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Equal Protection; Sex Discrimination; Veterans' Preference Statutes, Feeney v. Massachusetts

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CONSTITUTIONAL LAW

Equal Protection • Sex Discrimination

Veterans' Preference Statutes


A preference is given to veterans seeking public employment in the federal government, the states and numerous local governments. The laws vary considerably as to the amount of preference given, ranging from an absolute preference to preferences in the form of bonus points added to the veteran's final score in a test for a position. Courts which have considered challenges to these laws have upheld their validity. A rational basis for these laws is generally found on three grounds. First, they have been justified as a way of paying a debt of gratitude to those who have served in the armed services. Second, courts have accepted the claim that the qualities that veterans are thought to possess, such as courage and habits of obedience, are valuable qualifications for public servant positions. And finally, the thought that veterans should be aided in relocation and reassimilation has been accepted.

Historically, the armed services have been predominantly male. The result has been that the operation of veterans' preferences has placed women as a class at a particular disadvantage in comparison to men when in or entering into civil service. To nullify this stigma, the first successful challenge to veterans' preference, _Feeney v. Massachusetts_, was litigated.

_Feeney v. Massachusetts_ began its journey through the judicial process by being consolidated with and decided under the case name of _Anthony v. Massachusetts_. _Anthony_ and _Feeney_ were challenges to the Massachusetts Veterans' Preference Statute on the basis of 42 U.S.C. Section 1983. Four female residents of Massachusetts claimed they had failed to receive civil service appointments due to the operation of the Veterans' Preference Statute, in that it had unconstitutionally discriminated against them be-

2 Id. at 16-18.
4 From 1940 through 1972, the percentage of women in the armed forces never rose above 2%, with the exception of 1945 when the figure was 2.19%. The percentages improved for 1974-76, when the respective figures were 3.12%, 4.01% and 5.13%. Fleming & Shanor, supra note 1, at 13-14.
cause of their gender. Historically, women were either excluded from the armed services or their percentage was severely limited. At the time of the suit only 2% of Massachusetts veterans were women.9

The Massachusetts statute required that nonveterans, regardless of their comparative test scores, could not be ranked higher on state civil service eligibility lists than a veteran who had received a passing score.10 The Anthony suit involved three female attorneys seeking state legal positions. Two of the women tied for the highest score, while the third woman tied for the second highest score. However, due to the veterans' preference, they were ranked 57th or lower on the eligibility list, giving them no chance of being certified for the nineteen available positions.11

Helen B. Feeney was a nonveteran female12 who began her employment with the state in 1963 as a Senior Clerk Stenographer for the Civil Defense Agency.13 From 1967 to 1975 she was a Federal Funds and Personnel Coordinator for the same agency. Mrs. Feeney took the civil service examination three times. In February, 1971, in the examination for the position of Assistant Secretary, Board of Dental Examiners, she was the second highest scorer. The veterans' preference caused her to be ranked sixth behind five male veterans, four of whom scored lower than she. Instead of Mrs. Feeney, a male veteran with a score of 78.08 was appointed to the position. In February, 1973, in an examination for the position of Head Administrative

9 415 F. Supp. at 489.

10 The statutory ranking formula requires the following preferences: disabled veterans in order of their scores; other veterans in order of their scores; widows and widowed mothers of veterans in order of their scores; all others eligible in order of their scores. Id. at 485.

11 Carol A. Anthony was a provisional appointee who was seeking a position in the Massachusetts Department of Public Welfare. Her score on the unassembled examination (rated in May 1974) was a grade of 94, which tied her for the highest grade of any applicant. But, because of Veterans' Preference, she was ranked 57th behind 56 male veterans, 54 of whom had lower scores than she did.

12 Kathryn Noonan sought a position as counsel on the Labor Relations Committee. She was informed by its chairperson that her nonveteran status gave her little chance of obtaining a permanent position. Therefore, she accepted instead a provisional appointment as a Labor Relations Examiner since no statewide examination was pending for that position. Her position involved duties and responsibilities of a counsel, but an examiner was a lower grade than a Counsel I position and she received less pay. Like Anthony, she had received a grade of 94. Both women were ranked behind at least 56 veterans. With such a ranking, neither woman would be certified for any of the 19 available positions.

13 Betty A. Gittes also sought a Counsel I position. On the unassembled examination she received a grade of 92 which tied her for the second highest score. However, because of her nonveteran status, she was ranked 103rd behind 76 male veterans, 64 of whom received lower grades than she did. 415 F. Supp. at 490-91.

14 Mrs. Feeney tried to join the armed forces during World War II, but was unable to do so because she was not 21. The Selective Service law set up different age requirements for men and women. Feeney met the minimum age requirement for men but not for women. Feeney's mother refused to grant permission for her daughter to enter the service early. But for prior sex/age discrimination, Feeney would have been a veteran. Interview with Helen B. Feeney, All Things Considered, NPR, Radio, Feb. 26, 1979.
Assistant, Solomon Mental Health Center, her grade was 92.32, the third highest. She was ranked fourteenth behind twelve veterans, all male, eleven of whom scored lower than Feeney. She would have been certified for the position but for the veterans’ preference. In May, 1974, in an examination for positions classified as Administrative Assistant, her grade of 87 tied her for seventeenth place. Her final ranking was 70th behind 64 veterans, 63 of whom were male and 50 of whom scored lower than Feeney. These positions had not been filled because of a court injunction pending the resolution of the case. In March, 1975, Mrs. Feeney was laid off from her position in the Civil Defense Agency.¹⁴

The claims in the Anthony case were ruled moot because, on April 17, 1975, the Massachusetts legislature amended their general laws to remove all appointments for state and municipal legal positions from state civil service.¹⁵ As to the Feeney complaint, the pivotal question for the district court was, “given the legitimate state purpose of assisting veterans, does the means by which Massachusetts implements that purpose in the area of public employment unconstitutionally deprive women of their equal protection rights under the Fourteenth Amendment?”¹⁶ The court found the preference formula to be in violation of the fourteenth amendment.¹⁷

Based on more than fifty eligibility lists compiled between 1971 and 1975, the court held that women were deprived of certification for positions they would have obtained had the veterans’ preference not been in force.¹⁸ While a significant percentage of the civil servants in Massachusetts are women, they were found to occupy the lower status and lower paying job categories for which men have not traditionally applied.¹⁹ The operation of veterans’ preference effectively excluded women from the higher positions in the state civil service.

While the statute on its face was neutral, its operation was discrimina-

¹⁴ Id. at 492.
¹⁶ 415 F. Supp. at 492.
¹⁷ Id. at 496.
¹⁸ Id.
¹⁹ In every one, the application of veterans’ preference, in significant fashion, causes men to gain places at the expense of women. Moreover, of the approximately 500 men and 1200 women represented on the lists, 38% of the men are veterans while 0.6% of the women are veterans. And in each of the lists, one or more female eligibles were placed behind male veterans with lower scores and were thereby deprived of certification opportunity which, otherwise they would have had. Id. at 498.
²⁰ From 1963 to 1973, 43% of the permanent appointments had been women, but most of these were appointments of the lower grade positions, generally clerks and secretaries. Id.
tory towards women.\textsuperscript{21} The court, nonetheless, would have upheld its constitutionality had it been the only means by which the state could obtain its legitimate legislative objective of aiding veterans.\textsuperscript{22} However, the court found that there were alternatives available to the state, and that the alternatives would not have such a significant and permanent impact on women as a class.\textsuperscript{23} If a state decides to provide civil service jobs, then the fourteenth amendment requires that it be done in a nondiscriminatory manner. Here, women had virtually no opportunity to gain high level positions due to circumstances beyond their control.

While the objective of the policy was legitimate and rational, the court insisted that the means to that end must also be legitimate and rational.\textsuperscript{24} But the veterans’ preference did not contain any criteria that related to the demands of particular jobs. The absolute preference given to veterans could not be sustained when it operated to the detriment of another identifiable class, women.

The State Attorney General appealed the \textit{Anthony} decision to the United States Supreme Court.\textsuperscript{25} The Court vacated the judgment and remanded\textsuperscript{26} with instructions to reconsider the decision in light of \textit{Washington v. Davis},\textsuperscript{27} that case having been decided after \textit{Anthony}.

\textit{Davis} had challenged the validity of a written personnel test, Test 21, used by the District of Columbia Police Department and developed by the Civil Service Commission to test verbal skills. Plaintiffs argued that the test was not related to job required skills and it had a discriminatory effect by screening out a disproportionate number of black candidates.\textsuperscript{28} The Court of Appeals for the District of Columbia applied the standard of \textit{Griggs v.}

\begin{itemize}
  \item \textsuperscript{21}“Facially, the Veterans' Preference is open to both men and women. But to say that it provides an equal opportunity for both men and women to achieve a preference would be to ignore reality.” \textit{Id.}
  \item \textsuperscript{22}For other cases in which the Court found operational discrimination based on facial neutrality, see \textit{Turner v. Fouche}, 396 U.S. 346 (1970); \textit{Eubanks v. Louisiana}, 356 U.S. 584 (1958); \textit{Smith v. Texas}, 311 U.S. 128 (1940); \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886).
  \item \textsuperscript{23}As alternatives to the absolute preference the court suggested the use of a point system to provide “some reward” for length of service or to recognize specific skills or to set a time limit for exercising the preference. \textit{Id.}
  \item \textsuperscript{24}\textit{Id.} at 498-99.
  \item \textsuperscript{25}The Attorney General filed the appeal without the authorization of either the Massachusetts Personnel Administrator or the Civil Service Commission. These were the state agencies against whom the district court's judgment was entered. The Governor requested that an appeal not be taken from the judgment. By its own motion, the Supreme Court certified the question of whether state law allowed such appeals without the consent of the state officials against whom the judgment was entered. \textit{Ques. certified sub nom. Massachusetts v. Feeney}, 429 U.S. 66 (1976).
  \item \textsuperscript{26}98 S. Ct. 252 (1977).
  \item \textsuperscript{27}426 U.S. 229 (1976).
\end{itemize}
Duke Power Co., using Title VII of the Civil Rights Act of 1964 as a basis for the decision. The court held that disproportionate impact by itself was sufficient to establish a constitutional violation, and that legislative intent in designing or administering the test was irrelevant.

The Supreme Court reversed, finding that the court of appeals had erred in applying legal standards applicable to a Title VII case in resolving a fifth amendment issue and in being unconcerned with discriminatory purpose or intent.

In a later decision, Village of Arlington Heights v. Metropolitan Housing Development Corp., the Supreme Court elaborated further on the criteria of Davis. Both cases were challenges based on claims of racial discrimination. An integration of both would be required in the reconsideration of Feeney by the district court.

Davis required a finding of legislative intent to discriminate, while Anthony had assumed that a finding of disparate impact was sufficient to prove discrimination. However, Davis held that a disproportionate impact was not enough to justify an equal protection challenge on either fifth or fourteenth amendment grounds. Discriminatory purpose or intent had to be present, but it did not have to be expressed; it could instead be determined by the totality of the circumstances. Justice Stevens, in his concurring opinion in Washington v. Davis, amplified this point:

Frequently 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. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation.

Reconsidering in light of Davis, the district court again found in favor

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31 The parties in Davis had not challenged the applicability of Griggs. Their dispute was over whether it was being misapplied. The Court used the doctrine of "plain error" to take note of this ground for reversal. 426 U.S. at 238 n.12.
33 In Arlington Heights, plaintiffs claimed that the Village's refusal to rezone discriminated against racial minorities. Plaintiffs were seeking rezoning from single family to multiple family dwellings.
34 426 U.S. at 239-40.
35 Id. at 239.
36 Id. at 242.
37 426 U.S. at 252 (Stevens, J., concurring).
of Feeney. The decision was based on the long-standing federal policy limiting the number of women in the armed services to 2%, the result being that only 2% of Massachusetts' veterans are women. Thus, few women could become veterans and thereby qualify for the preference. The district court distinguished Feeney from Davis on their entirely different factual situations. The Veterans' Preference Statute did not constitute an impartial selection policy. Feeney was not challenging the written civil service examination, as was the case in Davis, but the ranking formula of the Veterans' Preference Statute, which required preference be given to veterans who had passed the examination over nonveterans no matter what their comparative scores.

In analyzing the totality of the circumstances, the majority found that the state policy had the natural, foreseeable and inevitable consequence of producing a discriminatory impact on women. While the statute was facially neutral, the court held that "[t]he legislature was, at the least, chargeable with knowlege of the long-standing federal regulations limiting opportunities for women in the military, and the inevitable discriminatory consequences produced by their application to the challenged formula." The district court found that the absolute and permanent veterans' preference had a devastating impact on women's chances for competitive civil service positions. This factual situation was different from that in Davis where the District of Columbia had made affirmative efforts to recruit blacks for the police force. Indeed, 44% of the new recruits over the preceding three years had been blacks, a figure that was close to the proportion of blacks in the area. While the state of Massachusetts tried to claim that the 57-43 proportion of men to women was not an adverse one, the court found the figure to be a misleading one because women were concentrated in the lower grade positions. The laudable legislative objective of bene-

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38 Feeney v. Massachusetts, 451 F. Supp. 143 (1978). The claims brought by the plaintiffs in Anthony v. Massachusetts were rendered moot when, in April, 1975, the state legislature removed all appointments of state and municipal attorneys from the civil service law. See MASS. ANN. LAWS ch. 31, § 5.
40 Id. at 147-49.
41 The court believed that the preference was not neutral because it was based on "decades of restrictive federal enlistment regulations" which disfavored women. 415 F. Supp. at 495. But the court, in reaching this conclusion, relied upon one of the cases, Castro v. Beecher, disfavored in Davis. See note 55 infra.
42 451 F. Supp. at 147.
43 Id. at 148.
44 Id. at 148-49.
45 426 U.S. at 246.
46 Id. at 235.
47 451 F. Supp. at 149.
fiting veterans could not be permitted by sacrificing the careers of women. And since there were less drastic alternatives available to the state to achieve its purpose, the absolute and permanent veteran preference was constitutionally impermissible.48

The opinion in *Anthony v. Massachusetts* has been described as "the ruminations of a liberal court searching for a theory that would disallow a seemingly socially outrageous result."49 *Anthony* departed both from the prevailing holdings and the prevailing standards. The plaintiffs' failure to demonstrate that the statute was based on sex-role stereotypes meant that the applicable standard should have been the rational relationship test.50 Thus a stricter standard was imposed in *Anthony* than that used in *Davis* or the intermediate scrutiny standard which is applied if there is a showing of sex-role stereotypes.51 There also appears to be confusion in the court's analysis of the type of discrimination before them. The failure to distinguish between *de facto* and *de jure* discrimination has resulted in a lack of clarity as to the appropriate standard.52 The court's difficulties are symptomatic of the varied and frequently unclear standards that have recently developed regarding equal protection.53

The standard to be applied in *Feeney*, that used in *Davis*, represents a rejection of the trend which had allowed a "wholesale importation" of Title VII criteria into fourteenth amendment cases. Title VII did not protect public employees until 1972.54 From 1964 to 1972, Title VII-type complaints were brought by public employees as constitutional cases under 42 U.S.C. Sections 1981 and 1983.55 Under Title VII it was not necessary to

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48 The court in *Anthony* suggested a point system or time limits for exercising the preferences as more flexible alternatives to the absolute state preference. 415 F. Supp. at 499.


50 For a lengthier discussion of the problems with the *Anthony* decision, see Note, 23 WAYNE Sr. L. Rev. 1435 (1977).

51 Strict scrutiny is applied for the suspect classification of race and alienage. The majority of the Supreme Court has failed to categorize sex as suspect. It is given only intermediate scrutiny. The least scrutiny is employed in the rational relation test where there is a presumption of validity if the statute bears a rational relation to a valid legislative purpose.

52 Blumberg, supra note 49, at 78-79.


55 Approval of the application of the relaxed criteria can be found in *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972); *Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972).
prove a discriminatory purpose; disproportionate impact was enough. The Court in *Davis* refused to extend that legislative standard to fifth or fourteenth amendment cases. They felt such an extension "should await legislative prescription."\(^{56}\)

Indeed, the Court indicated that it was in disagreement with numerous other lower court decisions\(^{57}\) that had held it was not necessary to prove discriminatory purpose in order to have an equal protection violation.\(^{58}\) So, after *Davis*, discriminatory intent or purpose needs to be proved in equal protection cases before stricter scrutiny will be triggered.\(^{59}\)

But the subjects most likely to fall under the *Davis* standard seem to be veterans' preference, urban renewal, zoning, and public housing.\(^{60}\) Employment cases will use alternate grounds since:

> [t]he Court's repudiation of the *sui generis* approach to constitutionally based challenges to government employment practices does not have broad ramifications in that particular area, because Title VII coverage has been extended to federal, state, and municipal government employees by the Equal Opportunity Act of 1972. For most fair employment litigants challenging facially neutral employment criteria, *Washington v. Davis* simply means that greater efforts will have to be made to comply with Title VII procedural requirements. The decision is, however, important with regard to state veterans' preferences which are specifically excluded from the reach of Title VII.\(^{61}\)

*Davis* appears to require affirmative answers to two questions before a statute can be invalidated on equal protection grounds.\(^{62}\) First, there must be a determination of whether a statute is discriminatory. If the discrimination is not facially apparent, then intent to discriminate must be found. Secondly, it must be ascertained whether the intent is invidious or impermissibly discriminatory. However, the requirements to support intent are far from clear, even after elaboration in *Arlington Heights*.

Other challenges to veterans' preference on the basis of sex discrimi-

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\(^{56}\) 426 U.S. at 248.

\(^{57}\) See 426 U.S. at 244 n.12.

\(^{58}\) *Id.* at 242-45.

\(^{59}\) *Id.* at 240.

\(^{60}\) Blumberg, *supra* note 49, at 34.

\(^{61}\) *Id.* at 34.

\(^{62}\) Fleming & Shanor, *supra* note 1, at 24-25.
nation have been unsuccessful. In *Feinerman v. Jones* the court did not use a heightened standard of scrutiny, nor did it find anything on the record to indicate a harsh adverse impact of the veterans' preference on women. Women there constituted 48% of the state workforce and there was no statistical breakdown submitted to the court for particular job categories to demonstrate discrimination.

In *Koelfgen v. Jackson*, the court avoided confronting the issue of the impact on women. Women were found to be just one of ten classes claiming to be disadvantaged because of the operation of veterans' preference. The various plaintiffs were consolidated into one manageable class, and the court merely applied the rational basis criteria in making its decision. The plaintiffs had not convinced the court that public employment was a fundamental right so as to require stricter scrutiny. Plaintiffs were also unable to prove that promotional preference for veterans was irrational. Lacking sufficient proof to warrant closer scrutiny, the court never got to the question of sex discrimination.

*Branch v. DuBois*, decided after *Anthony* and *Davis*, unanimously upheld the veterans' preference statute. The court found no legislative intent to discriminate; any disadvantage suffered was only incidental to the valid legislative purpose of rewarding veterans. The court reasoned that *Davis* required invidious discrimination in order to trigger stricter scrutiny. Finding none, the rational basis test was applied. The case was distinguished from *Anthony* by finding that the Illinois statute was not an absolute preference like the one in Massachusetts; the Illinois statute and its "use of preference points hinders the advancement of women but does not preclude it."
Ballou v. State Department of Civil Service also represents a post Davis and Anthony challenge to veterans’ preference based on claimed sex discrimination. Ballou contended that the law had a discriminatory impact on women because 98% of the armed forces were men. Relying on Davis and Arlington Heights, the court upheld the state law because the disproportionate impact argument was not sufficient to activate strict scrutiny in the absence of a claim of discriminatory purpose.

Other decisions applicable to Feeney include those dealing with sex-role stereotypes. An intermediate level of scrutiny as to gender discrimination will be applied if discriminatory intent is found as required by Davis. The invidious discriminatory purpose of Davis, as applied to a sex discrimination case, would mean an inquiry into whether the statute perpetuates gender discrimination. The major cases on this subject seem to indicate that a sex discriminatory classification will violate the Equal Protection Clause when the following two conditions are met: “first, if the statute reflects insensitivity to the attempts of some women to break out of traditional female roles, and second, if the gender discrimination is unnecessary to the achievement of the underlying purpose of the entire statute.”

The Court in these cases has not formulated anything that amounts to a precise standard relating to gender discrimination. It appears to have taken an ad hoc approach. However, when reviewed together, the cases reveal “a pattern in which certain factors relevant to challenges to veterans’ preferences have been consistently treated. Official gender discrimination is likely to be disallowed as ‘invidious’ if it disfavors women in employment opportunities, particularly when the discrimination has no more justification than archaic and overbroad assumptions about ‘gender roles.’

For a successful challenge to veterans’ preference based on sex discrimination, the key appears to be the amount of evidence that the plaintiff

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77 Ballou’s argument relied upon Anthony for support for a finding of discriminatory impact. But the court found that her argument was undercut because of the following Civil Service Commission finding:
Although women constitute a large integral group within the total population of non-veterans, there was not sufficient evidence to prove that women are discriminated against by the veterans' preference to any substantially greater degree than are all non-veterans. The system works to the disadvantage of all non-veterans, including women, who happen to be a very predominant group of non-veterans.
Id.
79 Fleming & Shanor, supra note 1, at 39-40.
80 Id. at 42.
is able to bring forth. But the hurdle of showing intent to discriminate as required by Washington v. Davis is a substantial one. Recent case law has made it more difficult to prove discrimination.

Attention has to be focused on constitutional standards because no federal statute exists for invalidating veterans' preference statutes. Title VII of the 1964 Civil Rights Act exempts these statutes from coverage. "Nothing contained in this subchapter shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preferences for veterans." Likewise, 42 U.S.C. Section 1981 applies to racial but not gender discrimination cases.

While Feeney must rest on recent case law, the decision should have limited impact in other areas of claimed discrimination. Statutory standards could still be utilized for other cases of discrimination.

Feeney represents the first major chink in the armor of veterans' preference. The United States Supreme Court has granted certiorari to consider the question of whether the Massachusetts preference violated the Equal Protection Clause of the fourteenth amendment. Additionally, there exists a series of unresolved issues that may or may not be resolved by the Court. They include: (a) How does one measure intent to discriminate? (b) Are veterans' preferences based on sex role stereotypes? (c) Can the distinctions drawn between Feeney and Davis be persuasive to the Court? (d) Can a stricter standard of scrutiny be applied to even a "facially neutral" statute? The future significance of this case will be determined by which of the many cases have been brought to the Court.

81 The factual situation in Feeney appears to be stronger than in the other four cases discussed. Koelfgen did not reach the question. Feinerman was not able to statistically substantiate sex discrimination. 356 F. Supp. at 261. The evidence in Ballou was undercut by contrary findings of the Civil Service Commission. See note 77 supra. In Branch, while there was evidence of an adverse impact on women, the situation was not as severe as in Feeney. Emphasizing the extreme nature of the preference in Feeney, both the Branch and Ballou courts distinguished the facts in their cases from Feeney. See 418 F. Supp. at 1132; 148 N.J. Super. at 123, 372 A.2d at 338-89.

82 The Court itself recognized that less proof was required in a Title VII violation than in a fifth or fourteenth amendment case. 426 U.S. at 247-48.


84 Fleming & Shanor, supra note 1, at 15-16 n.9.


avenues of approach available to the Court it chooses to utilize. The following approaches seem the most probable alternatives available to the Court.

First, it could distinguish *Feeney* from *Davis* as did the Massachusetts district court and invalidate the absolute preference given to veterans. This approach would impact on the six other states having absolute preference similar to Massachusetts, and possibly on the other states as well as the federal government which give absolute preference only to some positions or for disabled veterans. Upholding *Feeney* would leave intact the approaches of the other states and the federal government which, for most positions, give only some preference to veterans applying for civil service positions. But the Massachusetts preference is not only absolute but also is a lifetime preference. The striking down of the lifetime preference could have ramifications in those states which do not have an absolute preference but do have a lifetime preference.

Secondly, the Court could go further than *Feeney* and declare that veterans' preferences, whether absolute or preferential, must be struck down because their detrimental effect on job opportunities for women perpetuates sex-role stereotypes. Bonus points given to veterans would, in most cases, produce the same result as application of the absolute preference. Women seeking upper echelon civil service positions would benefit only if the entire system of preference were struck down or a separate preference system were instituted to aid them.

Thirdly, the Court could decide to overturn *Feeney* and uphold veterans' preference in Massachusetts. It could do so by giving only the most cursory examination of intent or "totality of the circumstances" and look primarily at legislative intent, thereby finding no discrimination. The overwhelming majority of the courts have taken this approach in validating veteran preference statutes and appear to take the two-tiered approach to equal protection. Such a conclusion would be much more difficult in *Feeney* because the statistical evidence compiled is more extensive than that presented in other cases. Additionally, the kind of preference is more extreme here than in the majority of the states or federal governments. It would also be fairly easy for the Court to find the situation in *Feeney* distinguishable from *Davis* without any erosion of the more stringent standards for proving discrimination imposed by that case.

89 See note 82, *supra*.
90 The majority of the states and the federal government have statutes that give veterans point preferences on civil service examinations rather than the absolute ranking preference of Massachusetts. Fleming & Shanor, *supra* note 1, at 16-17.
It also seems rather difficult for the Court to sustain such an absolute preference for veterans in light of *Regents of the University of California v. Bakke*, which disallowed such preference for the sixteen slots set aside for minority admissions into the Davis Medical School. *Feeney* could serve as a basis for further elaboration and definition of the Court’s decision in *Bakke*. It is unlikely that the Court will take that route because *Bakke* was essentially a Title VI case, while *Feeney* rests on fourteenth amendment grounds. The district court in *Feeney* was careful to point out that its decision did not rest on the standards applicable to Title VII cases. The concern was present because of its confusion of standards evident in the earlier *Anthony* decision. Likewise, the Supreme Court in *Davis* had been careful to make distinctions between statutory and constitutional standards in not allowing a Title VII standard to apply to a fifth amendment case. It is thus highly unlikely that the Court will use the fourteenth amendment case of *Feeney* to elaborate on the Title VI case of *Bakke*.

It is, of course, possible that *Feeney* could be utilized to firmly reiterate the Court’s concern that women be treated so as to give them fair opportunity in the job market. But real opportunity for women would require the Court to strike down all veterans’ preference statutes. The Court is unlikely to go that far. The facts of the *Feeney* case do not require them to do so; they need only deal with the more extreme type of veterans’ preference. The recently decided *Bakke* case permitted some preference be allowed to minorities. Given the disparate views in *Bakke*, it is hard to determine what is permissible and what is not. Justice Blackmun informs us of at least his stand on preferences:

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans’ preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist and may not be ignored.

The Court probably will take the middle road in *Feeney*, as it did in *Bakke*. They will choose to distinguish *Feeney* from *Davis* and rule the absolute preference invalid. They will, however, continue to allow the states and the federal government to employ less extreme methods of aiding or rewarding veterans as being well within governments’ legitimate legislative authority. In so holding, though striking down a sexually discriminatory practice, the case would not substantially enhance the prospects for women.

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93 98 S. Ct. at 2808.
obtaining jobs in civil service. On the other hand, veterans would continue to reap the rewards of the system. The retention of some preference to veterans would continue to serve as a substantial hindrance to women seeking the traditionally non-female positions. Their gain would only be the removal of the absolute bar.

Nonetheless, 

Feeney could represent a departure from the Court's recent approach in 

Davis, Arlington Heights and Geduldig to facially neutral statutes. Justice White, writing for the majority in 

Davis, did not preclude the possibility of finding discrimination in the application of a facially neutral statute. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." The factual situation in 

Feeney provides the Court with an excellent opportunity to do so.

One of the difficulties with 

Anthony which has been carried over to 

Feeney was a failure of plaintiffs to show and for the court to discuss adequately sex-role stereotypes. Assuming the 

Feeney decision can survive the initial 

Davis hurdle of showing intent to discriminate, an intermediate level of scrutiny thereby brought into play needs sex-role stereotypes in order to find gender based discrimination. 

Feeney could survive the initial test of finding the impermissible legislative intent and still fail because of insufficient proof of gender based discrimination. The discrimination could be justified in terms of some legitimate legislative purpose which overrides the discriminatory one. The court obliquely addresses this question in discussing the legislative intent to benefit veterans at the expense of women. The cursory treatment of sex role stereotypes may not be fatal but it is debilitating when the district court is trying to argue for application of a stricter standard in the case of a facially neutral statute, something not yet accepted, without adequately discussing the standard.

There are also difficulties with the court's finding of discriminatory legislative intent. This is not entirely of their own doing, since the definition of that standard is unclear in both 

Davis and Arlington Heights. It is clear that the Court would permit an investigation of the totality of the circumstances in reaching such a conclusion. But whether the Court will accept the

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94 426 U.S. at 242.
95 An intermediate scrutiny standard was applied by the majority in 

Anthony. 415 F. Supp. at 195-99. But intent was not considered as mandated by 

Davis.
96 See Note, supra note 50, at 1448-51.
97 Its only explicit mention of sex-role stereotypes is contained in a footnote discussing the legislative history of the preference. The court found that state law permitted a practice of requesting only women for certain positions thus suspending the operation of veterans' preference. This provision was repealed in 1971 but "[s]tatistics show that the exemption operated only to preserve stereotypically 'female' clerical jobs for women." 451 F. Supp. at 148 n.9.
notion that actors are presumed to intend the consequences of their actions articulated by Justice Stevens in *Davis* and accepted by the majority in *Feeney* is another question. The tort standard seems somewhat strained when applied to legislative politics abounding in its variety of purposes and bargains. But the foreseeability of the result is one way to attempt to demonstrate that there was an intent to discriminate. Generally, it will probably be the only proof available. 99 Whether the Court will be persuaded that the legislature knew or should have known its actions would cause discrimination probably depends on how likely it is that the presumption is correct99 or how invidious the discrimination might be.

By way of support, the *Feeney* case is on much firmer ground than *Davis*. The evidence of discriminatory impact was more extensively documented. There had been no governmental affirmative action program in Massachusetts, as had been the case in *Davis*. In a compilation of fifty certification lists, veterans' preference had excluded women from effective competition. Women in the state civil service were concentrated in the secretarial and clerical positions.

If policy considerations are important to the Court, there is political support for limiting veterans' preference in both the state and national government. In Massachusetts, the governor as well as the two state officials affected by the *Anthony* decision did not want an appeal from the case taken.100 The Carter Administration has supported reform of the federal civil service law to limit veterans' preference. The motive behind the reform was to improve the quality of the civil service by employing more job related criteria to choose employees. However, many of the suggested reforms were lost in a last minute flurry of lobbying activity by the veterans groups.

Finally, *Bakke* represents at least symbolic support for *Feeney* and the idea that qualified persons should not be excluded because of the operation of some quota or absolute preference.

*Feeney* can and should be upheld. The impact on a disadvantaged class in *Feeney* is much more pronounced than in either *Davis* or *Arlington Heights*. The absolute preference given to veterans starkly delineates the discriminatory effect on women who have been concentrated in the lower level positions. Such statutes clearly perpetuate the sex-role stereotypes already condemned by the Court.

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98 See Blumberg, *supra* note 49, at 44.
99 *Id.* at 45.
100 See note 25, *supra*.