1-1-1980

Personnel Administrator v. Feeney: A Policy Decision

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Personnel Administrator v. Feeney: A Policy Decision

In this casenote the author critically examines the recent decision of Personnel Administrator v. Feeney, *in which the Supreme Court of the United States advanced a two-part test to probe for a discriminatory intent behind a facially gender-neutral state law. The author sets this decision in the context of other equal protection cases and concludes that this case reflects a policy decision by the Court not to sustain equal protection challenges to facially gender-neutral laws unless the legislature has unequivocally expressed an invidious intent to discriminate.*

Helen B. Feeney had worked for the Commonwealth of Massachusetts as a senior clerk stenographer for twelve years before her job was eliminated in 1975.[1] During her employment, she had passed several civil service examinations with scores which would have earned her a place on the certified list of eligible candidates for more attractive positions,[2] had it not been for the Massachusetts Veterans' Preference Law.[3] Because she was not a veteran, Ms. Fee-

1. Personnel Adm'r v. Feeney, 99 S. Ct. 2282, 2288 (1979).

2. Civil service positions in Massachusetts fall into two general categories, labor and official. For jobs in the official service, with which the proofs in this action were concerned, the preference mechanics are uncomplicated. All applicants for employment must take competitive examinations. Grades are based on a formula that gives weight both to objective test results and to training and experience. Candidates who pass are then ranked in the order of their respective scores on an "eligible list." Ch. 31, § 23 requires, however, that disabled veterans, veterans, and surviving spouses and surviving parents of veterans be ranked—in the order of their respective scores—above all other candidates.

Rank on the eligible list and availability for employment are the sole factors that determine which candidates are considered for appointment to an official civil service position. When a public agency has a vacancy, it requisitions a list of "certified eligibles" from the state personnel division. Under formulas prescribed by civil service rules, a small number of candidates from the top of an appropriate list, three if there is only one vacancy, are certified. The appointing agency is then required to choose from among these candidates.

Id. at 2287-88 (footnotes omitted).

3. 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 . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B [the widow or widowed mother of a veteran killed in action or who died from a service-connected disability incurred in wartime service and who has not remarried] in the order of their respective standing; (4) other applicants in

ney was superseded by veterans with lower scores, as mandated by the absolute preference scheme of the statute.[4] Faced with the practical impossibility of obtaining advancement within the civil service, she brought an action challenging the constitutionality of the statute.[5] She claimed that the absolute preference formula inevitably operated to deny women the best civil service jobs, contrary to the guarantee of equal protection of the laws provided by the fourteenth amendment.[6] The three-judge district court found that the statute was enacted for the legitimate objective of aiding veterans and not for the purpose of discriminating against women.[7] Nevertheless, the court held that the drastic impact of the absolute preference scheme on the ability of women to compete for attractive civil service positions rendered the law unconstitutional.[8] The court enjoined its further operation. On appeal,[9] the Supreme Court of the

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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.

1954 Mass. Acts ch. 627, § 5 (codified at MASS. GEN. LAWS ANN. ch. 31, § 23 (West 1966)), *as amended by* 1971 Mass. Acts chs. 219, 1051, § 1 (current version at MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1979)).

The Court based its opinion on the language quoted above, which was in effect when this action commenced. The current statute temporarily suspends the absolute preference system and instead provides for a point preference system. 1976 Mass. Acts ch. 200, *as amended by* 1978 Mass. Acts ch. 393, §§ 41, 42 (codified at MASS. GEN. LAWS ANN. ch. 31, § 26 (West 1979)).

Deferred application of the enjoined absolute preference law would have defeated the purpose of the Massachusetts Legislature; however, the amendment allowed that state to continue providing employment benefits to veterans under the point preference system previously upheld against gender-based challenges. *See* note 9 *infra*.

4. On at least two occasions Ms. Feeney's scores on the competitive examinations would have earned her a place on the "certified eligible" list, had there been no veterans' preference law. She scored second highest on an examination for a position with the Board of Dental Examiners and third highest on an examination for an administrative assistant's position. Each time, men displaced her from the list of applicants certified as eligible because of the absolute preference for veterans. Only the top three applicants could be certified for a single vacancy. *See* note 1 *supra*. On the list for the administrative assistant position, the preference system placed Ms. Feeney fourteenth, behind 12 male veterans, 11 of whom had lower test scores, thus precluding her from certification; similarly, the absolute preference placed her sixth, behind five male veterans, on the list for a position with the Board of Dental Examiners. 99 S. Ct. at 2288.

5. She brought the suit under 42 U.S.C. § 1983 (1970). 99 S. Ct. at 2285. A claim under Title VII of the Civil Rights Act of 1964 was apparently foregone because one section of the Act provides that Title VII does not repeal or modify any laws which grant special preference to veterans. 42 U.S.C. § 2000e-11 (1970).

6. 99 S. Ct. at 2285-86.

7. Anthony v. Massachusetts, 415 F. Supp. 485, 495 (D. Mass. 1976).

8. *Id.* at 497-99.

9. Massachusetts v. Feeney, 434 U.S. 884 (1977). A direct appeal was taken to the Supreme Court pursuant to 28 U.S.C. § 1253 (1970), which provides for such appeals where

United States vacated the judgment and remanded for reconsideration in light of the intervening decision in *Washington v. Davis*[10] that "a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race."[11]

On remand, the three-judge district court found that *Davis* did not require reversal of the prior decision.[12] The court held that since the dramatically uneven impact on women caused by the statute was foreseeable and inevitable, the legislature could be said to have intended the discriminatory effect to occur.[13] Applying the *Davis* standard, the court held that this inference of discriminatory intent rendered the statute violative of the equal protection clause. On appeal,[14] the Supreme Court of the United States *held*, reversed: The challenger of the veterans' preference law had failed to prove that a discriminatory intent had in any way motivated the enactment of this law, despite its foreseeably severe and inevitable impact on the job opportunities of women in the civil service, and despite the availability of less drastic means of preference to the state legislature, because other historical and circumstantial evidence suggested that the preference promoted a legitimate interest in benefiting veterans, did not overtly classify on the basis of gender and was not enacted for the purpose of discriminating against women. Without proof of discriminatory intent, the law could not be held to violate the equal protection clause of the fourteenth amendment. *Personnel Administrator v. Feeney*, 99 S. Ct. 2282 (1979).

Considered narrowly, the *Feeney* case is the latest addition to a long line of decisions upholding the constitutionality of state statutes granting veterans preferential treatment in civil employment,[15] with the distinguishing feature of gender discrimination as the grounds for attack.[16] Previously, only males had brought to the Su-

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the case was required to be heard initially by a three-judge district court.

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

11. 99 S. Ct. at 2286.

12. Feeney v. Massachusetts, 451 F. Supp. 143 (D. Mass. 1978).

13. *Id.* at 149-50.

14. The appeal was taken pursuant to 28 U.S.C. § 1253 (1970).

15. For an overview and history of constitutional challenges to laws creating veterans' preferences, 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. 1, 13-17 (1976-77).

16. Before *Feeney*, the Supreme Court had never considered such a challenge. For cases brought on similar grounds in lower courts, see Branch v. Du Bois, 418 F. Supp. 1128 (N.D.

preme Court such challenges to veterans' preference laws. In each case the Court affirmed the application by the lower courts of a rational basis test to the male's equal protection challenge to the statutory classification between veterans and nonveterans.[17] To establish an equal protection claim under such an analysis, the plaintiff has the burden of proving that the law has a discriminatory purpose, unless the law either uses a "suspect" classification[18] or burdens a "fundamental right,"[19] in which case the Court carefully scrutinizes the law and requires the state to show that the law is closely related to a "compelling state interest" and is narrowly drawn to avoid unnecessary discrimination. In veterans' preference laws, the classification between veterans and nonveterans is not suspect, and the right to public employment is not fundamental. In the typical challenge by a male nonveteran, then, the court tests the law only for a rational basis, requiring the plaintiff to prove either that the legislature had an impermissible purpose or that the means employed had no rational relation to a legitimate state purpose.[20] Courts have traditionally recognized three possible motives of legislatures desiring to aid or reward veterans,[21] and granting them preference in hiring for state jobs clearly advances that desire. Thus, under this rational basis test, the male challenger always loses.

In *Feeney*, because Ms. Feeney claimed that the Massachusetts law discriminated against her on the basis of sex, the Court subjected the statute to an intermediate level of scrutiny, departing

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Ill. 1976) (sustaining a point preference statute); Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973) (sustaining a point preference scheme); Ballou v. State, 148 N.J. Super. 112, 372 A.2d 333 (Super. Ct. App. Div. 1977), *aff'd*, 75 N.J. 365, 382 A.2d 1118 (1978) (upholding an absolute preference scheme in hiring and promotion).

17. *See, e.g.*, Rios v. Dillman, 499 F.2d 329 (5th Cir. 1974); August v. Bronstein, 369 F. Supp. 190 (S.D.N.Y.), *aff'd mem.*, 417 U.S. 901 (1974); Koelfgen v. Jackson, 355 F. Supp 243 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973).

18. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race).

19. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote).

20. Koelfgen v. Jackson, 355 F. Supp. 243, 251 (D. Minn. 1972), *aff'd mem.*, 410 U.S. 976 (1973). The rational basis test demands no inquiry into actual motive, the value of legislative objectives, or the fairness of the means employed. Even if the means employed is grossly unfair, courts do "not ordinarily sit to evaluate the *wisdom* of particular statutory means; that task is assigned to others in our system of government." Rios v. Dillman, 499 F.2d 329, 332 (5th Cir. 1974) (emphasis in original); see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 995 (1978).

21. The three motives are: (1) The state owes a debt of gratitude to veterans; (2) a veteran is likely to possess the qualities of courage and fidelity, valuable in public office; and (3) veterans should be aided in readjusting to normal society. *Koelgfen*, 355 F. Supp. at 251. *Cf.* Rios v. Dillman, 499 F.2d at 333 (adding encouragement of enlistment as a proper objective).

significantly from the rational basis test applicable in the male challenges.[22] The Court did not characterize gender as a suspect classification[23] but did note that gender has "traditionally been the touchstone for pervasive and often subtle discrimination,"[24] and therefore classifications based on gender must have "an exceedingly persuasive justification" based upon "a 'close and substantial relationship to important governmental objectives.' "[25] This test applies even though the statute concededly[26] is gender-neutral on its face, if the apparent neutrality of the classification is a mere pretext masking a discriminatory purpose.[27] To determine whether a facially gender-neutral law violates the equal protection clause, a court must conduct a "two-fold inquiry":

> 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 of [*sic*] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. . . . In this second inquiry, impact provides an "important starting point," . . . but purposeful discrimination is "the condition that offends the Constitution."[28]

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22. On the other hand, the Court adopted certain premises from the male-initiated cases: The facial neutrality of the veteran-nonveteran classification, 99 S. Ct. at 2294; the legitimacy of a legislative objective to prefer veterans, *id.*; and the various justifications for governmental preference of veterans, *id.* at 2288, 2300.

23. Contrast Justice Stewart's position with that of Justice Brennan's plurality opinion in Frontiero v. Richardson, 411 U.S. 677 (1973): "At the outset, appellants contend that classification based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny. We agree . . . ." *Id.* at 682 (footnotes omitted). For other cases dealing with gender-based challenges, see Geduldig v. Aiello, 417 U.S. 484 (1974); Reed v. Reed, 404 U.S. 71 (1971).

24. 99 S. Ct. at 2293.

25. *Id.* (purporting to quote from Craig v. Boren, 429 U.S. 190, 197 (1976)).

26. 99 S. Ct. at 2293.

27. *Id.* at 2292-93.

28. *Id.* at 2293 (citations omitted).

In the concurring opinion, Justice Stevens, joined by Justice White, is apparently correct in stating that the distinction between question one and question two is only that between overt discriminatory classification and covert intent to discriminate. The Court answers the challenger's claim that the discriminatory impact on women is so obvious as to make the statute in effect an overt classification by pointing to the neutral definition of veterans and the fact that the disadvantaged class, nonveterans, includes large numbers of males. *Id.* at 2294. The real issue thus became the second question, because "even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Id.* at 2292-93. The Court reasoned that the statute's discriminatory impact alone "would signal that the *real* classification made by the law was in fact not neutral," in the absence of a satisfactory explanation for the discrimination, but that "this is not a law that can plausibly be explained *only* as a gender-based classification. Indeed, it is not a law that can rationally be explained on that ground." *Id.* at 2294 (emphasis added). The Court concluded that, at a

Prior equal protection cases not involving veterans' preference laws provide a context that illuminates the significance of this two-part test and its application in *Feeney*. These "impact" cases deal with the problem of inferring an intent to discriminate from the adverse impact of facially neutral laws on protected minorities. From these cases emerge two approaches[29] to allocating the burden of proof required under the intermediate level of scrutiny.[30] The earlier cases emphasize the challenger's burden of establishing an intent to discriminate.[31] Thus, where competing inferences can be drawn from the evidence, the complaining party must show that the greater weight of the evidence requires *his* inference be drawn, for that inference of intent to be persuasive.[32] Later impact cases, however, hold that "[o]nce a prima facie case of invidious discrimination is established, the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permis-

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minimum, the challenger must show that "a gender-based discriminatory purpose has, *at least in some measure*, shaped the . . . legislation." *Id.* (emphasis added).

29. A few cases analyzed challenged decisions solely on the basis of impact, apparently because of the difficulty of ascertaining legislative motive and the belief that it would be futile to overturn a law that the legislature could reenact for a "proper" motive. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 98, 101-02; *see* Wright v. Council of Emporia, 407 U.S. 451 (1972); Palmer v. Thompson, 403 U.S. 217 (1971); United States v. O'Brien, 391 U.S. 367 (1968). Washington v. Davis, 426 U.S. 229, 245 (1976), overruled this approach.

Other cases borrowed as a constitutional standard the holdings of Title VII cases such as Griggs v. Duke Power Co., 401 U.S. 424 (1971), that impact alone was sufficient to trigger a strict scrutiny analysis. In *Davis*, the district court, 348 F. Supp. 15 (D.D.C. 1972), and the court of appeals, 512 F.2d 956, 958 (D.C. Cir. 1975), followed such an analysis, but it was rejected by the Supreme Court. 426 U.S. at 238-42; *see* Blumberg, *supra* note 15, at 21-35.

30. Discovering the actual motives of the legislature goes far beyond the demands of the rational basis test for an imaginable motive, but is less demanding than a strict scrutiny analysis: "[A] growing range of cases, involving classifications other than gender and involving a number of important but not 'constitutionally fundamental' interests, have likewise triggered forms of review poised between the largely toothless invocation of minimum rationality and the nearly fatal invocation of strict scrutiny—intermediate forms of review . . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082 (1978). For further discussion of intermediate levels of review, see *id.* at 1082-92.

31. *E.g.*, Akins v. Texas, 325 U.S. 398, 400 (1945). *Akins* involved a challenge to the selection of grand jurors as covertly discriminatory on the basis of race. The Court required proof of discrimination by showing *"systematic* exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." *Id.* at 403-04 (emphasis added).

32. Wright v. Rockefeller, 376 U.S. 52, 57 (1964). In upholding a congressional apportionment statute neutral on its face, the Court reasoned that "[i]t may be true . . . that there was evidence which could have supported inferences that racial considerations might have moved the state legislature, but, even if so, we agree that there also was evidence to support [the] finding that the contrary inference was 'equally, or more, persuasive.'" *Id.* at 56-57. *Cf.* Norris v. Alabama, 294 U.S. 587, 590-96 (1934) (definite testimony as to the actual qualifications of specified individual Negroes, which was not met by any testimony equally direct, showed that there were Negroes in Jackson County qualified for jury service).

sible racially neutral selection criteria and procedures have produced the monochromatic result."[33]

The impact cases also delineate the factors that determine whether an inference of discriminatory intent behind a facially neutral law is appropriate. The uneven impact of the challenged law often establishes a prima facie case, leading to a deeper examination of intent. This "impact trigger" appears in election apportionment cases such as *Wright v. Rockefeller*,[34] where uneven racial distribution among districts prompted the scrutiny of actual legislative intent.[35] Another primary factor is a prior history of discrimination, especially in school desegregation cases. In *Griffin v. County School Board*,[36] repeated and systematic past attempts to avoid the integration of schools led the Court to conclude that a state law closing the schools of one county did not operate on all persons equally but was intended solely to deny blacks integrated public education. On the other hand, circumstantial evidence in *Akins v. Texas*[37] showed that the selection of a grand jury was not influenced improperly by race. In that decision the Court cited the actual events in the selection process, the judge's instructions and even individual testimony, in refusing to draw an inference of discriminatory intent. Finally, the foreseeability or inevitability of a discriminatory result may require an inference of discriminatory intent. In *Goss v. Board of Education*,[38] a school desegregation case, the Court held that "no official transfer plan or provision of which racial segregation is the inevitable consequence may stand under the Fourteenth Amendment."[39] The weight the Court gives to any one of these factors depends on the facts of each case, but impact, history, circumstantial evidence and foreseeability of result have all been significant in

33. Alexander v. Louisiana, 405 U.S. 625, 631-32 (1972) (citing Turner v. Fouche, 396 U.S. 346, 361 (1970); Eubanks v. Louisiana, 356 U.S. 584, 587 (1958)); *see* Keyes v. School District No. 1, 413 U.S. 189 (1973) (burden was shifted to a school board to prove that other citywide schools were not deliberately segregated after a finding of segregation in one community).

34. 376 U.S. 52 (1964).

35. Impact can be a decisive factor in the final determination of intent as well. In Gomillion v. Lightfoot, 364 U.S. 339, 340 (1960), the effect of a redistricting statute that created an "uncouth twenty-eight-sided figure" virtually eliminating blacks from the district, proved conclusive as to discriminatory intent. Racial discrimination was held to be the only possible motive which could adequately explain the apportionment. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), arbitrary denial of licenses to Chinese could only be explained as discrimination. These two cases are alone in relying almost entirely on impact to prove intent. *See* Brest, *supra* note 29, at 100.

36. 377 U.S. 218 (1964).

37. 325 U.S. 398 (1945).

38. 373 U.S. 683 (1963).

39. *Id.* at 689.

scrutinizing legislative motivations behind overtly neutral laws.[40]

Washington v. Davis[41] is a watershed in the continuing development of standards applicable to the inference of unconstitutional legislative motives. In *Davis,* the Court ratified analysis of intent as the true test of unconstitutionality, and thereby rejected the contention that impact could be used as the sole determinant.[42] That decision not only ended confusion as to the proper test, but also clarified the form of the analysis; a showing of impact would shift the burden to the state to explain the law or actions on racially neutral grounds,[43] and the "totality of the relevant facts," including impact, became the proper standard for proving illicit intent.[44] Aside from the role of impact, however, *Davis* offered no further guidance to later courts as to what kinds or degrees of evidence would suffice to prove such intent. Because the facts of *Davis* clearly precluded a finding of discriminatory purpose,[45] the Court was not pressed to elucidate an ambiguous, uncertain area.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[46] a more difficult situation forced the Court to analyze evidentiary factors in greater detail than in *Davis.* In *Arlington Heights*, the challenger alleged that the decision of the zoning board not to rezone certain property for use as low-income housing violated his equal protection rights because racial discrimination had motivated the decision. After adopting the general *Davis* test of intent, the Court observed that to invalidate a law it is necessary to prove only that discrimination was *a* motive, rather than the primary or dominant one.[47] The Court upheld the board's decision by looking to specific sources of evidence which can generally be classified as historical and circumstantial.[48] Despite the Court's at-

40. The availability of less discriminatory alternatives to achieve the legislative objective is not a factor cited in any of these cases. Such a criterion belongs to litigation under Title VII, where strict scrutiny is triggered by uneven impact. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (cited in *Feeney*, 99 S. Ct. at 2298 (Marshall, J., dissenting)).

41. 426 U.S. 229 (1976) (challenge to a test given police recruits to determine reading and comprehension skills with allegedly illegal discriminatory impact on minorities).

42. *Id.* at 242; *see* note 29 *supra.*

43. 426 U.S. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632).

44. *Id.* at 242.

45. Evidence that the police department had made affirmative efforts to recruit blacks, that the test was neutral and that blacks were represented on the police force in a proportion equivalent to the black population in the community eliminated discriminatory intent as an issue. *Id.* at 237.

46. 429 U.S. 252 (1977).

47. *Id.* at 265-66; *see* Brest, *supra* note 29, at 116-18. The *Davis* holding is consistent with prior cases such as Keyes v. School District No. 1, 413 U.S. 189 (1973) where discriminatory intent had proven a factor in the decision. *Id.* at 210; note 33 *supra.*

48. The Court listed several factors, such as the historical background of the decision,

tempted codification of factors pertinent to an evidentiary inquiry into intent, however, the *Arlington Heights* decision failed to analyze important factors such as foreseeability of result and the availability of less discriminatory alternatives.

Viewed in the context of these other equal protection cases, *Feeney* clarifies the standard for the propriety and relative weight of the evidence required to compel an inference of discriminatory intent.[49] The case does not formulate a new framework for analyzing unconstitutional legislative motive; rather, it adopted the *Davis* procedure of a threshold inquiry into intent, triggered by discriminatory impact, to determine whether a closer form of scrutiny than the rational basis test is justified.[50] Faced with the hard fact that a preference for veterans effectively denies women an opportunity to compete for attractive civil service positions, the Court ultimately focused on whether this unfair impact, together with other evidence showing the historical context of the statute, the avilability of less discriminatory alternatives and the foreseeability or inevitability of result, compelled an inference of discriminatory intent.

The majority and dissenting opinions both invoked the historical factor, but to support conflicting inferences. Justice Stewart, writing for the majority, claimed that the legislative history of the statute militated against an inference of discriminatory purpose,[51] since "the benefit of the preference was consistently offered to 'any person' who was a veteran."[52] The dissent took the position that the legislature necessarily intended to follow the gender-biased federal military policy, because the statute benefited only that historically all-male class.[53] On the basis of history alone, either interpretation might seem plausible. *Feeney* thus demonstrates the weakness of history as evidence of intent, except in cases like *Griffin v. School*

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the sequence of events leading up to the decision, any departures from the normal procedural sequence and contemporary statements by members of the decisionmaking body. *Id.* at 267-68.

49. Justice Stevens correctly pointed out in his concurring opinion in *Davis* that each case "may well involve differing evidentiary considerations." Washington v. Davis, 426 U.S. 229, 253 (1976). This does not mean that important generalizations about the type of evidence admissible, as well as the weight of general factors, cannot be taken as precedent for similar cases.

50. *See* text accompanying notes 28 & 30 *supra.*

51. Recourse to history to show nondiscriminatory legislative intent was also used in Jefferson v. Hackney, 406 U.S. 535, 547 (1972), where steady increases in payments to certain welfare recipients over the years undercut any inference of discriminatory intent in the legislative decision to reduce the overall percentage of available funds allocated to recipients.

52. 99 S. Ct. at 2296.

53. *Id.* at 2298-99.

Board, where a prior course of blatantly invidious action contradicted the supposed neutrality of a statute.[54]

While *Feeney* deprecates the importance of history in inferring legislative intent, the role of present discriminatory impact provides the pivot on which the decision turns. The majority argues that the statute is not a pretext for discrimination, because "significant numbers of nonveterans are men, and all nonveterans—male as well as female—are placed at a disadvantage."[55] This reasoning parallels that of another gender discrimination case, *Geduldig v. Aiello.*[56] The majority opinion in *Geduldig,* also written by Justice Stewart, stated that a state health insurance program which denied benefits for normal pregnancy did not discriminate against women, because the savings accrued by the exclusion benefited not just men, but also nonpregnant women.[57] Taken together, *Feeney* and *Geduldig* suggest that whenever numerous members of the sex allegedly preferred share the disadvantages, or whenever numerous members of the sex allegedly disadvantaged share the benefits, the Court will infer no intent to discriminate. In the *Feeney* context, the logic of this position fails: because the veterans' preference handicaps some males, it does not follow that the legislature did not intend to preserve the civil service as a male sanctum at the expense of females, given the overwhelming impact on women seeking civil service positions above the traditional secretarial and clerical levels that the system allows them to occupy.[58]

In any case, *Feeney* appears to modify the application, if not the logic of the *Geduldig* analysis. The two-part test of the majority contains a curious dichotomy in purporting first to determine

54. 377 U.S. 218 (1964); *see* text accompanying note 35 *supra.*

55. 99 S. Ct. at 2294.

56. 417 U.S. 484 (1974).

57. *Id.* at 496 & n.20. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." *Id.*

58. In noting that women held 43% of all civil service positions, the Court conceded that a "large unspecified percentage" of these women worked "in lower paying positions for which males traditionally had not applied." 99 S. Ct. at 2291.

The crucial statistic, however, is that 47% of Massachusetts men over 18, but only 0.8% of the Commonwealth women over 18, were veterans when the action commenced. *Id.* at 2299 n.3 (dissenting opinion). According to the stipulated facts before the district court in *Anthony v. Massachusetts* only 16,000 women in Massachusetts were veterans, out of 1,990,000 women residing in the Commonwealth; thus, 0.8% of the women were veterans. *Anthony v. Massachusetts,* 415 F. Supp. 485, 504 n.5 (1976) (dissenting opinion). The majority opinion in *Feeney* declared that 1.8% of Massachusetts women were veterans, without explaining this discrepancy from the agreed statement of facts. 99 S. Ct. at 2291. Apparently, 99.2% of Massachusetts women face this severe handicap in obtaining significant civil service positions.

whether the classification is a mere pretext for discrimination, then to determine if a "discriminatory purpose has, at least in some measure, shaped the . . . legislation."[59] Justice Stevens, concurring, correctly pointed out that the two approaches are analytically the same.[60] The intermediate level of review typical of sex discrimination cases[61] will be triggered regardless of whether the statute is found to be a pretext for, or merely in some measure motivated by an invidious intent. Significantly, whatever the rationale explaining this dichotomy, the Court applied the *Geduldig* reasoning only to determine whether the statute is a pretext, and not to decide whether some better disguised discriminatory motive exists.

While the two-fold *Feeney* inquiry might seem at first to offer a way for a challenger of a facially neutral law to pierce the statutory mask of neutrality, the application of the second part of the test by the Court severely blunted its effectiveness as a probe into legislative intent. For example, the Court dismissed the availability of less discriminatory alternatives as a factor in determining intent.[62] The dissenter argued that the preference, "when viewed against the range of less discriminatory alternatives available to assist veterans," clearly demonstrated the required intent, because a legislature not motivated to discriminate would have chosen a means with less severe impact.[63] Justice Marshall's argument is similar to a Title VII analysis, where the availability of less discriminatory employment practices puts the challenged practice under strict scrutiny, though not necessarily requiring an inference of discriminatory intent.[64]

The majority rejected Justice Marshall's approach. If offering a preference to veterans necessarily implies an intent to discriminate against women, the degree of preference should make no constitutional difference, since any invidious intent to discriminate, regardless of the extent of its impact, violates the equal protection clause.[65] Conversely, if a court finds that the statute was designed

59. 99 S. Ct. at 2294.

60. "If a classification is not overtly based on gender, I am inclined to believe the question whether it is covertly gender-based is the same as the question whether its adverse effects reflect invidious gender-based discrimination." *Id.* at 2297.

The concurring opinion also demonstrates a strict adherence to a *Geduldig*-like analysis, stating that the large number of disadvantaged males is sufficient "to refute the claim that the rule was intended to benefit males as a class over females as a class." *Id.*

61. *See* notes 28 & 30 *supra.*

62. 99 S. Ct. at 2295.

63. *Id.* at 2299.

64. *See* notes 29 & 40 *supra.*

65. 99 S. Ct. at 2295.

not to discriminate against women but solely to aid veterans, no degree of preference would alter the basic neutrality of the purpose of the statute.[66] Since the district court did find that the Massachusetts Legislature had acted without intent to discriminate against women,[67] the majority concluded that any application of this preference, regardless of severity of impact, is constitutionally permissible.

Rather than using impact as a factor in discovering intent, the majority seemed to reason backwards from a prior conclusion about that intent. It is unrealistic to view a dramatic difference in impact as not truly indicating the difference between invidious and benign motivation, especially where analysis of other factors leaves motivation in doubt. While a state may establish a degree of preference for veterans that discriminates somewhat more against women than against men, this system of absolute preference that automatically handicaps ninety-nine women out of a hundred reflects certain bias. The *Feeney* majority did not provide a satisfying rationale for its suggestion that no evidence of possible alternatives with less severe impact is relevant in a search for discriminatory intent.[68]

Equally baffling is the treatment by the Court of foreseeability or inevitability of discriminatory result as a factor in inferring hidden intent. The concurring judge in the district court argued that the uneven impact of the statute on men and women was so obviously inevitable that the lawmakers must have intended that result to occur.[69] The Supreme Court, while approving foreseeability of result as a relevant factor,[70] rejected the notion that awareness or volition by itself proves discriminatory purpose. Such purpose "implies that the decisionmaker . . . 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 group."[71] The Court thus distinguished between discriminatory impact as an obvious cost which is incurred to achieve a desired end and legislation where the discriminatory effect is an end in itself. At first glance, this analysis appears consistent with the weight given to the foreseeabil-

66. *Id.* n.23.

67. Feeney v. Massachusetts, 451 F. Supp. at 156.

68. 99 S. Ct. at 2295 n.23. The Court may have been aware of the weakness of the argument. Under the equal protection clause, the judiciary must distinguish between permissible and impermissible policies. By granting such deference to legislative choices of ostensibly neutral policies which have severe discriminatory impact, the Court in effect abdicated its equal protection responsibilities.

69. 451 F. Supp. at 151.

70. 99 S. Ct. at 2296 n.25.

71. *Id.* at 2296.

ity factor in prior cases. Although a foreseeable result was important in the *Goss* case,[72] for instance, inevitability of result was only decisive when seen in the light of other evidence, such as a history of opposition to integration.[73] The *Feeney* majority although purporting to reaffirm foreseeability as a relevant factor in inferring illegal purpose, thus eviscerated the practical significance of that factor by carving away the importance of other evidence, especially the overwhelming discriminatory impact on women.

Accordingly, the defense of the statutory classification by the majority as not "inherently non-neutral"[74] failed to recognize that the "class" of nonveterans really consists of two classes, male nonveterans and female nonveterans, not similarly situated for purposes of an equal protection analysis. First, because women nonveterans constitute virtually the entire female population[75] while only about half the men are nonveterans, the difference in the degree of harm to women as a class compared to the harm to all men as a class is so great as to belie any inference of neutrality. Second, restrictions on women's opportunities to enlist in the armed forces place women at a further disadvantage.[76] Facing fewer restrictions, most male nonveterans simply choose not to enlist. Facing a pre-1968 quota of two percent of enlisted personnel in the armed services, among other restrictions, women nonveterans have not had the same choice. The draft likewise excludes women. Few women obtain veteran's status, then, because of discriminatory federal military policies. To claim that the statute is gender-neutral because the disadvantaged class consists of both men and women is to mask the dramatic differences in treatment of men as a class and women as a class beneath the superficially neutral division between veterans and nonveterans. The legislature could have completely avoided this foreseeable result by making the absolute preference system genuinely gender-neutral: granting an absolute preference to male veterans over male nonveterans only, and to female veterans over female nonveterans only. This option would have avoided the entire argument about degrees of invidious discrimination, and demonstrates that in maximizing benefits for veterans beyond what a truly

72. 373 U.S. 683 (1963); *see* text accompanying note 38 *supra*.

73. 373 U.S. 686-87.

74. 99 S. Ct. at 2294-95.

75. *See* note 58 *supra*.

76. Until 1967, women were prohibited from making up more than two percent of all enlisted personnel in the armed forces. 99 S. Ct. at 2291 n.21 (majority opinion); *id.* at 2298 n.1 (dissenting opinion); *Anthony*, 415 F. Supp. at 489. Further restrictions on entrance have been placed on women in the past, and women are still ineligible for the draft. 415 F. Supp. at 489-90.

gender-neutral framework would provide, the legislature must have consciously chosen to discriminate against ninety-nine percent of the Commonwealth's women.

In conclusion, the importance of *Feeney* lies in its delineation of the evidentiary standards applied to compel an inference of discriminatory intent behind facially neutral laws. The use of history by the Court affirms its validity as a criterion, but also demonstrates its inconclusiveness. Similarly, *Feeney* severely limits the challenger's options by rejecting evidence of less discriminatory alternatives as a factor in inferring intent. In addition, the requirement that foreseeability of result prove discrimination as a positive goal of the statute negates the practical importance of foreseeability as an aid in determining intent. With this conservative definition of the evidence required to compel an inference of discriminatory intent, the Court has practically guaranteed that no equal protection challenge to a facially gender-neutral law will ever succeed unless the invidious legislative intent is express and unequivocal.

Even viewed in the light of the *Geduldig* decision, *Feeney* is not necessarily part of a trend "to return men and women to a time when 'traditional' equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex."[77] But *Feeney* does indicate a trend toward judicial passivity in the area of equal protection challenges generally. There are no guidelines in the Constitution, federal statutes or developed case law as to when a court must infer invidious intent behind a neutral law. Equal protection challenges to facially neutral laws fall into the relatively undeveloped area between Title VII and overt gender classifications. Left largely to its own discretion, the treatment of the evidentiary burden by the Court reflects more a policy decision than an interpretation of the law. The policy embodied in *Feeney* is that where neutral laws create discriminatory effects, the blame as well as the remedy lies in the political rather than the judicial sphere; "the Fourteenth Amendment 'cannot be made a refuge from ill-advised . . . laws.' "[78]

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77. Geduldig v. Aiello, 417 U.S. 484, 503 (1974) (Brennan, J., dissenting).

78. 99 S. Ct. at 2297 (quoting District of Columbia v. Brooke, 214 U.S. 138, 150 (1909)). Dandridge v. Williams provides a typical expression of this deference to state policy choices:

> We do not decide today that [the state's] regulation is wise, that it best fulfills the relevant social and economic objectives that [the state] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable