

1979

William Andrews v. Lawrence Morris : Brief of Respondent in Opposition to Petition for Rehearing

Utah Supreme Court

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Robert B. Hansen; Earl F. DOrius; Robert R. Wallace; Attorneys for Respondent;
John T. Caine; Timothy K. Ford; Attorneys for Appellant;

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Clk. Supreme Court Utah

WILLIAM ANDREWS, APPELLANT, V. LAWRENCE MORRIS, RESPONDENT
CASE NO. 16168

The recently decided case of Personnel Administrator of Massachusetts et al. v. Feeney, 47 U.S.L.W. 4650 (U.S. Sup. Ct. June 5, 1979), attached hereto, is submitted by respondent pursuant to Rule 75(p)(3), Utah Rules of Civil Procedure, as supplemental authority to supplement pages 84 and 85 of respondent's brief in the above case. The Feeney case is relevant for the following reasons:

Appellant Andrews in the court below challenged Utah's death penalty on the theory that it was being applied arbitrarily, capriciously and discriminatorily against persons who are non-white, poor, outcasts who are strangers to the community in which they were convicted, and males whose victims are white. (See paragraph 12B of appellant's amended petition for a writ of habeas corpus.) He sought an evidentiary hearing to show that others who were arguably equally or more deserving to receive the death penalty were not receiving the ultimate penalty. He also sought to put on experts and statistical evidence to show that male defendants whose murder victims were white receive the death penalty disproportionately more often. Judge Sawaya dismissed these claims as a matter of law, and on appeal appellant thus alleges that Judge Sawaya erred in not granting an evidentiary hearing on these claims.

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Respondent's position on this issue as expressed in his brief and during oral argument held before this Court on May 18, 1979, is that although appellant's claims sound factual in nature on which an evidentiary hearing might be deemed appropriate, courts which have reviewed these same claims have, like Judge Sawaya, concluded that they are issues of law which are proper subjects for dismissal.

Respondent has cited to the leading case of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied ___ U.S. ___, March 26, 1979, wherein the Fifth Circuit Court of Appeals was faced with claims virtually identical to those raised by appellant in the instant case and rejected each of them as a matter of law. One of Spinkellink's claims was that Florida's death penalty was being applied in a discriminatory fashion against male and poor defendants convicted of murdering whites as opposed to blacks in violation of the Fourteenth Amendment Equal Protection Clause of the United States Constitution. 578 F.2d at 612, 614. In rejecting this claim, the Fifth Circuit relied on the United States Supreme Court cases of Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597

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(1976),¹ and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and held that assuming Florida's death penalty statute does have a racially disproportionate impact with respect to the race of the murder victims, Davis and Arlington mandate that this claim must fail because the statute is facially valid and neutral with respect to race and the alleged discrimination is explainable on non-racial grounds. 578 F.2d at 614-616. Note also paragraph 6 of the Court's opinion at 578 F.2d at 616.

As stated earlier, appellant Andrews, like Spinkellink, also raised the claim that the capital punishment statutes, under which he was convicted, have a disproportionate discriminatory impact against male as opposed to female defendants in violation of the Fourteenth Amendment Equal Protection Clause. The recent United States Supreme Court decision of Personnel Administrator of Massachusetts et al., v. Feeney, supra, now expressly extends the high Court's rationale of Washington v. Davis,

1 The Davis case held that a neutral law does not violate the Equal Protection Clause solely because it results in racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race. 426 U.S. at 238-244.


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and Village of Arlington Heights, supra, to equal protection challenges to state laws based on sex. Feeney involved a challenge to Massachusetts' veteran's preference legislation. The United States Supreme Court concluded that the dispositive question was whether a gender-based discriminatory purpose, at least in some measure, shaped the Massachusetts' veteran's preference legislation. Since the statute was enacted with an intent to favor veterans over non-veterans, as opposed to males over females, it was upheld even though its application severely impacted against women. Ms. Feeney's claim that the statute was "inherently non-neutral or gender-biased" because of its obvious impact was rejected, and the Court held that a showing that the legislature had a purpose to discriminate on the basis of sex must be made before a violation of the Equal Protection Clause will be deemed to have occurred. Respondent submits that this rationale is clearly applicable to appellant's equal protection challenge to Utah's capital punishment statute on the basis of sex.

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Dated this 18th day of June, 1979.

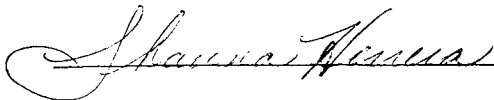
Respectfully submitted,



EARL F. DORIUS
Assistant Attorney General
Attorney for Respondent
236 State Capitol
Salt Lake City, Utah 84114

CERTIFICATE OF MAILING

Mailed a copy of the foregoing Supplemental Authority to Respondent's Brief in the case of William Andrews v. Lawrence Morris, Case No. 16168, to Mr. John T. Caine, Attorney for Appellant, 2568 Washington Boulevard, Ogden, Utah 84401, and Mr. Timothy K. Ford, Attorney for Appellant, P. O. Box 4066, Pioneer Square Station, Seattle, Washington 98104, this 18th day of June, 1979.



ago. "One branch of government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking Fund Cases*, 9 Otto 700, 718 (1878). Even where the authority of one branch over a matter is not exclusive, so that a federal court properly may accept jurisdiction over the dispute, we have recognized that the principle of separation of powers continues to have force as a matter of policy. For example, in *United States v. Nixon*, 418 U. S. 683 (1974), we held on the one hand that the question whether the President had a claim of privilege as to conversations with his advisers was an issue to be resolved by the judiciary, and on the other hand that separation-of-powers considerations required the recognition of a qualified privilege.

Whether or not the employment decisions of a Member of Congress fall within the scope of the Speech or Debate Clause of the Constitution, a question the Court does not reach today,² it is clear that these decisions are bound up with the conduct of his duties. As THE CHIEF JUSTICE observes, *ante*, a Congressman necessarily relies heavily on his personal staff in discharging the duties of his office. Because of the nature of his office, he must rely to an extraordinary extent on the loyalty and compatibility of everyone who works for him. Cf. *Elrod v. Burns*, 427 U. S. 347, 377-388 (1976) (Powell, J., dissenting). A Congressman simply cannot perform his constitutional duties effectively, or serve his constituents properly, unless he is supported by a staff in which he has total confidence.

The foregoing would seem self-evident even if Congress had not indicated an intention to reserve to its Members the right to select, employ and discharge staff personnel without judicial interference. But Congress unmistakably has made clear its view on this subject. It took pains to exempt itself from the coverage of Title VII. Unless the Court is abandoning or modifying *sub silentio* our holding in *Brown v. General Services Administration*, 425 U. S. 820 (1976), that Title VII as amended "provides the exclusive judicial remedy for claims of discrimination in federal employment," *id.*, at 835, the exemption from this statute for congressional employees should bar all judicial relief.

In sum, the decision of the Court today is not an exercise of principled discretion. It avoids our obligation to take into account the range of policy and constitutional considerations that we would expect a legislature to ponder in determining whether a particular remedy should be enacted. It fails to weigh the legitimate interests of Members of Congress. Indeed, the decision simply ignores the constitutional doctrine of separation of powers. In my view, the serious intrusion upon the authority of Members of Congress to choose and control their own personal staffs cannot be justified.³

affords no further protection to the prerogatives of Members of Congress. *Ante*, at 17. This assertion not only marks a striking departure from precedent, but also constitutes a non sequitur. Our constitutional structure of government rests on a variety of checks and balances; the existence of one such check does not negate all others.

² It is quite doubtful whether the Court should not consider respondent's Speech or Debate Clause claim as a threshold issue. The purpose of that Clause, when it applies, includes the protection of Members of Congress from the harassment of litigation. Since the Court chooses not to consider this claim, and addresses only the cause of action issue, I limit my dissent accordingly. In doing so, I imply no view as to the merits of the Speech or Debate issue or to the propriety of not addressing the claim before all other issues.

³ The justification the Court relies upon is the duty of federal courts to vindicate constitutional rights. It has been thought that this duty requires, without regard to other interests or constitutional provisions, that it would not be surprising for Congress to consider today's action unwarranted and to exercise its authority to present the proper balance between the

I would affirm the judgment of the Court of Appeals.

SANA F. SHTASEL, Washington, D.C. (PETER BARTON HUTT, and COVINGTON & BURLING, with her on the brief) for petitioner; A. RICHARD GEAR, Munroe, La. (HUDSON, POTTS & BERNSTEIN, with him on the brief) for respondent.

No. 78-233

Personnel Administrator of
Massachusetts et al.,
Appellants,
v.
Helen B. Feeney.

On Appeal from the United
States District Court for the
District of Massachusetts.

[June 5, 1979]

Syllabus

During her 12-year tenure as a state employee, appellee, who is not a veteran, had passed a number of open competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than appellee. Under the statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveterans. The statutory preference, which is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime," operates overwhelmingly to the advantage of males. Appellee brought an action in Federal District Court, alleging that the absolute preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best state civil service jobs and thus discriminates against women in violation of the Equal Protection Clause of the Fourteenth Amendment. A three-judge court declared the statute unconstitutional and enjoined its operation, finding that while the goals of the preference were legitimate and the statute had not been enacted for the purpose of discriminating against women, the exclusionary impact upon women was so severe as to require the State to further its goals through a more limited form of preference. On an earlier appeal, this Court vacated the judgment and remanded the case for further consideration in light of the intervening decision in *Washington v. Davis*, 426 U. S. 229, which held that a neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact and that, instead, the disproportionate impact must be traced to a purpose to discriminate on the basis of race. Upon remand, the District Court reaffirmed its original judgment, concluding that a veterans' hiring preference is inherently nonneutral because it favors a class from which women have traditionally been excluded, and that the consequences of the Massachusetts absolute preference formula for the employment opportunities of women were too inevitable to have been "unintended."

Held: Massachusetts, in granting an absolute lifetime preference to veterans, has not discriminated against women in violation of the Equal Protection Clause of the Fourteenth Amendment.

(a) Classifications based upon gender must bear a close and substantial relationship to important governmental objectives. Although public employment is not a constitutional right and the States have wide discretion in framing employee qualifications, any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause.

(b) When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionately adverse, a two-fold inquiry is appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, overt or covert, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination.

(c) Here, the appellee's contention and the District Court's finding that the Massachusetts statute is not a pretext for gender discrimination are rejected. The statute is a neutral, gender-blind law. In the reaction to the form of limiting the jurisdiction of federal courts, the effect conceivably could be to frustrate the vindication of rights properly protected by the Court.

Massachusetts preference, which is loosely termed an "absolute lifetime" preference, is among the most generous.⁷ It applies to all positions in the State's classified civil service, which constitute approximately 60% of the public jobs in the State. It is available to "any person, male or female, including a nurse," who was honorably discharged from the United States Armed Forces after at least 90 days of active service, at least one day of which was during "wartime."⁸ Persons who are deemed veterans and who are otherwise qualified for a particular civil service job may exercise the preference at any time and as many times as they wish.⁹

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.¹⁰

⁷ See State Veterans' Laws, Digest of State Laws Regarding Rights, Benefits and Privileges of Veterans and Their Dependents, House Committee on Veterans' Affairs, 91-4 Cong., 1st Sess. (1969); Fleming & Shamor, Veterans' Preferences in Public Employment: Unconstitutional Gender Discrimination?, 26 Emory L. J. 13 (1977).

⁸ The forms of veterans' hiring preferences vary widely. The Federal Government and approximately 41 States grant veterans a point advantage on civil service examinations, usually 10 points for a disabled veteran and 5 for one who is not disabled. See Fleming & Shamor, *supra* n. 6, 26 Emory L. J., at 17, and n. 12 (citing statutes). A few offer only tie-breaking preferences. *Id.* n. 14 (citing statutes). A very few States, like Massachusetts, extend absolute hiring or positional preferences to qualified veterans. *Id.* n. 13. See, e.g., N.J. Stat. Ann. §1:27-4 (West 1977); S.D. Comp. Laws Ann. §33-3-1 (1968); Utah Code Ann. §31-29-11; Wash. Rev. Code §§ 41.04.010, 73.16.010 (1976).

⁹ Mass. Gen. Laws Ann., ch. 4, § 7, d. 43 (West 1976), which supplies the general definition of the term "veteran," reads in pertinent part: "Veteran" shall mean any person male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service. . . .

Persons awarded the Purple Heart, ch. 4, § 7, d. 43, or one of a number of specified campaign badges or the Congressional Medal of Honor are also deemed veterans. Mass. Gen. Laws Ann., ch. 31, § 21.

"Wartime service" is defined as service performed by a "Spanish War veteran," a "World War I veteran," a "World War II veteran," a "Korean veteran," a "Vietnam veteran," or a member of the "WAC." Mass. Gen. Laws Ann., ch. 4, § 7, d. 43 (West 1976). Each of these terms is further defined to specify a period of service. The statutory definitions, taken together, cover the entire period from September 16, 1940 to May 7, 1975. See *id.*

"WAC" is defined as follows: "any woman who was discharged and so served in any corps or unit of the United States established for the purpose of enabling women to serve with, or as auxiliary to, the armed forces of the United States and such woman shall be deemed to be a veteran." *Id.*

¹⁰ The Massachusetts preference law formerly imposed a residency requirement; see 1951 Mass. Acts, ch. 627, § 3 (eligibility conditioned upon Massachusetts domicile prior to induction or five years' residency in State). The distinction was invalidated as violative of the Equal Protection Clause in *Stevens v. Campbell*, 332 F. Supp. 102, 105 (Mass., 1974). Cf. *August v. Branstetter*, 390 F. Supp. 190 (SDNY 1974) (upholding, *inter alia*, constitutional residency requirement in N.Y. veterans' preference statute), *unanimously* aff'd, 417 U.S. 901.

¹¹ Ch. 131, § 23 (preference to 100%).

¹² The names of persons who pass examinations for positions in the labor service and positions classified under the civil service shall be placed in the following order:

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.¹¹ Although the veterans' preference thus does not guarantee that a veteran will be appointed, it is obvious that the preference gives to veterans who achieve passing scores a well-nigh absolute advantage.

B

The appellant has lived in Braintree, Mass. most of her life. She entered the workforce in 1948, and for the next 14 years worked at a variety of jobs in the private sector. She first entered the state civil service system in 1963, having competed successfully for a position as Senior Clerk Stenographer in the Massachusetts Civil Defense Agency. There she worked for four years. In 1967 she was promoted to the position of Federal Funds and Personnel Coordinator in the same Agency. The Agency, and with it her job, was eliminated in 1975.

During her 12-year tenure as a public employee, Ms. Feeney took and passed a number of open competitive civil service examinations. On several she did quite well, receiving in 1971 the second highest score on an examination for a job with the Board of Dental Examiners, and in 1973 the third highest on a test for an Administrative Assistant position with a mental health center. Her high scores, however, did not win her a place on the certified eligible list. Because of the veterans' preference, she was ranked sixth behind five male veterans on the Dental Examiner list. She was not certified, and a lower scoring veteran was eventually appointed. On the 1973 examination, she was placed in a position on the list behind 12 male veterans, 11 of whom had lower scores. Following the other examinations that she took, her name was similarly ranked below those of veterans who had achieved passing grades.

Ms. Feeney's interest in securing a better job in state government did not wane. Having been consistently eclipsed by veterans, however, she eventually concluded that further competition for civil service positions of interest to veterans would be futile. In 1975, shortly after her civil defense job was abolished, she commenced this litigation.

C

The veterans' hiring preference in Massachusetts, as in other jurisdictions, has traditionally been justified as a measure designed to reward veterans for the sacrifice of military service, to ease the transition from military to civilian life, to encourage patriotic service, and to attract loyal and well-

"(1) Disabled veterans . . . in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section 23 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 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."

A 1977 amendment extended the dependents' preference to "surviving spouses," and "surviving parents." 1977 Mass. Acts, 1977, ch. 815.

¹³ The names of persons who pass examinations for positions in the labor service and positions classified under the civil service shall be placed in the following order:

¹⁴ The names of persons who pass examinations for positions in the labor service and positions classified under the civil service shall be placed in the following order:

disciplined people to civil service occupations.¹² See, e.g., *Hutcheson v. Director of Civil Service*, 361 Mass. 430, 281 N. E. 2d 53 (1973). The Massachusetts law dates back to 1884, when the State, as part of its first civil service legislation, gave a statutory preference to civil service applicants who were Civil War veterans if their qualifications were equal to those of nonveterans. 1884 Mass. Acts, ch. 320, § 16. This tie-breaking provision blossomed into a truly absolute preference in 1895, when the State enacted its first general veterans preference law and exempted veterans from all merit selection requirements. 1895 Mass. Acts, ch. 501, § 2. In response to a challenge brought by a male non-veteran, this statute was declared violative of state constitutional provisions guaranteeing that government should be for the "common good" and prohibiting hereditary titles. *Brown v. Russell*, 166 Mass. 14 (1896).

The current veterans' preference law has its origins in an 1896 statute, enacted to meet the state constitutional standards enunciated in *Brown v. Russell*. That statute limited the absolute preference to veterans who were otherwise qualified.¹³ 1896 Mass. Acts, ch. 517, § 2. A closely divided Supreme Judicial Court, in an advisory opinion issued the same year, concluded that the preference embodied in such a statute would be valid. *Opinion of the Justices*, 166 Mass. 589 (1896). In 1919, when the preference was extended to cover the veterans of World War I, the formula was further limited to provide for a priority in eligibility, in contrast to an absolute preference in hiring. 1919 Mass. Acts, ch. 150, § 2.¹⁴ See *Corliss v. Civil Service Comm'r*, 242 Mass. 61. In *Mayor of Lynn v. Comm'r of Civil Service*, 269 Mass. 410, 414, the Supreme Judicial Court, adhering to the views expressed in its 1896 advisory opinion, sustained this statute against a state constitutional challenge.

Since 1919, the preference has been repeatedly amended to cover persons who served in subsequent wars, declared or undeclared. See 1943 Mass. Acts, ch. 194; 1949 Mass. Acts, ch. 642, § 2 (World War II); 1954 Mass. Acts, ch. 627 (Korea); 1968 Mass. Acts, ch. 531, § 1 (Vietnam).¹⁵ The

¹² Veterans' preference laws have been challenged so often that the rationale in their support has become essentially standardized. See, e.g., *Koellgen v. Jackson*, 355 F. Supp. 243 (Minn. 1972), summarily aff'd, 410 U.S. 976; *August v. Brunsten*, 369 F. Supp. 190 (SDNY 1974), summarily aff'd, 417 U.S. 901; *Rios v. Dillmore*, 499 F.2d 329 (CA5 1974); *De Mitchell v. Cohen*, 333 U.S. 411, 419 n. 12. See generally *Brunsten v. De Facto and the Board of Civil Service*, 269 Mass. 410, 414, the Supreme Judicial Court, adhering to the views expressed in its 1896 advisory opinion, sustained this statute against a state constitutional challenge.

¹³ 1896 Mass. Acts, ch. 517, § 2. The statute provided that veterans who passed examinations should be preferred in appointment to all persons not veterans. . . . *Ibid.* A proviso stated: "But nothing herein contained shall be construed to prevent the certification and employment of women."

¹⁴ 1919 Mass. Act, ch. 150, § 2. The amended statute provided that "the names of veterans who pass examinations . . . shall be placed on the . . . eligible lists in the order of their respective standing, above the names of all other applicants," and further provided that "upon receipt of a requisition not especially calling for women, names shall be certified from such lists. . . ." The exemption for "women's requisitions" was retained in substantially this form in subsequent revisions, see, e.g., 1954 Mass. Act, ch. 627, § 4. It was eliminated in 1971. 1971 Mass. Act, ch. 219, when the State made all-angle sex examinations subject to the prior approval of the Massachusetts Commission Against Discrimination, 1971 Mass. Acts, ch. 221.

¹⁵ A provision requiring public agencies to hire disabled veterans certified as eligible is found in the *Massachusetts Library, funding for digitization of the State Archives and Records Act, administered by the State Archives*. The 1896 law, 1896 Mass. Acts, ch. 517, § 2, provided that veterans who served in the War of 1812, 1812-1815, 1861-1865, 1898-1902, 1917-1918, 1941-1945, 1950-1953, 1965-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 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itself has little if any relevance to actual job performance, more than suffice to prove the discriminatory intent required to establish a constitutional violation.

The contention that this veterans' preference is "inherently non-neutral" or "gender-biased" presumes that the State, by favoring veterans, intentionally incorporated into its public employment policies the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans. There are two serious difficulties with this argument. First, it is wholly at odds with the District Court's central finding that Massachusetts has not offered a preference to veterans for the purpose of discriminating against women. Second, it cannot be reconciled with the assumption made by both the appellee and the District Court that a more limited hiring preference for veterans could be sustained. Taken together, these difficulties are fatal.

To the extent that the status of veteran is one that few women have been enabled to achieve, every hiring preference for veterans, however modest or extreme, is inherently gender-biased. If Massachusetts by offering such a preference can be said intentionally to have incorporated into its state employment policies the historical gender-based federal military personnel practices, the degree of the preference would or should make no constitutional difference. Invidious discrimination does not become less so because the discrimination accomplished is of a lesser magnitude.²¹ Discriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not. The District Court's conclusion that the absolute veterans' preference was not originally enacted or subsequently reaffirmed for the purpose of giving an advantage to males as such necessarily compels the conclusion that the State intended nothing more than to prefer "veterans." Given this finding, simple logic suggests that an intent to exclude women from significant public jobs was not at work in this law. To reason that it was, by describing the preference as "inherently non-neutral" or "gender-biased," is merely to restate the fact of impact, not to answer the question of intent.

To be sure, this case is unusual in that it involves a law that by design is not neutral. The law overtly prefers veterans as such. As opposed to the written test at issue in *Davis*, it does not purport to define a job related characteristic. To the contrary, it confers upon a specifically described group—perceived to be particularly deserving—a competitive head start. But the District Court found and the appellee has not disputed, that this legislative choice was legitimate. The basic distinction between veterans and nonveterans, having been found not gender-based, and the goals of the preference having been found worthy, ch. 31 must be analyzed as is any other neutral law that casts a greater burden upon women as a group than upon men as a group. The enlistment policies of the armed services may well have discriminated on the basis of sex. See *Frontiero v. Richardson*, 411 U. S. 677; cf. *Schlesinger v. Ballard*, 419 U. S. 498. But the history of discrimination against women in the military is not on trial in this case.

The appellee's ultimate argument rests upon the presumption, common to the criminal and civil law, that a person intends the natural and foreseeable consequences of his voluntary actions. Her position was well stated in the concurring opinion in the District Court:

"Conceding . . . that the goal here was to benefit the veteran, there is no reason to absolve the legislature from awareness that the means chosen to achieve this goal would freeze women out of all those state jobs actively sought by men. To be sure, the legislature did not wish to harm women. But the cutting-off of women's opportunities was an inevitable concomitant of the chosen scheme—as inevitable as the proposition that if tails is up, heads must be down. Where a law's consequences are that inevitable, can they meaningfully be described as unintended?" 451 F. Supp. 143, 151.

This rhetorical question implies that a negative answer is obvious, but it is not. The decision to grant a preference to veterans was of course "intentional." So, necessarily, did an adverse impact upon nonveterans follow from that decision. And it cannot seriously be argued that the legislature of Massachusetts could have been unaware that most veterans are men. It would thus be disingenuous to say that the adverse consequences of this legislation for women were unintended, in the sense that they were not volitional or in the sense that they were not foreseeable.

"Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. See *United Jewish Organizations v. Carey*, 430 U. S. 144, 179 (concurring opinion).²² It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.²³ Yet nothing in the record demonstrates that this preference for veterans was originally devised or subsequently re-enacted because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service.

To the contrary, the statutory history shows that the benefit of the preference was consistently offered to "any person" who was a veteran. That benefit has been extended to women under a very broad statutory definition of the term veteran.²⁴ The preference formula itself, which is the focal point of this challenge, was first adopted—so it appears from this record—out of a perceived need to help a small group of older Civil War veterans. It has since been reaffirmed and

²¹ Proof of discriminatory intent must necessarily usually rely on objective factors, several of which were outlined in *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U. S. 252, 266. The inquiry is practical. What a legislature or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation." *Cramer v. United States*, 325 U. S. 1, 32-33 (Jackson, J.).

²² This is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing upon the existence of discriminatory intent. Certainly, when the adverse consequences of a law upon an identifiable group are as inevitable as the gender-based consequences of ch. 31, § 23, a strong inference that the adverse effects were desired can reasonably be drawn. But in this inquiry—made as it is under the Constitution—an inference is a working tool, not a synonym for proof. When as here, the impact is essentially an unavoidable consequence of a legislative policy, that has in itself always been deemed to be legitimate, and when as here, the statutory history and all of the available evidence demonstrate that the legislature was not aware of the adverse effects, the inference simply fails to ripen into proof.

²³ See nn. 8, 17, *supra*.

²⁴ This is not to say that the preference for veterans is not neutral for the question of intent. But it is to say that the preference is not neutral when it might well be an impact and as the State argues, might lessen the effectiveness of the statute in helping veterans, would not be any more of less neutral in the constitutional sense.

civil service employment an almost exclusively male prerogative. 451 F. Supp., at 151 (Campbell, J., concurring).

As the District Court recognized, this consequence followed foreseeably, indeed inexorably, from the long history of public severely limiting women's participation in the military.¹ Although neutral in form, the statute is anything but neutral in application. It inescapably reserves a major sector of public employment to "an already established class which, as a matter of historical fact, is 98% male." *Ibid.* Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme. Cf. *Castaneda v. Partida*, 430 U.S. 482 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1975); *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972); see generally *Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. L. Rev. 95, 123.

Clearly, that burden was not sustained here. The legislative history of the statute reflects the Commonwealth's patent appreciation of the impact the preference system would have on women, and an equally evident desire to mitigate that impact only with respect to certain traditionally female occupations. Until 1971, the statute and implementing civil service regulations exempted from operation of the preference any job requisitions "especially calling for women." 1954 Mass. Acts, ch. 627, § 5. See also 1896 Mass. Acts, ch. 517, § 6; 1919 Mass. Acts, ch. 150, § 2; 1945 Mass. Acts, ch. 725, § 2 (e); 1965 Mass. Acts, ch. 57, § 2; *ante*, at 8-9, nn. 13, 14. In practice, this exemption, coupled with the absolute preference for veterans, has created a gender-based civil service hierarchy, with women occupying low grade clerical and secretarial jobs and men holding more responsible and remunerative positions. See 415 F. Supp., at 455; 451 F. Supp., at 148 n. 9.

Thus, for over 70 years, the Commonwealth has maintained, as an integral part of its veteran's preference system, an exemption relegating female civil service applicants to occupations traditionally filled by women. Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which we have previously held invalid. See *Orr v. Orr*, — U.S. — (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-211 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975). Particularly when viewed against the range of less discriminatory alternatives available to assist veterans,² Mas-

sachusetts's choice of a formula that so severely restricts public employment opportunities for women cannot reasonably be thought gender-neutral. Cf. *Albemarle Paper Co. v. Moody*, *supra*, at 425. The Court's conclusion to the contrary—that "nothing in the record" evinces a "collateral goal of keeping women in a stereotypic and predefined place in the Massachusetts Civil Service," *ante*, at 22—displays a singularly myopic view of the facts established below.³

II

To survive challenge under the Equal Protection Clause, statutes reflecting gender-based discrimination must be substantially related to the achievement of important governmental objectives. See *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971). Appellants here advance three interests in support of the absolute preference system: (1) assisting veterans in their readjustment to civilian life; (2) encouraging military enlistment; and (3) rewarding those who have served their country. Brief for Appellants 24. Although each of those goals is unquestionably legitimate, the "mere recitation of a benign compensatory purpose" cannot of itself insulate legislative classifications from constitutional scrutiny. *Weinberger v. Wiesenfeld*, *supra*, at 648. And in this case, the Commonwealth has failed to establish a sufficient relationship between its objectives and the means chosen to effectuate them.

With respect to the first interest, facilitating veterans' transition to civilian status, the statute is plainly overinclusive. Cf. *Trimble v. Gordon*, 430 U.S. 762, 770-772 (1977); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974). By conferring a permanent preference, the legislation allows veterans to invoke their advantage repeatedly, without regard to their date of discharge. As the record demonstrates, a substantial majority of those currently enjoying the benefits of the system are not recently discharged veterans in need of readjustment assistance.⁴

Nor is the Commonwealth's second asserted interest, encouraging military service, a plausible justification for this legislative scheme. In its original and subsequent re-enactments, the statute extended benefits retroactively to veterans who had served during a prior specified period. See *ante*, at 8-9. If the Commonwealth's "actual purpose" is to induce enlistment, this legislative design is hardly well-suited to that end. See *Califano v. Webster*, *supra*, at 317; *Weinberger v. Wiesenfeld*, *supra*, at 648. For I am unwilling to assume what appellants made no effort to prove, that the possibility of obtaining an *ex post facto* civil service preference significantly influenced the enlistment decisions of Massachusetts residents. Moreover, even if such influence could be presumed, the statute is still grossly overinclusive in that it bestows benefits on men drafted as well as those who volunteered.

erment grant point or tie-breaking preferences that do not foreclose opportunities for women. See *id.*, at 13, and nn. 13, 14; *ante*, at 4 n. 7; Hearings before the Subcommittee on Civil Service of the House Committee on Post Office and Civil Service, 95th Cong., 1st Sess., 4 (1977) (statement of Alan Campbell, Chairman, U.S. Civil Service Commission).

³ Although it is relevant that the preference statute also disadvantages a substantial group of men, see *ante*, at 1 (STEVENS, J., concurring), it is equally pertinent that 47% of Massachusetts men over 18 are veterans, as compared to 0.8% of Massachusetts women. App. 83. Given this disparity, and the index of intent noted at pp. 4-5, *supra*, the absolute number of men denied preference cannot be dispositive, especially since they have not faced the barriers to achieving veteran status confronted by women. See *id.*, *supra*.

⁴ The figures for 1971 for the 100,000 men Mr. Fennely sought included 95 veterans for whom discharge information was available. Of those 95 males, 61 (64%) were discharged prior to 1960. App. 106, 150-151, 160-170.

¹ S. C. 415 F. Supp. 445, 490, 495-499 (Mass. 1976); 451 F. Supp. 143, 147-148 (Mass. 1978). It is often noted that the 12 n. 21, enlistment and appointment requirements have been more stringent for females than males with respect to age, mental and physical aptitude, parental consent, and educational attainment. M. Binkin and S. Bach, *Women and the Military* (1975) (hereinafter Binkin and Bach); Note, *The Equal Rights Amendment and the Military*, 82 Yale L. J. 1533, 1539 (1973). Until the 1970's, the armed forces precluded enlistment and appointment of women, but not men, who were married or had dependent children. See 415 F. Supp. at 140, App. 85; *Ex. 99*, 103, 104. Sex-based restrictions on advancement and training opportunities also diminished the incentives for qualified women to enlist. See Binkin and Bach 10-17; Beans, *Sex Discrimination in the Military*, 67 Mil. L. Rev. 19, 59-83 (1979). Cf. *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

² Thus, unlike the employment examination in *Washington v. Davis*, 426 U.S. 229 (1975), where the Court found to be demonstrably job related, the Massachusetts preference statute incorporates the results of sex-based military policies irrelevant to women's current fitness for civilian public employment. See 415 F. Supp. at 148-149.

³ Only four Massachusetts men have been denied the preference for military service. See Fennely and Shostrom, *Discrimination in the Military Service and the Technology of the Military Service*, 26 Suffolk U. L. Rev. 13 (1977) (citing statutes). Other States and the Federal Gov-

Finally, the Commonwealth's third interest, rewarding veterans, does not "adequately justify the salient features" of this preference system. *Craig v. Boren*, 429 U. S., at 202. See *Orr v. Orr*, — U. S., at —. Where a particular statutory scheme visits substantial hardship on a class long subject to discrimination, the legislation cannot be sustained unless "carefully tuned to alternative considerations." *Trimble v. Gordon*, *supra*, at 772. See *Caban v. Mohammed*, — U. S. — n. 13 (1979); *Mathews v. Lucas*, 427 U. S. 495 (1976). Here, there are a wide variety of less discriminatory means by which Massachusetts could effect its compensatory purposes. For example, a point preference system, such as that maintained by many States and the Federal Government, see n. 2, *supra*, or an absolute preference for a limited duration, would reward veterans without excluding all qualified women from upper level civil service positions. Apart from public employment, the Commonwealth, can, and does, afford assistance to veterans in various ways, including tax abatements, educational subsidies, and special programs for needy veterans. See Mass. Gen. Laws Ann., ch. 59, § 5 (West Supp. 1979); Mass. Gen. Laws Ann., ch. 69, §§ 7, 73 (West Supp. 1979); and Mass. Gen. Laws Ann., chs. 115, 115A (West Supp. 1978). Unlike these and similar benefits, the costs of which are distributed across the taxpaying public generally, the Massachusetts statute exacts a substantial price from a discrete group of individuals who have long been subject to employment discrimination, and who, "because of circumstances totally beyond their control, have [had] little if any chance of becoming members in the preferred class." 41 F. Supp., at 499. See n. 1, *supra*.

In its present unqualified form, the Veteran's Preference Statute precludes all but a small fraction of Massachusetts women from obtaining any civil service position also of interest to men. See 451 F. Supp., at 151 (Campbell, J., concurring). Given the range of alternatives available, this degree of preference is not constitutionally permissible.

I would affirm the judgment of the court below.

THOMAS R. KILEY, First Assistant Attorney General, State of Massachusetts (FRANCIS X. BELLOTTI, Attorney General, and EDWARD F. VENA, Assistant Attorney General, with him on the brief) for appellants; RICHARD P. WARD, Boston, Mass. (STEPHEN B. PERLMAN, ELANOR D. ACHESON, JOHN H. MASON, ROPES & GRAY, and JOHN REINSTEIN, with him on the brief) for appellee.

No. 78-223

Bruce Babbitt, Governor of the
State of Arizona, et al.,
Appellants,

United Farm Workers National
Union, Etc., et al.

On Appeal from the United
States District Court for
the District of Arizona.

[June 5, 1979]

Syllabus

Appellees (a farm workers union, a union agent, farm workers, and a union supporter) brought suit in Federal District Court in Arizona seeking a declaration of the constitutionality of various provisions of Arizona's farm labor statute, as well as of the entire statute, and an injunction against its enforcement. A three-judge court ruled unconstitutional on

various grounds the provisions (1) specifying procedures for the election of employee bargaining representatives; (2) limiting union publicity directed at consumers of agricultural products; (3) imposing a criminal penalty for violation of the statute; (4) causing an agricultural employer from furnishing a union any materials, information, time, or facilities to enable it to communicate with the employer's employees (access provision); and (5) governing arbitration of labor disputes, construed by the court as mandating compulsory arbitration. Deeming these provisions inseparable from the remainder of the statute, the court went on to declare the whole statute unconstitutional and enjoined its enforcement.

Held:

1 The challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions present a case or controversy, but the challenges to the access and arbitration provisions are not justiciable.

(a) The fact that appellees have not invoked the election procedures provision in the past or expressed any intention to do so in the future, does not defeat the justiciability of their challenge in view of the nature of their claim that delays attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail their freedom of association. To await appellees' participation in an election would not assist the resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all, and as this question is dispositive of appellees' challenge there is no warrant for postponing consideration of the election procedures claim.

(b) With respect to appellees' claim that the consumer publicity provision (which on its face proscribes, as an unfair labor practice, dishonest, untruthful, and deceptive publicity) unconstitutionally penalizes inaccuracies inadvertently uttered, appellees have reason to fear prosecution for violation of the provision, where the State has not disavowed any intention of invoking the criminal penalty provision (which applies in terms to "any person . . . who violates any provision" of the statute) against unions that commit unfair labor practices. Accordingly, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision to present a case or controversy. For the same reasons, a case or controversy is also presented by appellees' claim that such provision unduly restricts protected speech by limiting publicity to that directed at agricultural products of an employer with whom a union has a primary dispute.

(c) Where it is clear that appellees desire to engage in prohibited consumer publicity campaigns, their claim that the criminal penalty provision is unconstitutionally vague was properly entertained by the District Court and may be raised in this appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril.

(d) Appellees' challenge to the access provision is not justiciable, where not only is it conjectural to anticipate that access will be denied but, more importantly, appellees' claim that such provision violates the First and Fourteenth Amendments because it deprives the state agency responsible for enforcing the statute of any discretion to compel agricultural employers to furnish the enumerated items, depends upon the attributes of the situs involved. An opinion on the constitutionality of the provision at this time would be patently advisory, and adjudication of the challenge must wait until appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused.

(e) Similarly, any ruling on the allegedly compulsory arbitration provision would be wholly advisory, where the record discloses that there is no real and concrete dispute as to the application of the provision, appellees themselves acknowledging that employers may elect responses to an arguably unlawful strike other than seeking an injunction and agreeing to arbitrate, and appellees never having contested the constitutionality of the provision.

2 The District Court properly considered the constitutionality of the election procedures provision even though a prior construction of the provision by the Arizona state courts was lacking, but the court should have abstained from adjudicating the challenges to the consumer publicity and criminal penalty provisions until material unresolved questions of state law were determined by the Arizona courts.

(a) A state-court construction of the election procedures provision would not obviate the need for decision of the constitutional issue or the advisory nature of the challenges to the other provisions of the statute. (b) The criminal penalty provision might be construed broadly as applying to all provisions of the statute alternatively proscribing or