10-1978

Personnel Administrator of Massachusetts v. Feeney

Lewis F. Powell Jr.

Dissent
Mole

3 J/Ct invalidated mass. Veterans Preference Act.
Issues are too imp. to affirm summarily.

PRELIMINARY MEMORANDUM

Oct. 6, 1978 Conference
List 1, Sheet 1

No. 78-233 ATX

PERSONNEL ADMINISTRATOR
OF MASSACHUSETTS

v.

FEENY, job applicant, non-veteran, woman

Appeal to USDC Mass.
(Tauro, D.J.; Campbell, CAJ, concurring; Murray, D.J., dissenting)
3 J/Ct

Federal/Civil

Timely

1. SUMMARY: Appt challenges the court's holding that Mass. Gen. Laws c.31, §23, which affords veterans a preference in obtaining state civil service jobs, violates the Equal Protection Clause.

2. FACTS & DECISIONS: Historically, women have been excluded from full participation in the nation's military forces. From 1948 until 1967, a federal statute prohibited women from making up more than two per cent of total personnel in the armed forces. The Army has continued a similar limit by regulation.
I would note. See comments on back. David

Since 1884, Massachusetts has given veterans a preference in obtaining public employment. Under present law, the first step in getting a public job is to take an examination. The test results in a composite score. Applicants who pass are placed on an "eligible" list and ranked under the formula established by §23, the statute in question here:

1. Disabled veterans in order of their composite scores.
2. Other veterans in order of their composite scores.
3. Widows and widowed mothers of veterans in order of their composite scores.
4. All other eligibles in order of their composite scores.

When a job becomes available, the Civil Service Director certifies candidates from the top of the eligible list, and the hiring agency chooses from among those certified. Of 47,005 appointments made during a 10-year period ending in 1973, 14,476 went to male veterans and 374 went to female veterans. Overall, 26,794 men were hired and 20,211 women.

Aee, a non-veteran, was a state employee who sought to move up the administrative ladder. In 1971, she took an examination for an available position, scored second, and, because of §23, was listed sixth on the eligible list. She was not among those certified and a male veteran with a lower grade got the job. In 1973 her story repeated itself. The court found that in 1973 she would have been certified if the state had not given a preference to veterans. In 1974 she applied for yet another job, scored 17th and was ranked 70th. She then brought this lawsuit

alleging §23 discriminated against women. The three-judge court held the statute denied her equal protection. Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976). The court enjoined the defendant state officers from enforcing the statute, and the Massachusetts legislature enacted a substitute law to have effect only during the pendency of this case. Juris. Stat. App. C.

An appeal was taken to this Court and the Court certified to the Supreme Judicial Court of Massachusetts the question whether the Attorney General of that state could bring an appeal when none of the named defendants wanted to appeal. Massachusetts v. Feeney, 429 U.S. 66 (1976). Mr. Justice Blackmun would have dismissed for want of jurisdiction. The Massachusetts court held the Attorney General had the authority to prosecute the appeal. This Court then vacated the judgment and remanded for further consideration in light of Washington v. Davis, 426 U.S. 229 (1976). Massachusetts v. Feeney, 434 U.S. 884 (1977) (No. 76-265) (prior pool memos are dated 10-6-76 and 9-28-77). Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Powell would have noted probable jurisdiction.

On remand, the court reaffirmed its prior holding. The effect of veteran's preference is to exclude virtually all women from the top civil service positions desired by men. While the legislature's purpose, rewarding public service in the military, was worthy, the means were not grounded on a convincing factual rationale. The preference was not related to

job performance. Less drastic alternatives, such as a system which added points to a veteran's test score, were available. The preference was not limited to those who have shortly returned to civilian life. Although the statute was not designed for the sole purpose of subordinating women, "its clear intent was to benefit veterans even at the expense of women" and Davis was distinguishable. Here the discriminatory impact was "natural, forseeable, and inevitable." The legislature could be charged with knowledge of sex discrimination in the military, and, because in the past certain women-only jobs were exempted, it could also be inferred that the legislature knew the preference statute favored men. The impact on aee and her class was "devastating." The preference was not job-related. Unlike the defendants in Davis, the defendants here had not shown affirmative recruiting efforts or a recent rise in the proportion of the minority in the civil service workforce. Judge Cambell concurred, saying the system was one "of absolute preference which makes it virtually impossible for a woman, no matter how talented, to obtain a state job that is also of interest to males." It was thus unlike the test in Davis on which a black might "by dint of extra effort," improve his score.

Judge Murray reiterated his prior dissent. The preference statute is not on its face gender-based. It has not been shown to be a pretext for discriminating against women. It favors veteran women, and disfavors non-veteran men.

While the statute has a weightier impact on the relevant group than did the test challenged in Davis, "impact alone is not determinative." A legislature's choice to prefer veterans "implies invidious intent only if it appears inconsistent with expected and valid considerations." While the state could consider job-relatedness and relocation benefits, it could also simply desire to reward veterans. The statue is rationally tailored to meet that goal, and the less drastic alternatives posed by the majority would also reduce the benefit to veterans. Since Davis, three courts have rejected equal protection challenges to state veteran's preference statutes. Bannerman v. Department of Youth Authority, 436 F. Supp. 1273, 1279-1281 (N.D. Cal. 1977) (Schwarzer, J.); Branch v. Du Bois, 418 F. Supp. 1128, 1131-1133 (N.D.Ill. 1976) (Tone CAJ; Will, Decker DJs); Ballou v. State Department of Civil Service, 148 N.J. Super. 112, 372 A.2d 333 (N.J. App. Div. 1977), aff'd, 46 U.S.L.W. 2454 (NJ 1978)(per curiam).

3. CONTENTIONS: Appt makes two arguments. First, the district court's decision conflicts with Davis and requires summary reversal. The proof of discriminatory intent is insufficient. The statute is neutral on its face, and the contrary view expressed in a footnote in Judge Tauro's opinion for the court, App. A11n.7, is without merit. By relying on both forseeability of impact and actual impact to show intent the court countermanded the instruction to heed

Davis, which held that intent cannot be inferred from impact alone. The additional factor relied on, the lack of job-relatedness, is grossly overstated. The veteran's preference statute was primarily intended to benefit qualified individuals for their prior service to the nation. By focussing on job-relatedness alone, the court confused the Equal Protection Clause with Title VII. In its earlier opinion the court admitted the "purpose" of the statute was not "disqualifying women."

Second, appt says the veterans' preference statute rationally promotes legitimate state interests and so is constitutional. Sex classifications are not judged by the compelling state interest test. Craig v. Boren, 429 U.S. 190, 197 (1976). The court therefore erred in inquiring into less restrictive alternatives. With the exception of the decision below, the federal courts have uniformly rejected equal protection challenges to veterans' preference statutes. Furthermore, because veteran's preference is merely one factor that is considered in an elaborate civil service program, it satisfies the constitutional test adopted by Mr. Justice Powell in University of California v. Bakke, 46 U.S.L.W. 4896 (June 27, 1978).

Aee responds that the court analyzed the "totality of the relevant facts" and properly found discriminatory intent under Davis. Subjective ill-will is not required. The impact on women was both forseeable and devastating. Impact is one indicator of intent. See United States v. School District

of Omaha, 565 F.2d 127 (8th Cir. 1977), cert. denied, 46 U.S.L.W. 3526 (No. 77-728; Feb. 21, 1978). The district court also relied on the state's historical use of separate requisitions for women, the exemption of those jobs from the veteran's preference statute, and the resulting paternalistic stereotyping.

Aee also maintains that the statute does not meet the requirements of Craig, which are that it "must serve important governmental objectives and must be substantially related to the achievement of those objectives." This heightened scrutiny is justified because the statute is based on "old notions" that a woman's place is in the home, and it excludes women from jobs because of circumstances beyond their control. The district court properly found that this statute is not carefully tailored to meet the state's objectives because the state could use other means to aid veterans which would not be at the expense of women.

4. DISCUSSION: The Court in Davis said impact could show intent when impact could not be explained on nondiscriminatory grounds. 426 U.S. at 242. Here the court reasoned that neither job-relatedness nor relocation explained the statutory structure, yet failed to consider whether the third justification, rewarding those who served, did so. Even if the statutory structure is sufficiently related to "old notions" to satisfy the intent element, rewarding veterans may be important enough to enable

the statute to withstand scrutiny. Cf. Schlesinger v. Ballard, 419 U.S. 498 (1975)(discrimination against men in naval discharges permissible). The prior cases of this Court provide no definitive answer.

Both Bannerman and Branch involved point systems which resemble the veteran's preference for most of the federal civil service. Consequently, those cases can be distinguished from this one, where the preference is "absolute." The conflict with Ballou, a New Jersey decision, however, is square, and, if the judgment below were affirmed, the constitutionality of 5 U.S.C. §3310, which gives veterans an absolute preference for some jobs, e.g., as elevator operators, would be subject to serious question. See Anthony, 415 F.Supp. at 499n.13.

On remand, aee sought to amend the complaint to add a cause of action under the Equal Rights Amendment to the Massachusetts state constitution. After the state stipulated that it would not raise the defense of estoppel if aee brought a subsequent action in state court, the court below denied aee's motion. Aee does not now argue that denial was in error and therefore the state constitutional question is not before this Court.

There is a motion to affirm.

I would note probable jurisdiction.

9/25/78 Munford opinion in juris. statement

To my mind there are at least two issues meriting review here. First, I think there is a real problem concerning the application of Washington v. Davis. It certainly seems that there are alternative explanations for the veterans' preference having nothing to do with discrimination against women. Moreover, the preference discriminates against a large number of men who also have not served during wartime.

Second, there is the problem of what state interest is required to justify a statute that discriminates on the basis of sex. Even if the justifications for the preference would be inadequate if this were a suspect classification, they may be sufficient to support a sexual classification.

Accordingly, I would note.

David

Court ..... *Voted on* ....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No 78-233

Submitted ....., *19*... *Announced* ....., *19*...

PERSONNEL ADMINR. OF MASS.

vs.

FEENEY

Also motion to affirm.

C.J. Hughes was recused

3 2/CT

Noted

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.				✓				✓					
Brennan, J.							✓						
Stewart, J.				✓									
White, J.				✓									
Marshall, J.							✓						
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.				✓									

lfp/ss 2/20/79

MEMORANDUM

TO: David DATE: Feb. 20, 1979

FROM: Lewis F. Powell, Jr.

78-233 Personnel Administrator v. Feeney

This is the troublesome case involving the validity of Massachusett's Veterans Preference Act with respect to civil service positions.

The case has been here twice before. On the first time we remanded it to ascertain whether - under Massachusetts law - whether the Attorney General of the state had authority to appeal over the express objections of the nominal defendants. On the second "round", we remanded the case to the District Court for reconsideration in light of Washington v. Davis.

The three-judge court, on this remand, reaffirmed its prior decision invalidating the Veterans Preference statute on the ground that it discriminated invidiously against women. A majority of the three-judge court met the Washington v. Davis argument by concluding, in effect, that the legislature must have intended the natural and inevitable effect of the statute: namely, that women, so few of whom were permitted to or did serve in military service, were denied access to civil service positions.

Judge Campbell's concurring opinion states, more clearly than I have seen stated previously, the rationale of Washington v. Davis, and Arlington Heights. The Equal

Protection Clause simply cannot be applied literally so that all state-conferred benefits will be available equally to all citizens. Judge Campbell, nevertheless, concluded that despite the facial neutrality of this statute, its inevitable effect was discriminatory.

Massachusetts argues strongly to the contrary, and it is supported by a 42-page amicus brief by the Solicitor General (written by Frank Easterbrook). The SG's brief arques, persuasively, that the fallacy in the analysis of the three-judge District Court is that the statute was intended to benefit veterans, a laudable and legitimate purpose, and was not intended to discriminate against women. If the doctrine of "purposeful discrimination" heretofore deemed to be the meaning of the Equal Protection Clause is to be respected, and the authority of Davis and Arlington Heights, the SG arques that veterans preference statutes must be sustained. A good deal of emphasis is placed on the long history of such statutes, going back to President Lincoln.

* * *

David: I am not at rest in this important case, and will need all the help I can get from my clerks. In view of the discriminatory impact of the statute, my "gut reaction" is that it cannot be sustained under modern gender-based discrimination analysis. On the other hand, I do not

want to undercut or weaken the authority of Davis and Arlington Heights. As stated by Judge Campbell, the Equal Protection Clause simply must have some principled limits, and I cannot join an opinion that reasonably could have the effect of invalidating classifications based on their "impact" or even their "inevitable effect". I do not want to place equal protection analysis on an "effects" basis comparable to Title VII.

L.F.P., Jr.

ss

DW 2/26/79 Reviewed. Excellent memo

Bobtail Bench Memorandum

To: Justice Powell
Re: Personnel Administrator of Mass. v. Feeney, No. 78-233

At issue in this case is the constitutionality of Massachusetts' statutory system of giving veterans preference in the obtaining of state jobs. The question is whether the Massachusetts Legislature, in enacting the preference system, had the "purpose" of discriminating against women. The three-judge court below, purporting to apply this Court's decision in Washington v. Davis, 426 U.S. 229 (1976), ruled that the discriminatory effect of the Massachusetts system was

purposeful in that the legislators passed the statute knowing that it would have a severely disproportionate effect on women. Appellants contend that in effect the lower court inferred intent from the mere foreseeability of discriminatory consequences, and that such an approach would emasculate the intent requirement of Washington v. Davis. The facts are adequately set forth in the briefs, and I will proceed directly to the legal issue involved.

1. Discriminatory Effect

Despite the plain findings of the three-judge court to the contrary, appellant suggests that, quite apart from the Legislature's intent, the the Massachusetts veterans preference scheme does not in fact discrimate against women. Thus, appellant contends that under the veterans preference system many women nonetheless are hired to various posts in the State's civil service; indeed, more non-veteran women have been hired in the last ten years than veteran men. Additionally, one could contend that there is no discrimination whatever against women as such. Rather, the distinction is between veterans and non-veterans. All non-veterans suffer an equal disability regardless of their gender.

I believe both of these arguments to be misplaced. In assessing the impact of the Massachusetts system, it is not enough to compare the number of women hired with the number of veteran men hired. Rather, the correct comparison should be between the percentage of women applying for civil service jobs

who receive them, and the percentage of veterans applying for such jobs who receive them. If, for example, only 10% of all women applicants are given jobs, whereas 90% of all veteran applicants are given jobs, the discriminatory effect of the statute would be apparent. Indeed, even these figures may not adequately reflect the extent to which the Massachusetts system affects women's participation in the State's civil service, as there may be many women who would apply for jobs but for the discouraging influence of the veterans preference.

Similarly, I find unpersuasive the argument that women are not discriminated against here because they are treated alike with all non-veterans. It cannot be denied that those who receive the benefits of the Massachusetts system are largely men--in fact, 98% men. Although the Massachusetts system necessarily affects some men, therefore, it is undeniable that the costs it imposes fall disproportionately upon women. Under such circumstances, it is disingenuous to say that there is no discriminatory impact upon women. Of course, the fact that the distinction is between veterans and non-veterans may be strong evidence that it was not intended to discriminate against women as such. This, however, is a question of the purpose of the disproportionate impact--not whether such an impact exists.

2. Discriminatory Intent or Purpose

The key question here, then, is whether the admittedly disproportionate impact of the Massachusetts veterans

preference scheme can be said to be "purposeful discrimination" against women. In Village of Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977), the Court suggested the ways in which one could determine whether a legislative or administrative act was intentionally discriminatory. First, the Court suggested that if there were a clear pattern of otherwise unexplained discriminatory effect, a court might infer a discriminatory purpose. Alternatively, the Court stated that the historical background of a governmental action might demonstrate the purpose behind the action. For example, in some cases an unusual deviation from normal procedure or substance would be a hallmark of some invidious objective. Finally, the Court suggested that in some unusual circumstances direct evidence from the decision makers might be called for.

In the present case, as I have discussed above, there is a plainly disproportionate impact upon women. Whether this is "a pattern as stark as that in Gomillion or Yick Wo," Arlington Heights, at 266, is a question over which one might debate. Even if it is, however, there is an explanation for the disparity of treatment that has nothing to do with women. Thus, all the judges below were in apparent agreement that the Massachusetts Legislature's desire in enacting a veterans preference scheme was only to benefit veterans--not to harm or otherwise affect women. Furthermore, I am satisfied that there is little in the history of the veterans preference legislation to support an inference of invidious intent. Although it

Intent only to benefit Veterans

cannot be denied that legislators (and people generally) had conceptions concerning women in the nineteenth century that we would consider anachronistic today, there is little evidence that such notions played any substantial role in the framing of Massachusetts' veterans preference statute.

Under the analysis set forth by the Court in Arlington Heights, therefore, it is difficult to conclude that the Massachusetts veterans preference statute is intentionally discriminatory. At the same time, however, in Washington v. Davis, 426 U.S. 229 (1976), the Court explicitly stated that in some cases the plainly disproportionate effect of a statute would be probative evidence of a legislature's intent to discriminate. The difficult issue in this case, therefore, is how best to reconcile the undeniable, express objective of the Massachusetts statute (the benefitting of veterans) with the undeniable, undoubtedly foreseen effects of the statute (the disabling of women.) There are three possible arguments for ignoring the plain objective of the Legislature and striking down the Massachusetts statute as one that discriminate against women: (1) the statute incorporates the intentional discrimination present in federal armed services policies; (2) a legislature should be deemed to "intend" the reasonably foreseeable consequences of its actions; and (3) at some point, the certainty and extent of discriminatory effect constitute conclusive evidence of discriminatory intent. I shall address each of these arguments in turn.

a. Incorporation

Appellees argue strenuously that the statute in issue here is quite different from the employment practice involved in Washington v. Davis. Thus, in Washington v. Davis the employer administered a test neutral on its face to determine job qualifications. Although the results of this test generally disfavored Negroes, there was no necessary tie between the test and past acts of intentional discrimination. Here, on the other hand, the Massachusetts statute explicitly draws a distinction based upon service in the armed forces--a quality that unquestionably has been distributed according to gender on purpose. Thus, appellees urge that legislative actions should be deemed to be purposefully discriminatory irrespective of the intentions or desires of the legislature, provided that the actions incorporate the purposefully discriminatory actions of others.

It is difficult, however, to cabin the principle appellees argue for. Thus, over time there have been countless ways in which societal benefits and status have been given on the basis of intentionally discriminatory criteria. For example, until the last twenty years many Negroes were purposefully excluded from many colleges and universities. To say, however, that any distinction according to one's college education is therefore purposefully discriminatory would be absurd. Thus, I would reject appellees' incorporation argument, as I can see no ready limitation on its

ramifications.

b. Foreseeable Consequences

Alternatively, appellees contend (and are supported in their contention by Judge Tauro's opinion below) that legislatures, like tortfeasors, should be deemed to "intend" the natural and foreseeable consequences of their acts. The foreseeability of the Massachusetts' statute's leading to a disproportionate impact on women is beyond question. Thus, appellees and Judge Tauro conclude that the Massachusetts Legislature intended to discriminate against women.

One difficulty with the "foreseeablity" argument is readily apparent: Like appellees' incorporation argument, it could not be limited in any way that would preserve the effectiveness of the Washington v. Davis limitation upon the Fourteenth Amendment. There is another fundamental difficulty with this approach, however, as it misperceives the basic rationale underlying the intent requirement of this Court's decisions.

As I understand it, there are two good reasons for the requirement that discrimination be intentional to be unconstitutional under the Fourteenth Amendment. First, by requiring an intent to discriminate, the Court eliminates many general social equality questions. For example, if disproportionate impact were in itself enough to warrant application of the Equal Protection Clause, every social program enacted by Congress would have to be reviewed

statistically by the courts to determine who was affected and in what way. Second, by permitting those actions motivated solely by purposes other than invidious discrimination, the Court allows legislatures to legislate for the social good without constant monitoring and tinkering by the judiciary. In those cases where we know that no discriminatory purpose lay behind an enactment, we may be reasonably certain that some social benefit will result. On the other hand, no such social benefit is likely to be obtained by the application of statutes, for example, that are designed to harm Negroes.

Under this rationale, it makes no sense whatsoever to assume that legislatures intend the foreseeable consequences of their actions. Where legislatures act soley to achieve some laudatory purpose, we have the necessary assurance that some good will result, whether or not the legislature also is aware that there will be some unavoidable, but incidental, disparate impact. Similarly, with the state of social science such as it is, it is difficult to say that any effect of a given piece of legislation was unforeseen by the legislating body. In sum, I conclude that the normal tort principles concerning foreseeability of consequences are inapplicable to adjudication under the Fourteenth Amendment.

c. Certainty and Extent of Disparate Impact

Finally, one could adopt what I understand to be Judge Campbell's approach and say that at some point the certainty and extent of disparate impact is so great that it should be

taken to be conclusive evidence of the legislature's intent. (Alternatively, one could read Judge Campbell's opinion to say that there is an exception to Washington v. Davis where the disparate impact is great and certain. These are, however, only two ways of saying exactly the same thing.)

In many ways, this is the most attractive of the alternative arguments presented for affirmance. Thus, by reading strictly the certainty and extent of the disproportionate impact required, one could limit narrowly the scope of this case. For example, one could easily distinguish Washington v. Davis by noting that, although there was a palpably different impact on Negroes applying for jobs in the District of Columbia, no such certain difference was to be anticipated with respect to the nation as a whole, which is the area for which the employment test was adopted. Indeed, a fair reading of Justice Stevens' concurring opinion in Washington v. Davis would come close to this position.

Although Judge Campbell's position is attractive for its narrow reach, I find it difficult to accept analytically. Thus, insofar as certainty and extent of effect are probative of intent, there is little need to draw a per se rule that they will be determinative in some cases. Rather, it should be sufficient to say, as the Court did in Washington v. Davis, that a court must take into account the sum total of the circumstances and infer the purpose of the legislature or agency. The reason, of course, that Judge Campbell did not

take this tack here is that he found it necessary to overcome explicit findings that the objective of the Massachusetts Legislature was solely to benefit veterans. If the certainty and extent of impact is not enough to overcome such evidence in a general balancing procedure, however, then it should not be enough to warrant any general rule. Unless you conclude that the certainty and extent of the disparate impact in this case is sufficient to overcome the manifest reason for the adoption of the Massachusetts' veterans preference system, therefore, I think you should vote to reverse the three-judge court.

3. Conclusion

In conclusion, the Court should carefully consider the language it uses in writing this opinion. Thus, I see this as a valuable opportunity for setting forth with some clarity what the Court means when it uses terms such as "purpose" and "intent" in Fourteenth Amendment adjudication. For me, there is no meaningful distinction between the two words. Moreover, it is possible for a legislature to adopt a statute knowing it will operate in a certain fashion without "intending" it to do so. Thus, I would adopt Professor Brest's notion that something is a "purpose" of a decisionmaker in adopting a rule only if it is an "effec[t] that the decisionmaker seeks to establish or retain by promulgation of the rule." See Brest, supra, at 104. In the present case, disabling women cannot be said to be a purpose of the Legislature in adopting Massachusetts' veterans preference system because we have no

reason to believe that such disabling was anything that the Massachusetts Legislators sought to bring about.

2/26/79 David

78-233 PERSONAL ADM. v. FEENEY Argued 1/26/79

Mass. Veterans Preference Case.
(Exclusively an E/P case. Title VII not applicable)
not a class action.

Kiley (Asst AG of Mass)

Emphasizes the way in which statute operates.

All 3 judges of 3d Ct agreed there was no purposeful discrimination.

40% of C/Ser. jobs are not covered by ~~=~~ C/S.

The 60% includes the ~~appeal~~ "clamped appeal" and the "Labor" Services.

All applicants [, including veterans,] must pass qualifying exam.

Statute applies only to war time service.

Non-eligible males in Mass total about One million.

The appointing authority need not select the b service applicant merely because he is at top of list

Emphasizes the "story" of Helen Feeney (Why?). Argues that whatever injury she suffered would have been suffered by a male similarly situated.

Kiley (for Mass.)

Neutral on its face. The eligibility prescribed by statute have nothing to do with sex.

Argues Davis + Arlington Heights

But DC made a "finding of discriminatory intent". (W+R disagree. He agrees that Judge Tuard made such a finding, but that Campbell made no such finding — relying, rather, on "inevitable consequences".

Relies on SG's Brief as to absence of discriminatory intent.

Non veteran females received 42% of all civil service jobs for which there are preferences for veterans. (Men + women tend to apply for different types of jobs).

Ward (for appellee

Concedes there is discrimination against males who were not qualified for military service

Although women were allowed to enlist, there were different standards from those applicable to men.

Argues that even if Mass can accorded preference only to disabled veterans, would still be invalid.

Concedes statute discriminates vs non-veterans.

Ward (for appellee - continued)

Relies on "foreseeability" & "inevitability":

98% of veterans are males.

Answering John's Q as to G.I. benefits, Ward says "burdens" (min cost) & "benefits" (G.I. Bill) are different for E/P analysis.

Mass. statute incorporates by reference the entire history of Fed discrimination vs women. (John noted this argument would invalidate all Fed veterans' benefits).

Is a deliberate & purposeful discrimination vs women.

Mass statute is extreme & absolute. Only handful of states have this form. Most states merely have a point system.

Preference last for life.

Law is so extreme that it is not "tailored" to the State's leg. interests.

John { The excluded class is not "women" in all non-veterans.

Reverse 7-2

78-233 Personnel Adm. v. Feeney Conf. 2/28/79

The Chief Justice Reverse

Law discriminates against all non-~~veterans~~ veterans -

SG's Br. & Frank Summary's dissent provide the answer.

Mr. Justice Brennan Affirm

Not intended as a gender based statute, but it has been applied with intent to discriminate vs women.

Impact is so devastating that intent may be inferred.

Mr. Justice Stewart Reverse

No neutral on its face. It discriminates against non-veterans, but case here is not this. The only basis of attack here is that statute discriminates vs women. No intent to do this.

Davis & Arlington Heights control.

Can't distinguish bet. this & Fed statute.

Mr. Justice White Reverse

Agrees with C J & R. S.

Mr. Justice Marshall Affirm

Agrees with W. J. B.

Mr. Justice Blackmun Reverse

The D C - on two occasions - found there was no intent to discriminate vs women. This finding just about decides the case

Mr. Justice Powell Reverse

Altho I do not approve of Veterans Preference statutes, they are deeply rooted in our history and have had no purpose to discriminate vs. women.

They do discriminate vs non-veterans but that is not case before us.

I agree with PS & BRW.

Mr. Justice Rehnquist Reverse

for reasons stated

Mr. Justice Stevens Reverse

If you look at benefit & burden, it helps analysis?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 7, 1979

Re: No. 78-233 - Personnel Administrator of Massachusetts v. Feeney

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

May 8, 1979

78-233 Personnel Administrator v. Feeney

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

lfp/ss 5/8/79

Feeney

Full Copy

I decided not to use this, as I am not making a constitutional argument here.

No. 78-233 Personnel Administrator v. Feeney

MR. JUSTICE POWELL, concurring.

I agree with the Court that although the Masssachusetts Veterans Preference Statute overtly discriminates against all nonveterans, it was never intended to discriminate against women. I therefore join the Court's opinion.

In doing so, I emphasize what is implied in Part IV of the opinion: Veterans' hiring preferences "represent an awkward - and many argue, unfair - exception to the deeply shared view that merit and merit alone should prevail in the employment policies of government." Ante, at 23. In view of the antiquity of such statutes at both the national and state levels, and as the issue is not before us, I express no considered constitutional judgment. But I do question the social utility, if not the constitutional validity of laws that have a seriously discriminatory effect

in support of veterans preference statutes may have been valid when enacted earlier in our history. See, ante, at 7. One may doubt, however, the rationality of these justifications in a period when such a large percentage of the population is composed of veterans of three major wars within the past third of a century. The record statistics in this case are illuminating. Over one-quarter of the Massachusetts population are veterans. Ante, at 13. It is said, as one of the state interests served by those statutes that they "encourage patriotic service" despite the fact that a large percentage of all veterans were drafted. Secondly, it is argued that a purpose is to "ease the transition from military to civilian life", a transition that hardly extends for the lifetime of a veteran - many if not most of whom became civilians many years ago. Nor is there reason to

In many instances the sacrifice was indeed severe. But as a justification for munificent and indiscriminate preference, I find it unconvincing.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 8, 1979

Re: No. 78-233 - Personnel Administrator of Massachusetts v. Feeney

Dear Potter:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 8, 1979

Re: 78-233 - Personnel Administrator of Mass. v. Feeney

Dear Potter:

Please join me.

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 17, 1979

Re: No. 78-233 — Personnel Administrator of Massachusetts, et al. v. Helen B. Feeney

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Dear John:

Please add my name to your concurring opinion in this case.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 23, 1979

Re: 78-233 - Personnel Administrator of Massachusetts
v. Feeney

Dear Potter:

I join.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 25, 1979

RE: No. 78-233 Personnel Administrator of Massachusetts v. Feeney

Dear Thurgood:

Please join me in the dissenting opinion you have prepared in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1979

RE: No. 78-233 Personnel Administrator, etc. v. Feeney

Dear Thurgood:

Since I've joined your fine dissent in the above, I'll withdraw my separate dissent.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
		3/5/79						
Ø join PS 5/23/79	1st draft dissent 5/8/79	1st draft 5/7/79	~~1~~ join JPS 5/17/79	await dissent 5/8/79	join PS 5/8/79	join PS 5/8/79	join PS 5/7/79	typed draft 5/14/79
	join TM 5/25/79			typed draft 5/24/79				1st draft 5/15/79 2nd draft
	withdraw separate dissent 5/30/79			2nd draft 5/31/79				5/31/79
				78-233 Personnel Adm. v. Feeney				