position for which she was applying pending the outcome of the case and then sought a permanent injunction against enforcement of the statute and a declaration by the court that the veterans' preference statute was unconstitutional. A three-judge panel of the Massachusetts federal district court issued the injunction and declared the statute unconstitutional.[17] On direct appeal[18] to the United States Supreme Court, the case was remanded[19] under the name *Feeney v. Massachusetts*[20] for reconsideration in light of the Court's recent decision in *Washington v. Davis*.[21]

Before examining the *Feeney* holding, it is helpful to consider the Court's decision in *Davis* concerning the required elements of an equal protection analysis. *Davis* involved the validity of a qualifying test administered to applicants for positions as police officers in the Washington, D.C. Police Department. The complainants alleged that the written test was racially discriminatory because its results excluded a disproportionate percentage of black applicants.[22] The Supreme Court

14. 415 F. Supp. 485 (D. Mass. 1976).
15. 451 F. Supp. at 149.
16. *See* Anthony v. Massachusetts, 415 F. Supp. 485, 487 n.2 (D. Mass. 1976). The court dismissed the actions against the commonwealth of Massachusetts and the Division of Civil Service stating that they were not "persons" as required by section 1983.
17. 451 F. Supp. at 144.
18. 28 U.S.C. § 1253 (1976).
19. 434 U.S. 884 (1977). It should be noted that the *Davis* decision dealt with disproportionate impact on race while *Feeney* deals with gender-based discrimination.
20. 451 F. Supp. 143 (D. Mass. 1978), *prob. juris. noted,* 47 U.S.L.W. 3245 (1978).
21. 426 U.S. 229 (1976).
22. *Id.* at 232-37.

held that the facts of the case did not warrant invalidation of the test procedure based solely upon its disproportionate impact.[23] Application of the principles of equal protection was held to require a tracing back of the invidious quality of a law to a racially discriminatory purpose.[24] Such a purpose does not have to appear on the face of the statute, but can be discerned from the totality of the facts demonstrating the disproportionate impact. The Court looked to objective factors in deciding whether a discriminatory purpose could be attributed to the legislature.[25] Perhaps the most important objective factor was whether the act served a legitimate purpose which the defendants are not constitutionally prohibited from promoting.[26] Impact may not be the "sole touchstone" of a determination of discrimination; there must also be a finding of a racially discriminatory purpose to the allegedly unlawful statute or state act.[27]

On remand, the Massachusetts district court, in *Feeney*, held that the *Davis* holding supported its earlier decision.[28] The court stated that the primary legislative purpose of the statute—to reward public service in the military—was praiseworthy, but the means chosen by the state to achieve its objective were not founded on a "convincing factual rationale."[29] Relying on its earlier language in *Anthony*, the court held that the impact of the selection formula involved was controlled by

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23. Prior to *Davis*, there was considerable uncertainty regarding whether the principal test of discrimination was purpose or effect. Although prior cases suggested that discriminatory effect and not purpose was the chief determinant, no prior Supreme Court case was actually based on that principle. Perry, *The Disproportate Impact Theory of Racial Discrimination*, 125 U. PENN. L. REV. 540 (1977).

24. 426 U.S. at 240. "Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Id.* at 242.

25. 426 U.S. at 241-42.

26. Schwemm, *From Washington To Arlington Heights and Beyond: Discriminatory Purpose In Equal Protection Litigation*, 1977 U. ILL. L.F. 961 (1977). (1977).

27. 426 U.S. at 242. The court stated further that the impact claim standing alone does not trigger the rule that classifications must be strictly scrutinized. The majority was not disposed to adopt the Title VII standard (of the Civil Rights Act of 1964) for reviewing acts which disqualify a substantially disproportionate number of blacks. According to the court, under the Title VII approach discriminatory purpose need not be shown, and it is an insufficient defense to state that some rational basis existed for the challenged practices. This stricter review does not apply for purposes of the Fifth and Fourteenth Amendments. *Id.* at 238-39.

28. The majority of the district court felt that both *Davis* and the Supreme court's later opinion in Arlington Heights v. Metro Housing Dev. Corp., 429 U.S. 252 (1977) supported their conclusion that the preference statute was unconstitutional.

29. 451 F. Supp. 143, 145.

previous federal military proscriptions, which limited to two percent the number of women who could participate in the armed forces.[30] The act clearly benefited male veterans at the expense of women,[31] and the legislature was charged with the knowledge of previous restrictions on women entering the military.[32]

The court distinguished *Davis* on the basis of the nature of the selection procedure challenged in both cases. The written examination in *Davis* was found to be neutral on its face; the Massachusetts statute, however, was "anything but an impartial, neutral policy of selection," because of "the formula's impact, triggered by decades of restrictive federal enlistment regulations . . . ."[33]

The district court, interpreting the Supreme Court's reasoning in *Davis,* examined the Massachusetts preference statute and policies and determined that it had the foreseeable effect of producing a discriminatory impact.[34] Using the statistical evidence demonstrating a pattern of exclusion from the civil service, the court ascertained a discriminatory intent on the part of the legislature.[35] The formula was thus determined to be "a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group . . . those who qualify as veterans, . . . at the absolute and permanent disadvantage of . . . women."[36] Finally, the court found that the state had other less drastic alternatives available to it for aiding veterans.

ANALYSIS

The *Feeney* opinion reflects the difficulties confronting state and federal courts in attempting to discern and apply the discriminatory purpose test laid down in *Davis*. The *Feeney* court attributed a discriminatory intent to the Massachusetts legislature on three grounds: (1) the foreseeability of disproportionate impact, (2) the statistical evidence of negative impact, and (3) the availability of less

30. *Id.*

31. *Id.* at 146.

32. 451 F. Supp. 143. The court also assumed the legislature knew that the criteria in the military regulations bore no relations to fitness for civilian public service. This conclusion was an additional factor in determining discriminatory intent. *Id.* at 148.

33. 451 F. Supp. at 146 (quoting Anthony, 415 F. Supp. 485, 495).

34. This examination was mandated by the language in *Davis* stating that an invidious discriminatory purpose may be inferred from the totality of the facts. 426 U.S. at 242.

35. At the time of the suit, only two percent of Massachusetts women were veterans. A large percentage of women civil service appointees filled lower grade positions and the preference statute was found to virtually exclude women from advancing their position. 451 F. Supp. at 149.

36. 451 F. Supp. at 146 (quoting *Anthony,* 415 F. Supp. at 495).

drastic alternatives. Although all such inquiries are pertinent to traditional equal protection analysis, the foreseeability and statistical evidence tests are not sufficient indicia of the discriminatory intent required by *Davis*. According to one leading commentator, the less drastic alternative analysis is only controlling when a court uses strict scrutiny in evaluating an equal protection challenge, *i.e.*, the statute involves a suspect class or violates a fundamental right.[37]

Since the *Davis* decision, equal protection challenges to veterans' preference statutes have been rejected in California,[38] Illinois,[39] and New Jersey.[40] In each case the court rejected a showing of disproportionate impact as the sole basis on which to judge invidiousness of a facially neutral statute. Unlike the Massachusetts statute, the statutes involved in these states did not grant veterans absolute preference on eligibility lists once they had passed the exam.[41] Arguably, these decisions can be distinguished from *Feeney*, based upon the enhanced impact of the absolute preference in *Feeney*. Nevertheless, the holding of *Davis* and subsequent cases interpreting that decision is that a showing of disproportionate impact is insufficient to invalidate a statute neutral on its face. It must also be shown to have been promulgated with discriminatory intent.

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37. Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). *But see* Kahn v. Shevin, 416 U.S. 351, 360 (1974) (Brennan, J., dissenting). *See generally*, 1976 WIS. L. REV. 330, 333-41 (1976).

38. Bannerman v. Dep't of Youth Auth., 436 F. Supp. 1273 (N.D. Cal. 1977). In California, pursuant to CAL. GOV. CODE § 18973 (West Supp. 1979), a veteran, widow or widower of a veteran is allowed a credit of ten points to his or her passing score on an entrance examination for a civil service position. Relying on *Davis*, the court held that legislative intent was the crucial factor in discrimination cases. No intent to discriminate against women was attributed to the California legislature, and the statute was upheld.

39. Branch v. DuBois, 418 F. Supp. 1128 (N.D. Ill. 1976). The Illinois preference statute provided for an addition of seven-tenths of one point, or fraction thereof, for each six months served, not to exceed thirty months of credit. Plaintiff's disproportionate impact challenge was rejected because the court found the extent of discrimination to be unclear. The use of preference points in Illinois arguably hinders but does not preclude the advancement of women in the civil service, and for that reason, was distinguished from *Anthony*. *Id.* at 1132.

40. 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 118 (Sup. Ct. 1978). Here the plaintiff's equal protection challenge was undercut by a finding of the New Jersey Civil Service Commission that there was insufficient evidence to prove that women were discriminated against by the preference statute to any greater degree than were other non-veterans. The equal protection argument was also rejected because the statute was neutral on its face and satisfied the *Davis* mandate of lack of discriminatory intent. *See* N.J. Stat. Ann.§ 11:27-4 (West 1976).

41. In every veterans' preference scheme, a passing grade must be attained before the veteran is eligible to receive any of the various forms of preference. *See* note 5 *supra*.

A. Foreseeability of Disproportionate Impact

The Supreme Court in *Arlington Heights v. Metropolitan Housing Development Corp.*[42] reaffirmed the *Davis* decision and established certain criteria to guide a judicial inquiry into legislative purpose.[43] *Arlington* set out four basic criteria by which an investigation into legislative purpose may be guided. These factors are as follows: (1) the disproportionate impact of the act, (2) the historical background of the legislative decision, (3) the sequence of events leading up to the challenged action, including departures from the norm, and (4) the legislative or administrative record of the decision.[44] The *Feeney* court erroneously considered only the first and fourth of these criteria. If it had considered the remaining two, it would have found that the statute was passed against a background of a post-war period and that many other states, as well as the federal government, had passed similar statutes.

The *Feeney* court imputed discriminatory intent to the Massachusetts legislature. "The legislature was, at the least, chargeable with knowledge of the long-standing federal regulations limiting opportunities for women in the military, and the inevitable discriminatory consequences produced by the challenged formula because of these limited opportunities."[45]

The *Feeney* court strays here from the purpose test stated in *Davis* and refined in *Arlington*.[46] Neither the purpose test of *Davis* nor the guidelines enumerated in *Arlington* includes the concept of foreseeability. On the contrary, the analysis prescribed by these cases is mostly retrospective and not prospective in determining whether there is a discriminatory purpose. In *Arthur v. Nyquist,*[47] a New York District Court felt that both *Davis* and *Arlington* precluded a foreseeable consequence analysis in determining whether disproportionate impact is determinative of discriminatory intent.

It is misleading to suggest, as does the court in *Feeney*, that simply because the Massachusetts legislature may have or should have been aware that this statute would disproportionately affect women, they acted with a purpose to discriminate. Since Massachusetts cannot be charged with purposefully setting the federal military limitations upon women in the armed forces, argument is much weaker that the

42. 429 U.S. 252 (1976).
43. *Id.*
44. *Id.* at 267-68.
45. 451 F. Supp. at 148.
46. *See* note 21 *supra*.
47. 429 F. Supp. 206 (W.D. N.Y. 1977).

disproportionate effect of this statute was the product of a discriminatory intent. It can be argued that a legislature which has a discriminatory intent could carry it out by taking advantage of a situation created by another level of government. Nevertheless, the military limitations on women have been altered over the years[48] and could even be abolished. They are not a constant disability on which the state legislatures can depend, but are rather a variable factor independent of the passage of a state statute benefiting veterans.

In addition, there are several legitimate state goals which are served by preference legislation.[49] The legislative history of the statute states that the purpose of the law was to give preference to qualified veterans for consideration in civil service employment.[50] The intent is to aid veterans who were unable to gain civilian work experience or seniority during the period of military service.

The discrimination in the present case is analogous to *Geduldig v. Aiello*,[51] where the legislative distinction was held to be between types of disabilities, and not between males and females. In that case California's disability insurance system, the Unemployment Compensation Disability Fund was challenged. Under that system benefits were paid to persons in private employment who were temporarily unable to work because of a disability not covered by workmen's compensation. The definition of disability, however, did not include pregnancy. Thus neither workmen's compensation nor the disability insurance program paid benefits to persons temporarily unable to work because of pregnancy. The Supreme Court found that there were no risks from which men are protected and women are not.[52] Similarly, in *Feeney*, there are no advantages given to male veterans which are not given to female veterans. The legislative classification is drawn along the non-gender distinction between veterans and non-veterans.

B. Statistical Evidence of Disproportionate Impact

The statistical evidence relied upon by the *Feeney* court is also relevant to the impact argument. Foreseeability concerns the prospective view of impact, statistical evidence the retrospective view. Statistical evidence was used in *Feeney* to create an inference of discriminatory purpose.

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48. *See* note 6 *supra*.
49. *See* notes 2-4 *supra*, and accompanying text.
50. 451 F. Supp. at 154. (Murray, J., dissenting).
51. 417 U.S. 484 (1974).
52. " "Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on a reasonable basis . . . ." *Id.* at 496 n.20.

Davis held that disproportionate impact is relevant in ascertaining a discriminatory intent and that a statute cannot be administered in a manner tantamount to deliberate discrimination. Statistical patterns from a sampling of administrative decisions can lead to an inference, without proof of motive, that an improper criterion had been used.[53] Absent a statistical pattern approaching the extremes of *Yick Wo v. Hopkins*,[54] however, impact evidence is not enough and the court must look to other evidence.[55] In *Yick Wo,* of a total of 320 laundries subject to the Board of Supervisors control, 310 were in wooden buildings, of which 240 were owned by Chinese citizens. A licensing statute required operators of laundries located in wooden buildings to obtain the consent of the Board of Supervisors before continuing operation. Chinese laundry owners were denied licenses, but non-Chinese, with one exception, were granted permission to continue operations.

Since the district court failed to fully consider other evidence of discriminatory intent, the connection between the statistical inference of discrimination and invidious motive seems tenuous. The impact is indeed greater on women than on men but the statute has not been applied in such an uneven manner as to establish that the legislature sought to exclude women from higher administrative civil service posts. The pattern of administration must be so discriminatory as to be unexplainable on other grounds.[56] The pattern in *Feeney* can be explained on grounds other than sex discrimination, as the state had legitimate goals it wished to implement in order to aid veterans who experienced a disadvantage for the period of their service which was not experienced by non-veterans. Non-veterans were able to gain civilian job experience and seniority while veterans served in the armed forces.

C. Presence of Less Drastic Alternatives

While the preceding discussions of foreseeability and statistics are related to an impact argument, less drastic alternative analysis deals more with the strict scrutiny equal protection analysis. Equal protection review requires a determination of the appropriate standard to be used in gauging the constitutionality of the statute.[57] Traditional analysis looks to the reasonableness of the classification in light of its purpose.[58] The class must bear a rational relationship to a legitimate

53. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).
54. 118 U.S. 356 (1886).
55. 429 U.S. at 266.
56. *Id.*
57. Feinerman v. Jones, 356 F. Supp. 252, 256 (M.D. Pa. 1973).
58. Shapiro v. Thompson, 394 U.S. 618, 631 (1969).

end and will only be set aside if based on reasons totally unrelated to that goal.[59]

A stricter equal protection analysis is applied in instances where a classification is based upon a suspect criterion or involves a fundamental right.[60] Classifications in these instances will be upheld only if the state can show compelling interests necessitating the classification used.[61] Less drastic alternatives analysis is applicable under this strict scrutiny judicial review.[62]

The right to be considered for public employment has not been viewed as a fundamental right.[63] Furthermore, classifications based on gender have not been declared suspect by the Supreme Court.[64] The *Feeney* court reasoned that because less drastic alternatives were available to effectuate the legislature's desire to aid veterans,[65] the preference statute was invalid. Since the class of veterans defined in *Feeney* is not suspect, however, and the right to public employment which is sought to be protected is not a fundamental right, the court inappropriately considered less drastic alternatives, a tool of strict scrutiny analysis.

CONCLUSION

Disproportionate impact, absent additional evidence of discriminatory intent, is not sufficient to invalidate a facially neutral

59. McDonald v. Board of Election Comm'rs., 394 U.S. 802, 809 (1969).

60. *See* Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969).

61. Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 HARV. C. R.—C. L. 725, 726 (1977).

62. *See* Gunther, *The Supreme Court 1971 Term, Foreward: In Search of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection*, 86 HARV. L. REV. 1, 21-24 (1972).

63. Ms. Feeney was contending that the statute precluded her from being *considered* for a civil service appointment. Given the nature of the selection process, it cannot be maintained that she would definitely have received the appointment in the absence of this statute. *See* Feinerman, 356 F. Supp. at 257. Some examples of fundamental interests are: (1) the right to vote, Bullock v. Carter, 405 U.S. 134 (1972); (2) the right to travel interstate, Shapiro v. Thompson, 394 U.S. 618 (1969); and (3) rights of a uniquely private nature, Roe v. Wade, 410 U.S. 113 (1973).

64. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) in which a four-judge plurality declared women a suspect class. Examples of suspect classes are: race, McLaughlin v. Florida, 379 U.S. 184 (1964), and alienage, Graham v. Richardson, 403 U.S. 365 (1971). The tendancy in modern judicial decisions involving gender has been to use the Reed v. Reed, 404 U.S. 71 (1971), test of a "fair and substantial" relationship between the classification and the end sought to be achieved by the state. Recent cases by the Supreme Court have found sex discrimination in instances of dissimilar treatment of men and women who are similarly situated. *See* Frontiero v. Richardson, 411 U.S. 677, 688 (1973).

65. 451 F. Supp. at 150. For the specific alternatives suggested by the district court, see Anthony v. Massachusetts, 415 F. Supp. 485, 499 (D. Mass. 1976).

statute. The Massachusetts veterans' preference statute involved in this case is neutral on its face, as it is neither drawn along gender lines, "nor does it provide for dissimilar treatment for similarly situated men and women."[66] Once an act is shown to be neutral on its face, the Supreme Court's holding in *Davis* dictates that proof of racially discriminatory intent or purpose is required to establish an equal protection violation. The *Feeney* court attributed an invidious purpose to the Massachusetts legislature, based primarily on its finding of disproportionate impact. The reasons upon which the court relied—that disproportionate impact was foreseeable, that statistical evidence created an inference of a discriminatory purpose, and that less drastic alternatives were available—do not prove that the Massachusetts legislature was influenced by sexually discriminatory motives in promulgating its veterans' preference statute.

A rule that a statute designed to serve legitimate ends is invalid because its burdens fall disproportionately on one sex and this disproportionate impact is foreseeable is far-reaching and could serve to invalidate many tax, public service, and welfare statutes, which place a higher burden on one group than another.[67] Nevertheless, the court in *Feeney* applied such a rule to find the Massachusetts veterans' preference statute invalid.

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66. 451 F. Supp. at 152. (Murray, J., dissenting).
67. *Davis*, 426 U.S. at 248; *see also* Kahn v. Shevin, 416 U.S. 351, 355 (1974).