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Absolute Veterans' Preference in Public Employment: Personnel Administrator of Massachusetts v. Feeney

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CASENOTES

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


Mass. Gen. Laws Ann. ch. 4, § 7, cl. 43 (West 1976) provides Massachusetts's general definition of the term veteran as quoted here in pertinent part: "Veteran" shall mean any person, male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service, provided, that any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete ninety days of active service.

Id. Mass. Gen. Laws Ann. ch. 31, § 21 (West 1976) adds to the general definition provided in chapter 4:

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

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

Id.

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

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

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

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

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

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

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

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


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

1. Disabled veterans as defined in section twenty-three A, in the order of their respective standing;
2. veterans in the order of their respective standing;
3. persons described in section twenty-three in the order of their respective standing;
4. other applicants in the order of their respective standing.

Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

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

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

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

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

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


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

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

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

19 See, e.g., Hutcheson v. Director of Civil Serv., 361 Mass. 480, 281 N.E.2d 53 (1972) (describing the troubled history of the Massachusetts veterans' preference); Mayor of Lynn v. Commissioner of Civil Serv., 289 Mass. 410, 169 N.E. 502 (1929) (Supreme Judicial Court of Massachusetts adopting the Opinion of the Justices, 166 Mass. 589, 44 N.E. 625 (1896), where a majority of four justices declared that it was constitutional to absolutely prefer veterans who pass civil service examinations over all male non-veterans); Brown v. Russell, 166 Mass. 14, 43 N.E. 1005 (1896) (holding unconstitutional St. 1895, ch. 501, §§ 2, 6, making the appointment of veterans to the detective force compulsory without examination).

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

Contending that the absolute preference formula operated to systematically exclude eligible women from consideration for upper-level civil service positions, Mrs. Feeney brought an action under 42 U.S.C. § 1983 in the

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

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

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

Id. Because of a temporary restraining order entered by Judge Tauro on May 23, 1975, no appointments were made to the position of Administrative Assistant while the original action was pending. Id. at 487-88. Following the district court's initial decision, see text and note at note 36 infra, Massachusetts suspended MASS. GEN. LAWS ANN. ch. 31, § 5 providing: "No rule made by the [Civil Service] commission shall apply to the following: ... counsels, attorneys-at-law, including attorneys designated as counsel or counsellors-at-law, city solicitors, town counsels, and assistant town counsels." MASS. GEN. LAWS ANN. ch. 31, § 48, added by 1975 Mass. Acts ch. 134. 442 U.S. at 259 n.30.

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

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state ... subjects ... any citizen of the United
United States District Court for the District of Massachusetts. The Massachusetts Civil Service Commission and the Director of Civil Service were named as defendants. Plaintiff's complaint alleged that the Massachusetts absolute veterans' preference discriminated against her in the area of public employment on the basis of gender in violation of both the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.

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

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

Id. Plaintiff was precluded from bringing an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to 2000e-17 (1976), since section 2000e-11 of that Act provides that "[N]othing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans."


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


In addition to this initial entry limitation, women have been subjected to more stringent enlistment and advancement requirements than have similarly situated men. See Anthony v. Massachusetts, 415 F. Supp. at 489. While men could enlist at age seventeen, women were barred until age eighteen. Id. Men were free to enlist without parental consent after age eighteen, while women were required to have their parents' permission until age twenty-one. Id. at 489-90. Women were subjected to higher mental aptitude tests and more strenuous physical tests than were men. Id. Women with minor children were prohibited from enlisting. Id. Women have also been restricted to a top rank of lieutenant colonel. See generally Landrum & Zanica, Women in the Military, 5 WOMEN'S WORK 17, 17 (Sept.-Oct. 1979) [hereinafter cited as Landrum & Zanica]. While many of these restrictions may have operated to prevent or discourage plaintiff from enlisting in the armed forces, see note 20 supra, the 2% ceiling on female personnel within the military was never reached. Landrum & Zanica, supra.
sachusetts women could ever attain the preferred veteran status, the preference statute excluded most women from the best civil service positions.\(^{34}\) Plaintiff sought to permanently enjoin the continued enforcement of this absolute preference formula.\(^{35}\)

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

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

\(^{35}\) *Anthony v. Massachusetts*, 415 F. Supp. at 487.

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

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

\(^{38}\) 434 U.S. 884 (1977).

\(^{39}\) 426 U.S. 229 (1976).

\(^{40}\) *Id.* at 244-45. Note that in *Davis* the alleged discrimination was racial. The importance of this is discussed in text and notes at notes 190-218 infra.
mand, the district court, with one judge concurring and one judge dissenting, reaffirmed its prior holding, finding that the Massachusetts legislature had intentionally sacrificed the employment opportunities of women in order to benefit its veterans. \(^{41}\)

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

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

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

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


\(^{43}\) 442 U.S. at 271-81.

\(^{44}\) \(\textit{Id.}\) at 275.

\(^{45}\) \(\textit{Id.}\) at 280.

\(^{46}\) \(\textit{Id.}\) at 281-82 (Marshall and Brennan, JJ., dissenting).
appropriately extended Davis's discriminatory purpose standard to the issue of gender discrimination involved in Feeney. Finally, the Court's definition of the level of intent that is required to satisfy Davis's discriminatory purpose standard will be discussed. After examining the special facts of Feeney, it will be suggested that the Court should have included within its definition of discriminatory intent legislative disregard concerning the occurrence of discrimination, as well as positive legislative desire to discriminate.

I. THE SUPREME COURT'S ANALYSIS IN FEENEY

A. The Majority's Analytical Approach

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

1. First Inquiry: Overt or Covert Classification

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

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

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

50 Id. at 274.

51 Id.

52 Id.

53 Id. at 274.

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

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

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

55 Id. at 274-75.
56 Id. at 274.
57 Id. at 274-85.
58 Id. at 274.
59 Id. at 274-85. Anthony v. Massachusetts, 415 F. Supp. at 496.
60 442 U.S. at 274; 415 F. Supp. at 495.
61 442 U.S. at 274-75.
62 Id. at 275.
63 Id. Mass. Gen. Laws Ann. ch. 4, § 7, cl. 43 defines the term "veteran" as "any person, male or female . . . ."
65 442 U.S. at 275.
66 Id. Here, the Court has caught itself in a statistical inconsistency. By emphasizing that the veteran class is not uniquely male, the Court places great significance on the 2% of the armed forces personnel which is female. Yet by stressing that men, as a group, are significantly disadvantaged by the preference, the Court places little importance on the fact that 47% of Massachusetts men are veterans, whereas only 0.8% of Massachusetts women have veteran status. See 442 U.S. at 286 n.3 (Marshall, J., dissenting).
adverse impact is not that women are excluded from civil service positions because they are females, but because they are non-veterans.67

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

2. Second Inquiry: Existence of Purposeful Gender Discrimination

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

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

67 Id. at 275.
68 Id.
69 Id.
70 Id.
71 Id. at 276.
73 Id. at 244.
74 Id. at 245-47.
75 442 U.S. at 276.
76 Id.
77 Feeney v. Massachusetts, 451 F. Supp. at 151 (Campbell, J., concurring).
78 442 U.S. at 276.
79 Brief for the Appellee at 31, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979). This portion of plaintiff's argument actually involves the issue whether Massachusetts veterans' preference establishes a covert classification, the issue considered by the Court in its initial inquiry. See text and notes at notes 176-86 infra.
of Judge Campbell, the military's dividing line between 98% men and 2% women was "built in" to the Massachusetts preference legislation, a factor sufficient to remove the statute from the scope of the *Davis* opinion.

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

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

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80 *Feeney* v. Massachusetts, 451 F. Supp. at 151 (Campbell, J., concurring).
81 *Id.* at 150-51.
82 *442 U.S.* at 276.
83 *Id.*. The Court noted that the Massachusetts statute was "unusual" in that by overtly preferring veterans it was designed to be non-neutral. *Id.*. This partiality, recognized the Court, made the Massachusetts statute technically different than the truly neutral personnel test at issue in the *Davis* case. 426 U.S. at 245-46. Since the Massachusetts law was biased simply in favor of veterans, and not in favor of men, however, the Court determined that *Davis* was controlling. *442 U.S.* at 277-78.
84 *442 U.S.* at 277-78.
85 *Id.* at 276.
86 Brief for Appellee at 31, Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256. This portion of plaintiff's argument more clearly involves the question central to the Court's second inquiry, whether the adverse effect of the veterans' statute reflects invidious gender discrimination. Compare text and note at note 79 *supra*, where plaintiff uses the inherently non-neutral argument to allege that the veterans' law contains a gender classification.
87 In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), a majority of the Court struck down an Air Force statute which required servicewomen to demonstrate that their husbands were dependent upon them for over one-half their support before the servicewomen could qualify for certain allowances and benefits. Servicemen, on the other hand, were not required to establish the dependency of their spouses in order to qualify for these fringe benefits. In declaring this statute unconstitutional, the Court held that male and female members of the armed forces could not be accorded different treatment solely for the purpose of achieving administrative convenience. *Id.* at 690-91. In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), the Court, however, upheld a statute which provided female naval officers a thirteen year period to attain tenure, while male naval officers were given only nine years. Instead, noting the Navy's historical restrictions on the opportunities of female officers, the Court reasoned that the statute was an attempt to offer Navy women "fair and equitable career advancement program[s]." *Id.* at 508.
against women was not on trial in the Feeney case. Further, the Court stated, any presumption that the Massachusetts legislature had intentionally incorporated existing military gender-based practices into its veterans' act was rebutted by the district court's finding that the state had not established the preference for the purpose of discriminating against women. Moreover, the Court stressed, the plaintiff's claim of discriminatory incorporation was inconsistent with her concession that a more limited hiring preference was permissible. Discriminatory intent, said the Court, is not measured by degree, but rather by the fact that it exists at all. Thus, the Court reasoned, if a discriminatory desire had influenced the legislative choice, it would have affected the Massachusetts preference legislation from the outset, and the subsequent form of that preference, whether absolute or limited, would make no constitutional difference.

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

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

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88 442 U.S. at 278.
89 Id.
90 Id.
91 Id. at 277.
92 Id.
93 Id.
94 See text and notes at notes 38-40 supra.
95 442 U.S. at 277. The Court stated that this finding by itself compelled the conclusion that Massachusetts had "intended nothing more than to prefer 'veterans'."
96 Id.
97 Id.
98 Id. at 278.
99 Id.
In the plaintiff's view, the statute's exclusionary impact on the job opportunities of women was sufficiently foreseeable to impute a discriminatory intent to the Massachusetts legislature.\textsuperscript{101}

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

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

\textsuperscript{101} 442 U.S. at 276. See note 49 \textit{supra} for a statistical breakdown of the statute's disproportionate impact.

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

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

\textsuperscript{104} 442 U.S. at 278.

\textsuperscript{105} \textit{Id.} at 279.

\textsuperscript{106} \textit{Id.} (emphasis added).

\textsuperscript{107} In footnote twenty-four the Court seems to place a limitation on the applicability of this subjective intent method of proof by stating that "proof of discriminatory intent must necessarily \textit{usually} rely on objective factors . . ." \textit{Id.} at 279 n.24.
Reviewing the additional evidence contained in the record, the Court concluded that the plaintiff had been unable to meet this burden of proof, since "nothing in the record demonstrat[ed]" that the veterans' preference was enacted because it would keep women "in a stereotypic and predefined place in the Massachusetts Civil Service." Rather, the Court reiterated, the Massachusetts statute merely preferred veterans of either sex over non-veterans of either sex as a means of accomplishing the worthy state goal of rewarding people for their service in the armed forces. Under the rational-basis test as applied by the Court, the validity of this goal and the appropriateness of the statute's means were more than sufficient to protect the absolute, lifetime preference from constitutional challenge.

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

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

109 Id. at 279.

110 Id. at 280.

111 See text and note at note 146 infra.

112 442 U.S. at 280-81.

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

114 Id.

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

Justice Marshall, joined by Justice Brennan, dissented on four grounds from the holding that the legislative choice of an absolute, lifetime veterans' preference did not reflect gender-based discrimination. As a starting point, Justice Marshall disagreed with the majority's logic that the primary benevolent purpose of the veterans' statute foreclosed the possibility of a subsidiary objective to disadvantage women. In support of this view, Marshall relied upon the Court's decision in Village of Arlington Heights v. Metropolitan Housing Development Corp., which acknowledged that legislators frequently seek to accomplish multiple goals and are rarely motivated by a single concern.

Given this reality, Justice Marshall reasoned that the presence of a dominant, legitimate purpose could not, by itself, exclude the possibility of an unconstitutional subsidiary objective. Justice Marshall stressed that the appropriate inquiry was not whether an illicit consideration was the causative reason for enacting the statute, but rather whether it was a motivating factor in shaping otherwise legitimate legislation.

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

116 Id. at 281-82 (Marshall and Brennan, JJ., dissenting).
117 Id. at 282.
119 Id. at 282.
120 442 U.S. at 282-83.
121 Id. at 283.
122 Id.
123 Id.
124 Id.
126 442 U.S. at 284.
been exempted from jobs "especially calling for women." This exemption, coupled with the absolute preference itself, resulted in a two-tier civil service system with women occupying lower-level secretarial jobs and men holding more responsible and remunerative positions. Given the state's attempt to mitigate the statute's impact only with respect to traditional female jobs, Justice Marshall criticized the majority's holding that "nothing in the record evinces a collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service." Instead, he concluded that the statutory scheme of the veterans' preference reflected and perpetuated the very kind of discriminatory assumptions about the role of women which the Court previously had held invalid.

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

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127 Id. at 284-85.
128 Id.
129 Id. at 285-86.
130 Id. at 285.
131 Id. at 286.
132 Id. Statutes that reflect gender-based discrimination are subjected to a more relaxed judicial scrutiny than are statutes suspected of discrimination on the basis of race, alienage, or national origin. See text and note at note 152 infra. In Craig v. Boren, 429 U.S. 190 (1976), the Court established that "[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objectives and must be substantially related to those objectives." Id. at 197.
133 442 U.S. at 286.
134 In support of the absolute preference, Massachusetts advanced three governmental objectives: (1) assisting veterans in their readjustment to civilian life; (2) encouraging patriotic service [military enlistment]; and (3) rewarding those who have sacrificed in the service of their country. See Brief for the Appellants at 24, Personnel Administrator of Mass. v. Feeney, 442 U.S. 256 (1979). See generally Hutcheson v. Director of Civil Serv., 361 Mass. 480, 281 N.E.2d 53 (1972).
135 442 U.S. at 286.
136 See note 134 supra.
137 442 U.S. at 287.
138 See note 134 supra.
without foreclosing the public employment opportunities of women. For these reasons, the dissent concluded that the Massachusetts absolute veterans' preference violated the equal protection clause of the fourteenth amendment. Before considering whether this conclusion is indeed correct, the following critique will examine the validity of the majority's analytic approach.

II. CRITIQUE OF THE SUPREME COURT'S ANALYSIS

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

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

A. First Inquiry: Overt or Covert Classification

1. Traditional Equal Protection Analysis

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

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

140 442 U.S. at 288.

141 426 U.S. 229 (1976).

142 The fourteenth amendment states in pertinent part that "No state shall ... deny to any person in its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A law is equal when it treats similarly situated persons in the same manner. There is, however, no requirement that a law identically treat persons in dissimilar positions. Hence, while equal protection under the laws is guaranteed by the fourteenth amendment, equal results from the laws is not. See generally Washington v. Davis, 426 U.S. 229 (1976); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).
individuals, distinguishing between those within and without their reach. Given this reality, the Supreme Court has stated that the equal protection clause of the fourteenth amendment does not strip the states of their power to classify individuals;\textsuperscript{143} rather it commands that these statutory classifications be reasonable.\textsuperscript{144} Evaluating the reasonableness of a challenged classification is, therefore, the central aim of the traditional equal protection analysis.\textsuperscript{145}

Under this analysis, most classifications rationally related to a reasonable governmental objective are presumed valid.\textsuperscript{146} If, however, a law involves identifiable minority groups traditionally the targets of discrimination and disadvantage, the Court is far more skeptical of the statute's purported purpose.\textsuperscript{147} Hence, any statute explicitly distinguishing individuals on the basis of their race,\textsuperscript{148} alienage,\textsuperscript{149} national origin,\textsuperscript{150} or gender\textsuperscript{151} is said to erect an

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

\textsuperscript{144} The reasonableness of a classification is measured by a means-end analysis. See generally G. GuntHER, CONSTI\textsuperscript{1}TUTIONAL LAW 665-90 (1975). If the statutory classification, or means, is sufficiently related to the law's purpose, or end, then the classification is deemed reasonable. Id. Since the degree of congruence actually required varies with respect to the group being classified, the Court has developed three standards of review, or "means tests," by which to measure the validity of a challenged classification. See text and notes at notes 146-52 infra. For the classic discussion of the doctrine of reasonable classification, see Tussman and tenBroek, \textit{The Equal Protection of the Laws, 37 Calif. L. Rev.} 341 (1949) [hereinafter cited as Tussman and tenBroek].

\textsuperscript{145} See generally Tussman and tenBroek, supra note 144.

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

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

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

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

\textsuperscript{150} See, e.g., Oyama v. California, 332 U.S. 653, 646 (1948); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

\textsuperscript{151} See, e.g., Orr v. Orr, 440 U.S. 268, 278-79 (1979) (since a statutory scheme provides that different treatment be accorded individuals on the basis of their sex, "it
overt discriminatory classification. Since these overt classifications are presumed to result from purposeful discrimination, each triggers a heightened standard of review under which the state must establish the validity of its purpose and the reasonableness of its classification.\textsuperscript{152}

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

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

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

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

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

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

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


\textsuperscript{154} 238 U.S. 347 (1915).
In *Guinn*, the Court considered the validity of a 1909 amendment to Oklahoma's state constitution. This amendment, while imposing a literacy test as a condition to voting, contained a "grandfather" clause which exempted from the literacy requirement any person, or "lineal descendant of such . . . person who was, on January 1, 1866, or anytime prior thereto, entitled to vote." The Court's evaluation of this provision entailed three distinct steps. Initially, in considering the explicit language of the amendment, the Court stated that there were "no express words" classifying people on the basis of race. The Court thus concluded that the Oklahoma amendment did not erect an overt racial classification. Turning next to the amendment's actual operation, the Court observed that the grandfather clause "inherently brings that result into existence" since it related back to January 1, 1866, a period of time when most blacks did not have the right to vote. Hence, the Court reasoned, while the amendment seemingly imposed a literacy test on all persons, the grandfather clause exempted whites from this requirement, and, thus, applied the literacy standard only to blacks. Having uncovered a classification incorporated within the Oklahoma amendment, the Court next searched for the purpose behind choosing the 1866 date. "Unable to discover . . . the slightest reason for basing the classification upon a period of time prior to the enactment of the Fifteenth Amendment," the Court concluded that the real purpose of Oklahoma's state amendment was to deny blacks the right to vote.

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

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155 Id. at 356-57.
156 The amendment provided:
No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at anytime prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.
Id. at 357.
157 Id. at 364.
158 Id. at 364-65.
159 Id. at 365.
160 Id.
161 Id. The fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.
defines the role which each classification plays in the equal protection analysis. Easily apparent overt classifications provide a starting point for the Court's equal protection inquiry by creating a presumption of purposeful discrimination. In contrast, a finding of purposeful discrimination is first necessary to uncover the existence of a covert classification. Hence, rather than marking the starting point of the Court's search for purposeful discrimination, the identification of a covert classification instead signals the end of the Court's analysis. Although the distinction between the function of an overt classification and the less significant role of a covert classification may seem unimportant, the following suggested analysis of the Massachusetts veterans' preference reveals that the differentiation at times can be critical.

2. The Three-Step Analysis Applied

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

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

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162 238 U.S. 347, 364 (1915).
163 Id. at 364-65.
164 Id. at 365.
165 See note 2 supra.
166 Since the Massachusetts veterans' preference is both absolute and permanent, the results of the military's discrimination are actually "frozen" into the statute, thus eliminating women from consideration for civil service positions. Under the limited hiring techniques, although the military's past practices preclude women from being preferred, many female applicants still have access to civil service positions by virtue of their high composite test scores.
167 See note 33 supra.
allowed entrance to the military could attain the preferred veteran status and, thus, be considered for appointment to the best civil service positions.\textsuperscript{168}

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

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

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

\textsuperscript{168} Feeney v. Massachusetts, 451 F. Supp. at 151. See also text at notes 80-81 supra.

\textsuperscript{169} See Fleming & Shanor, supra note 4, at 21-22.

\textsuperscript{170} See text and notes at notes 142-55 supra.

\textsuperscript{171} See text at note 160 supra.

\textsuperscript{172} See note 134 supra.

\textsuperscript{173} See text at notes 117-20 supra.

\textsuperscript{174} See text at notes 160-61 supra.
questioning whether the statute resulted from purposeful discrimination. As will be seen, the *Feeney* majority's apparent failure to understand this similarity when formulating its two-step inquiry led, in part, to the Court's repetitive and disorderly opinion.

3. The Two-Step Approach in *Feeney*

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

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

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

177 442 U.S. at 274.

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

179 See text following note 161 supra.
containing a covert classification, therefore, may be characterized as simply a facially neutral law whose disproportionate impact is produced by a discriminatory purpose. For this reason the Feeney Court was mistaken in formulating its two-step approach since it considered the question of covert classification independently from the issue of discriminatory purpose.

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

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

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

181 Id.

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

183 See note 180 supra.

184 442 U.S. at 275. The Court noted that Massachusetts' definition of veteran was neutral as to gender. Since the military's enrollment quota had already established an armed forces personnel ratio of 98% men and 2% women, however, the actual neutrality of Massachusetts' definition of veteran is not dispositive of whether the veterans' statute contains a discriminatory classification.
Having never truly investigated whether the Massachusetts statute contained a covert classification, the Court next turned to the second part of its two-step inquiry, and considered whether a discriminatory purpose had shaped the preference legislation.\footnote{442 U.S. at 276.} Ironically, the first question addressed and rejected by the Court involved plaintiff's contention that the veterans' act was inherently non-neutral,\footnote{Id. at 276-78.} an argument more appropriately analyzed under the Court's first inquiry. By considering the purpose underlying the absolute preference in its first inquiry, and the inherent structure of the veterans' statute in the second, the \textit{Feeney} Court not only misapplied its two-step analysis, but also reversed the logical order of determining the existence of covert classification as already demonstrated through explanation of the \textit{Guinn} Court's three-step treatment. The \textit{Feeney} Court's misformulation and misapplication of its analytical approach resulted in a seemingly illogical and incomplete opinion, since the Court continually appeared to be using the wrong analysis to determine whether the Massachusetts statute contained a covert gender classification. This result may have been caused by the Court's failure to truly appreciate the hybrid nature of a covert classification. It is more likely, however, that the superficial treatment given the classification issue stems from a belief that the veterans' statute is simply a neutral law with a disproportionate impact, thus deserving analysis in accordance with the purposeful discrimination standard developed in \textit{Washington v. Davis}.\footnote{442 U.S. at 279.}

\section*{B. Second Inquiry: Existence of Purposeful Gender Discrimination}

The Supreme Court in \textit{Feeney} treated the Massachusetts absolute preference as a neutral law which disproportionately excludes women from public employment positions. This treatment entailed a two-step extension of the \textit{Washington v. Davis} holding. First, the Court extended the purposeful discrimination requirement developed in the racial context of \textit{Davis} to the gender issue raised in \textit{Feeney}.\footnote{426 U.S. 229 (1976).} Second, in fashioning a subjective "because of—in spite of" distinction to differentiate allowable from unconstitutional legislative motivation, the \textit{Feeney} Court explicitly defined the level of intent required under \textit{Davis}'s discriminatory purpose standard.\footnote{442 U.S. at 273-74.} Focusing on both aspects of the Court's two-step extension, the following critique first questions the applicability of \textit{Davis}'s purposeful discrimination standard to the gender issue involved in the \textit{Feeney} case. An examination of the holding and rationale of the \textit{Davis} decision will demonstrate that in measuring the constitutionality of the veterans' statute the \textit{Feeney} Court should have applied a two-prong
standard. Initially the Court should have asked whether the law's adverse impact reflected purposeful discrimination. Additionally, the Court should have determined whether the adverse effect resulted from the influence of archaic gender assumptions on the legislative decision to adopt and preserve the absolute veterans' preference. After concluding that the Court improperly extended Davis's holding to the Feeney case, the final section of this casenote will critique the Court's definition of the level of intent required to satisfy Davis's discriminatory purpose standard.

1. Extension of Davis's Discriminatory Purpose Standard

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

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

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191 Id. at 236.
192 Id. at 242.
193 Id. Justice White stated:
194 Id. at 240.
197 Id.
law. The basic concept expressed through this construction, and implicit in
the Davis Court’s protective rationale, is that a condition offensive to the
constitution—including, but not necessarily limited to, purposeful
discrimination—must be established before a neutral statute with unequal re-
sults deserves a heightened standard of review. This rationale is broad
enough to justify heightened judicial scrutiny of a statute with disproporti-
ionate results produced by any unconstitutional consideration. The holding in
Davis was limited to a discriminatory purpose because, in the racial context,
that was the single consideration which violated the constitution. As the
Davis Court emphasized, a purpose or intent to discriminate is the one “dif-
ferentiating factor” between allowable and impermissible state action. Consequently, the Davis Court developed a single discriminatory purpose stan-
dard and held that the racially disproportionate impact of a facially neutral
law must be traced to an underlying discriminatory purpose.

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

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198 In Jefferson v. Hackney, 406 U.S. 585, 548 (1972), the Court rejected a
claim of racial discrimination based solely on a law’s disparate results because the ac-
cceptance of this “theory would render suspect each difference in treatment among the
grant classes, however lacking in racial motivation and however otherwise rational the
treatment might be.” Id. See also Village of Arlington Heights v. Metropolitan Hous.

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


201 Id. at 239-45.

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

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

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


206 Id. at 685-87.
archaic assumptions about the dependent role of women constitutes invidious
gender discrimination.\textsuperscript{207}

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

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

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

\textsuperscript{207} See text and notes at notes 208-14 infra.
\textsuperscript{208} 404 U.S. 71 (1971).
\textsuperscript{209} See the Supreme Court discussion of Reed v. Reed, 404 U.S. 71 (1971), in
\textsuperscript{210} 404 U.S. 71, 76-77 (1971).
\textsuperscript{211} 411 U.S. 677 (1973).
\textsuperscript{212} 411 U.S. 677, 690-91 (1973).
\textsuperscript{213} 420 U.S. 636 (1975).
\textsuperscript{214} Id. at 643. See also \textit{Schlesinger v. Ballard}, 419 U.S. 498, 507 (1975).
\textsuperscript{215} 83 U.S. 130 (1872).
\textsuperscript{216} Id. at 141.
The view that women are suited for only certain types of jobs is also reflected in *Brown v. Russell*, an 1896 decision in which the Massachusetts Supreme Judicial Court sustained an early form of the absolute veterans' preference and stated "[w]hen women are to be appointed, there is a satisfactory reason in the nature of the office or employment why this should be done." Since these discriminatory assumptions probably shaped the Massachusetts legislative choice in adopting an absolute veterans' preference, their perpetuation alone would be sufficient, under a two-prong standard, to produce a gender classification which then triggers a heightened standard of review. Under the single discriminatory purpose standard as applied by the *Feeney* Court, however, such assumptions have no independent significance. Rather, as the Court's opinion demonstrates, these prior assumptions were considered only as evidence of a specific legislative intent to discriminate against women. Although this result was neither mandated by the rationale of *Davis*, nor consistent with the conditions which constitute invidious gender discrimination, the *Feeney* Court extended the holding of *Davis* without alteration or explanation.

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

### 2. Development of an Explicit Intent Rule

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

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218 Id. at 17, 43 N.E. at 1007.
219 442 U.S. at 278. The Court stated:
And it cannot seriously be argued that the Legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

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

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

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

A similar rule of intent, which does not differentiate between a subjective wish to cause harm and a total disregard as to whether such harm occurs, seems particularly appropriate in the \textit{Feeney} context. Since the fourteenth
amendment guarantees individuals the protection of equal laws,\textsuperscript{228} it should make no difference in determining the validity of a challenged statute whether a state legislature enacted a law because of a subjective desire to discriminate or from indifference as to whether such discrimination will result. Specifically, with respect to the Massachusetts absolute veterans' preference, it should make no difference for the purpose of satisfying Davis' intent requirement whether the exclusion of women from a major sector of public employment was a product of a legislative desire to exclude women or of indifference to that result. Unfortunately, the Feeney Court, by fashioning a "because of—in spite of" distinction to define purposeful discrimination, never directly considered whether a legislative disregard satisfied Davis's intent standard.

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

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

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

\textsuperscript{228} See note 142 supra.
\textsuperscript{229} 442 U.S. at 279.
\textsuperscript{230} See generally P. BREST, PROCESS OF CONSTITUTIONAL DECISIONMAKING 351-435 (1975).
Precisely for these reasons, Mrs. Feeney limited her constitutional challenge to the absolute form of the Massachusetts preference, and acknowledged the validity of more limited veterans' preferences.\textsuperscript{231} The \textit{Feeney} Court, however, by applying its "because of—in spite of" distinction, avoided deciding whether the Massachusetts legislature, through indifference, can knowingly and needlessly sacrifice the employment opportunities of women in order to benefit veterans. To the extent that the Court intended its distinction to implicitly condone such legislative indifference, the protection guaranteed by the fourteenth amendment is diminished since such a decision permits a legislature to knowingly sacrifice the opportunities of one identifiable group in order to grant preferential treatment to another.\textsuperscript{232}

\textbf{Conclusion}

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

\textsuperscript{231} 442 U.S. at 274.

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

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

**Constance A. Browne**

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

442 U.S. at 280-81.