De Facto and De Jure Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment

Grace Blumberg
University at Buffalo School of Law

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Civil Rights and Discrimination Commons, Constitutional Law Commons, Fourteenth Amendment Commons, Labor and Employment Law Commons, Law and Gender Commons, and the Legal Remedies Commons

Recommended Citation
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol26/iss1/2
DE FACTO AND DE JURE SEX DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE: A RECONSIDERATION OF THE VETERANS’ PREFERENCE IN PUBLIC EMPLOYMENT

Grace Blumberg

Table of Contents

I. Introduction ........................................ 3
   A. Background ........................................ 3
   B. A Brief Overview of Veterans’ Benefits ............ 7
   C. Constitutional Challenges .............................. 9

II. The Preference and Fair Employment Laws ............ 17

   A. Griggs v. Duke Power Co. ............................ 21
   C. Washington v. Davis ................................ 31

IV. Alternative Paths to a Heightened Standard of Equal Protection Review .......................... 35
   A. Intent to Discriminate ................................ 35
   B. The Veterans’ Preference as Sex-Based Rather than De Facto or “Impact” Discrimination ........................... 46

V. The Applicable Standard of Review .................... 52

VI. Examination of the Veterans’ Preference Under a “Strict Scrutiny” Analysis .......................... 56
   A. Proof of Sexual Impact and Definition of the Affected Class 56
   B. Applying the Griggs/“Strict Scrutiny” Standard of Review to the Veterans’ Preference .......................... 59
      1. The Veterans’ Preference as a Job Qualification ......... 59
      2. What Standard Should be Applied to Discriminatory Criteria that do not even Purport to be Job Related? ....... 60
      3. Applying the “Compelling Social Necessity” Test ........ 64
VII. Examination of the Veterans' Preference Under a "Rational Basis" Test ........................................ 68

VIII. A Problem of Remedies ......................................................... 73

IX. Recent Litigation Challenging the Preference as Sexually Discriminatory ....................................... 75

X. Conclusion ........................................................................... 81
DE FACTO AND DE JURE SEX DISCRIMINATION UNDER THE EQUAL PROTECTION CLAUSE: A RECONSIDERATION OF THE VETERANS' PREFERENCE IN PUBLIC EMPLOYMENT

GRACE BLUMBERG*

I. INTRODUCTION

A. Background

The federal government and virtually all states give veterans an initial hiring preference in civil service employment. Such pref-

* Assistant Professor of Law, State University of New York at Buffalo, Faculty of Law and Jurisprudence. B.A., University of Colorado, 1960; J.D., State University of New York at Buffalo, 1971; LL.M., Harvard University, 1974.

1. The primary federal provisions are 5 U.S.C. §§ 2108, 3309 and 3313 (1970). Nondisabled veterans who have passed the qualifying examination receive an additional five points on their competitive civil service ratings. Those who can establish a service-connected disability are entitled to a ten-point increment and to an absolute preference in all positions other than scientific and technical positions rated GS-9 or higher.

Establishment of a "service-connected disability" may entail considerably less than a showing of serious physical handicap. Levitan and Cleary report that "[m]ost veterans [receiving federal disability payments] were compensated for minor impairments. Forty percent were deemed to be ten percent disabled, and their impairments to earning ability were often slight or hardly discernible. Removal of a knee cartilage, amputation of one finger or a big toe, impaired vision in one eye, dysentery, slight deafness in one ear, damaged facial muscles or hemorrhoids usually qualified for the minimum disability rating. Fifty-six percent of veterans on compensation had less than 30 percent disability in 1971, and were not considered sufficiently handicapped to qualify for vocational rehabilitation." S. LEVITAN & K. CLEARY, OLD WARS REMAIN UNFINISHED: THE VETERAN BENEFITS SYSTEM 34-35 (1973).

This article will not, however, consider the preferences granted to disabled veterans. The practice of according special preferences to veterans whose service-connected disabilities do disadvantage them in the labor market presents issues different from those treated in this paper. To the extent, however, that the "disabled" veterans' preference is enjoyed by veterans who are not so disadvantaged, the issues do not substantially differ from those involved in the ordinary veterans' preference.

See also 5 U.S.C. § 3310 (1970), which restricts competitions for the positions of guards, elevator operators, messengers and custodians to veterans so long as veterans are available; note 6 infra.

2. For a complete survey, see HOUSE COMM. ON VETERANS' AFFAIRS, 91ST CONG., 1ST SESS., STATE VETERANS' LAWS, DIGESTS OF STATE LAWS REGARDING RIGHTS, BENEFITS, AND PRIVILEGES OF VETERANS AND THEIR DEPENDENTS (1959). See also R. KIMBROUGH & J. GLEN, AMERICAN LAW OF VETERANS 1177-1238 (1954). Mississippi appears to be the only state that does not have a statute providing for some sort of general preference.

3. The term "preference" is misleading in that it tends to divert attention from the possible effects of its operation. The veteran does not merely step in line ahead of the non-veteran to assume one of an endless stream of jobs. When eligible applicants exceed openings and a non-veteran does not get a position that absent the veterans' preference he would have been offered, previous military experience is effectively a job "requirement."
ferences range from the widespread practice of increasing the veteran's civil service examination score by a specified number of points to the less common grant of an absolute preference to all veterans who meet minimum qualifications. The preference can generally be claimed at any time during the veteran's lifetime and may be invoked more than once. After a veteran has secured a civil service job, he may be entitled to a further preference in promotion and is generally


5. See, e.g., MASS. GEN. LAWS ANN. ch. 31, § 23 (Supp. 1975); MINN. STAT. ANN. § 197.45(2) (Supp. 1975).

6. The policy represented by the preference, that of easing a veteran's way into civil service, may also be effectuated by means more subtle than the bonus-point or absolute preference. Since such preferences do not generally operate until the veteran has established the minimum required qualifications for the particular job, the preference statute or the civil service administration may make an effort to minimize such qualifications. Thus, for example, a provision originating in the Veterans' Benefits Act of 1944 provides that:

The Civil Service Commission or other examining agency may not prescribe a minimum educational requirement for an examination for the competitive service except when the Commission decides that the duties of a scientific, technical or professional position cannot be performed by an individual who does not have a prescribed minimum education. The Commission shall make the reasons for its decision under this section a part of its public records.


Similarly, even without statutory authorization or requirement, the civil service administration can lower or eliminate minimum education and experience requirements and can lower the passing examination grade or even eliminate it entirely. See, e.g., Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969).


accorded greater job security than his non-veteran counterpart. The grounds for a veteran's discharge may be narrowly limited. In times of retrenchment, he may be, by statute, the last to lose his job.

Federal, state, county and municipal governments employ more than 14.5 million people, or 19 percent of all employed persons. In a period in which the private employment picture has been less than promising, federal employment figures have remained stable while state and local government has grown substantially. There are presently almost 12 million state and local government employees, an increase of nearly four million since 1965. It is expected that this trend will continue. Additionally, in many professions there are few or no private sector alternatives. Most school teachers and librarians, for example, must seek government employment.

Veterans constitute a class that is overwhelmingly male: 98 percent of all veterans are male. Veterans form a very substantial part of the male work force; approximately 40 percent of all males over 18 have experienced military service sufficient to qualify them for the federal veterans' preference. In view of the sexual imbalance within the class of veterans and the frequency of the preferred characteristic among working-age males, it seems clear that the preference necessarily has a marked differential sexual impact in competitions for those civil service jobs which are sought by both men and women.

13. This point is made by O'Neil, Politics, Patronage and Public Employment, 44 U. Cin. L. Rev. 725, 727 (1975).
14. Males constitute 98.1 percent of all veterans, females 1.9 percent. As of June 30, 1975, there were 29,459,000 veterans, of whom 562,000 were female. Administrator of Veterans Affairs, Annual Report, Year Ending June 30, 1975 [hereinafter cited as Annual Report].
15. S. Levitan & K. Cleary, supra note 1, at 4. See also Annual Report at 3 (reporting that 45 percent of all males 20 years and older in the civilian noninstitutional population in March 1975 were veterans). Using the lower percentage reported by Levitan and Cleary, it would seem that roughly .75 percent of the females over 18 are so qualified.
The existence of such a differential impact seems to run against the tide of recent constitutional and statutory developments intended to provide disadvantaged groups with, at the very least, a neutral context in which to strive for economic equality. Conditioning a public job upon a relatively unrelated experiential qualification from which women have long been restricted by law and social mores would seem the very sort of a discrimination that fair employment practice laws were intended to reach. The major federal provision, Title VII of the Civil Rights Act of 1964, has, however, a saving clause which would appear to exempt veterans' preferences from the statute's otherwise general prohibition of sex discrimination in employment.

This article will examine the veterans' preference in terms of the fourteenth amendment's equal protection clause and in the course


18. See text accompanying notes 246-51 infra.


22. An argument may be made that the clause does not preserve state public employment preferences. This possibility is explored and rejected in Section II. See text accompanying notes 86-93 infra. Such a saving clause does not, however, appear in most state fair employment laws. Regarding the possibility of interpreting state fair employment laws implicitly to repeal veterans' preference statutes, see note 93 infra.

23. With respect to other possible constitutional infirmities, it has been argued that the preferences run afoul of art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States") and art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility") of the Constitution. See Comment, Titles of Nobility and the Preferential Treatment of Federally Employed Military Veterans, 19 WAYNE L. REV. 1169 (1973). Attempts also have been made to invoke due process. For example, in Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976), discussed in text accompanying notes 394-410 infra, plaintiffs, although relying primarily on the equal protection clause, argued that the preference was violative of procedural due process in that it created "irrebuttable presumptions" often contrary to fact: awarding a lifetime employment preference to veterans assumed that every veteran applicant "served in reliance upon the prospect of the preference or deserves a reward or needs rehabilitation or reintegration," and that "for no experience . . . [non-veterans] may have endured or societal contribution they may have made are they entitled to any reward or are they in need of rehabilitation and reintegration into the community and work force." Brief for Plaintiff at 191, 202-04.

If rehabilitative purpose alone were the state's announced goal, utilization of the fact of service as a conclusive measure of individual need for rehabilitation might be sufficiently overinclusive to raise this somewhat questionable due process objection. See generally Weinberger v. Salfi, 422 U.S. 749, 767-77 (1975). (Note that underinclusiv-
of such examination will explore (1) the history of veterans' public employment preferences; (2) the conceptual relationship between the operation of the preference and employer behavior prohibited by fair employment laws; (3) the development and demise of a sui generis approach to equal protection challenges to de facto discrimination in public employment; (4) whether the preference should, for equal protection purposes, be treated as de facto or de jure (that is, explicitly sex-based discrimination); (5) the choice and application of available standards of constitutional review; and, finally, (6) recent litigation challenging state preferences as sexually discriminatory.

B. A Brief Overview of Veterans' Benefits

It seems fair to say that this country tries to take good care of its veterans. Federal benefits designed to compensate for individual service-connected loss include disability payments, hospital care, unemployment insurance, reemployment rights and survivors' compensation. Other benefits are granted perhaps partially to compensate for some less tangible loss but primarily to reward a class that is perceived as deserving: pensions to aged veterans and veterans disabled in civilian life, hospital care for non-service-connected disabilities, employment programs, and housing and education subsidies. Benefits and rights ostensibly designed to facilitate the veteran's return to civilian life include a minimum of 26 weeks of unemployment insurance, the "GI Bill" academic and vocational training program, a reemployment and restricted discharge right in the veteran's former civilian job, priority in manpower training programs, exclusive rights to certain federal jobs, priority in job openings with government contractors and sub-

24. In this article the term "de facto discrimination" will be used interchangeably with "impact discrimination" to connote instances in which facially neutral employment criteria disproportionately exclude applicants of a particular group historically subject to de jure discrimination, for example, explicitly sex-based or racial discrimination. To illustrate the distinction, the notice "No women or blacks need apply" is de jure race and sex discrimination. The requirement that all applicants achieve a certain score on a written examination and be at least 5' 8" in height may operate disproportionately to exclude blacks and women, respectively. If so, this is de facto discrimination and may or may not be unlawful. For a more extensive discussion, see text accompanying notes 79-86 & 94-107 infra.
contractors, and a point preference on civil service exams (five points for nondisabled veterans and ten points for disabled veterans).25

State benefits26 include mustering-out bonuses,27 burial benefits,28 relaxed rules for professional and occupational qualification,29 exemption from payment of license fees and real property taxes,30 priority in state sponsored housing projects,31 special assistance for needy veterans32 as well as those disabled by service-connected illness or injury,33 maintenance of special state homes and hospitals for veterans,34 and hiring,35 promotion36 and retention37 preferences in state and local employment.

Most of the civilian readjustment benefits are of relatively recent vintage. The “GI Bill” educational benefits, the availability of unemployment benefits, and counseling, guidance, and placement services originated in the Servicemen’s Readjustment38 and Veterans’ Preference Acts of 1944.39 Manpower and government contractor provisions were developed during the Vietnam War era.40 The situation today is considerably different from that which may have prompted many state legislatures to enact veterans’ employment preferences in the period between the Civil War and World War I. While some

25. See generally S. LEVITAN & K. CLEARY, supra note 1; R. KIMBROUGH & J. GLEN, supra note 2; ANNUAL REPORT, supra note 14.
26. See generally note 2 supra.
27. See, e.g., CONN. GEN. STAT. ANN. §§ 27-140a to 27-140n (West 1975); MICH. COMP. LAWS §§ 35.1001-11 (Supp. 1976) (giving a $500 bonus to combat veterans and $15 per month for each month served—up to a maximum of $450—for other veterans).
33. See, e.g., MASS. GEN. LAWS ANN. ch. 115, § 68 (West 1969); N.Y. EXEC. LAW §§ 362-64 (McKinney 1972).
34. See, e.g., OHIO REV. CODE ANN. §§ 5907.01 to 5907.07 (Page 1954).
35. See notes 4 & 5 supra.
36. See note 8 supra.
37. See note 10 supra.
40. See S. LEVITAN & K. CLEARY, supra note 1, at 124, 133-46.
attention had previously been directed to the needs of disabled veterans of the Civil and Spanish-American Wars, enactment of state employment preferences represented the first substantial effort to respond to the claims of able-bodied veterans.

In comparison with later expressions of popular gratitude, the preference is not a genuine "benefit" at all. Unlike true "benefits," which draw their substance from the public treasury and impose a direct detriment on no one, the preference costs the public no money but imposes a very heavy burden on non-veterans who seek public employment. The concept was novel and caused the state judiciaries much consternation. In considering the early judicial response to those who challenged this new development, it is helpful to bear in mind the novelty of the idea of an employment preference for one group of citizens, the tension between such a preference and the simultaneously emerging merit principle of civil service appointment, and the difficulties of testing this novel concept against the recently ratified and, as yet, little-elaborated and vague standard of the fourteenth amendment's equal protection clause.

C. Constitutional Challenges

From their inception, state law preferences have been challenged. Complainants have generally been male non-veterans displaced by veterans and appointing authorities barred from hiring a non-veteran believed by the authority to be the best qualified candidate. The posture of the complainants indicates the nature of the interests asserted. The non-veteran claims a right to be free from arbitrary restrictions in his pursuit of public employment, and the appointing authority purports to assert the public interest in securing the best possible civil servants. While some of the early challengers relied pri-

41. The preference does not seem to have gained currency elsewhere. Telephone inquiry in Boston and New York to consular officials of Canada, Great Britain, Israel, Sweden and Germany indicates that the veterans' preference does not exist in those countries. Compare the German approach of establishing hiring preferences for all the seriously disabled by setting minimum hiring quotas for the disabled in both public and private employment. See H. Becker, The Employment of Seriously Disabled Persons (1965).


43. So far there have been only two challenges by women in which the issue of sexual impact was squarely presented. See Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973), and Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976). These cases are discussed in Section IX infra. See text accompanying notes 383-411 infra.
arily upon state constitutional provisions, it is not difficult to recast the responses of the state court judges in the language of fourteenth amendment equal protection and substantive due process. The issues were initially treated in a series of Massachusetts cases, which are worth examining for their careful consideration of the question and because they frequently provided the basis for similar results elsewhere.44

An 1887 Massachusetts provision exempting veterans of wartime service from taking civil service examinations was challenged in Brown v. Russell.45 Brown, a non-veteran, had taken the exam for police detective and was ranked first on the eligible list. He was later displaced by a veteran who, without examination, was placed at the top of the list. The court observed that the provision necessarily would cause the appointment of some unqualified persons, persons who could not achieve a passing score on the qualifying examination. The issue was, therefore, narrowly framed in terms of the permissibility of a legislative requirement that the appointing power fill jobs with veterans regardless of whether they are minimally qualified. The court invalidated the provision, resting primarily upon the self-evident observation that it is not in the public interest to permit deviation from the principle that public jobs should be filled only by those who are at least minimally qualified. In terms of traditional equal protection or substantive due process analysis, the Massachusetts court treated the exemption of veterans from the examination requirement as wholly irrational in view of the requirement's underlying purpose of excluding persons not minimally qualified to perform the job.46 This approach seems to have been adopted by every state court that has considered the question.47

While the Massachusetts court framed the issue in terms of legislative control over the executive, the court's discussion raised many of the other issues presented by the preference. Chief Judge Field, writing for a unanimous court, expressed concern that the class of eligible veterans was closed to some through no fault of their own because the

46. See note 114 infra.
47. For extensive discussion, see Higgins v. Civil Service Comm., 139 Conn. 102, 90 A.2d 662 (1952); Commonwealth ex rel. Graham v. Schmid, 333 Pa. 568, 3 A.2d 701 (1938), and cases cited therein.
preference's wartime service requirement was (happily) not so easily satisfied then as it has been in our century.\textsuperscript{48} The court questioned the assertion that military service is in itself an incomparably valuable job qualification and expressed doubt regarding a rule that would assume job relatedness without taking into account the nature of the veteran's military experience as well as the particular civil service job in question. The court noted that "[o]ne, and perhaps the chief, purpose of the exemption must be to reward veterans for their services in the war of the Rebellion."\textsuperscript{49} Conceding that the state could constitutionally reward veterans with pensions and bonuses, the court nevertheless advanced two reasons for questioning the use of civil service jobs as a medium of reward: first, such a system is inconsistent with the primary purpose of civil service, which is to hire the most qualified applicants; and second, some non-veterans are excluded because they lack a requirement that is not necessarily job-related and that \textit{without personal fault} they are unable to acquire.\textsuperscript{50}

The court considered the initial statute,\textsuperscript{51} which had only given a preference when all other things were equal, and observed that it might have been constitutional, since military experience could reasonably be believed to have some marginal utility and because it is also possible to identify some degree of public purpose in rewarding those who have served the state; that is, such rewards tend to promote the future patriotic endeavors of others.\textsuperscript{52} The court also suggested that it might sustain a statute that allowed but did not require the appointing authority to appoint veterans without examination, because the appointing authority presumably would exercise his discretion solely with a view to the needs of the civil service.\textsuperscript{53}

\begin{footnotes}
\footnote{48. 166 Mass. at 16, 43 N.E. at 1006.}
\footnote{49. \textit{Id.}}
\footnote{50. \textit{Id.} at 17, 43 N.E. at 1006.}
\footnote{51. The original 1884 statute gave "preference in appointments to office and promotions in office (other qualifications being equal) to applicants who served in the army or navy of the United States in time of war and have been honorably discharged therefrom." Act of June 3, 1884, ch. 320, \textsection 14, cl. 6, 1884 Mass. Acts 346.}
\footnote{52. 166 Mass. at 23-24, 43 N.E. at 1009. Having identified this alternative legislative goal, should the court have upheld the challenged exam exemption provision on the ground that it too would promote patriotism? The court's decision not to do so does not necessarily reflect the application of dubious principles of substantive due process. The court may have adjudged the goal of promoting patriotism too far removed from the means of giving a preference to support the preference when it was inconsistent with the other legislative goal of securing qualified civil service personnel, although according the patriotism goal some marginal substance when the nature of the preference was consistent with civil service goals.}
\footnote{53. The court later made a more definitive statement to this effect in Opinion of the Justices, 166 Mass. 589, 596, 44 N.E. 625, 627 (1896).}
\end{footnotes}
Later that year the court issued an advisory opinion to the governor, in which it approved, four to three, a provision granting veterans who had passed the appropriate test a "preference to all other persons, except women." The majority, which included Justices Field and Holmes, attributed two alternative permissible purposes to the legislature:

The General Court [the legislature] may have . . . thought . . . either that such a person would be likely to possess courage, constancy, habits of obedience and fidelity, which are valuable qualifications for any public office or employment, or that the recognition of the services of veterans in the way provided for by the statute would promote that love of country and devotion to the welfare of the State which it concerns the Commonwealth to foster.

The minority would have held the provision unconstitutional. They treated the preference as just one additional civil service rule and felt that such rules have only one legitimate object, the selection of the best qualified applicant. They insisted on a close match between the purported job qualification—military service—and the actual civil service job requirements. The minority opinion also pointed out a tension between one of the fundamental principles of civil service appointment procedure and the concept of the veterans' preference, which arises from the difference between relative and absolute job qualification. This distinction has invariably been ignored by sustaining courts, which generally stress that the veteran is "qualified" in some absolute sense because he has passed the test. Yet civil service appointment methodology recognizes an absolute standard only in

55. Mass. Stat. 1896, ch. 517, §§ 2, 6. That provision, now codified as Mass. Gen. Laws Ann. ch. 31, § 23 (West Supp. 1976), remains essentially unchanged today, save that the phrase "except women" has been, ironically, dropped to conform with the letter of the state antidiscrimination law. As section 2 of the original statute tends to indicate, the intent of the "except women" proviso was to preserve the appointing authority's capacity to request women for certain jobs, rather than to assure equal employment opportunities for women. Subsequent recodifications make this point clear. See, e.g., Stat. 1954, ch. 627, § 5; Mass. Gen. Laws Ann. ch. 31, § 23 note (West 1966) (Legislative History).
56. 166 Mass. at 595, 44 N.E. at 627.
57. Id. at 599-600, 44 N.E. at 628-29. Compare the Supreme Court's similar approach to Title VII cases in Griggs v. Duke Power Co., 401 U.S. 424 (1971), discussed in text accompanying notes 94-100 infra.
disqualification; all qualification is relative. Applicants are given an examination which is graded on a point basis. Those whose grades exceed a minimum cutoff point are placed on the eligible list in order of their examination scores. Applicants from the head of the list are certified to the appointing authority. When application for a position is truly competitive, some passing applicants are not certified. Lists have limited lives and new examinations are held periodically. While the majority's concept of an absolute and sufficient basic minimum may represent a defensible alternative to the relative-qualification approach, it is not the concept that underlies civil service appointment.

Several decades later the advisory opinion was tested by litigants in Mayor of Lynn v. Commissioner of Civil Service. The Mayor sought to mandamus the Commissioner to certify for appointment in the fire department the applicant having the highest score on the competitive exam. The Commissioner, relying on the preference statute, certified instead the three highest-standing veterans. The Justices denied the Mayor's petition and deferred to their illustrious predecessors by adopting without further discussion the majority's view in the earlier advisory opinion, but they recorded their ambivalence by noting that "[t]he reasons on the one side and on the other are nearly evenly balanced."

This posture of reluctant approval has proved characteristic of the Massachusetts court's treatment of the preference. A provision giving a preference to veterans who received medals of honor from the President was narrowly construed to exclude those who received such medals from the Secretary of the Navy. When a disabled veteran, Dr. Klebanoff, asserted his statutory right to absolute preference over the better qualified Dr. Hutcheson, the appointing authority's choice for the position of Assistant Commissioner of Children's Services, the Justices invalidated the "absolute" preference, distinguishing Mayor of Lynn on the ground that while a statute could constitutionally


60. 269 Mass. 410, 169 N.E. 502 (1929).
61. Id. at 414, 169 N.E. at 503.
require that veterans be preferentially certified, it could not prede-
termine the appointing authority's choice among those lawfully cer-
tified.\textsuperscript{63}

While other state judiciaries have tended to rely heavily on the early Massachusetts opinions, some courts have taken slightly different approaches, and a few have proposed new entries to the catalogue of purposes attributable to the legislature. The Pennsylvania Supreme Court has taken the strictest approach short of totally invalidating the preference. Agreeing with the minority 1896 Massachusetts advisory opinion,\textsuperscript{64} the Pennsylvania court views the preference as just one addition to the civil service rules, the unitary purpose of which is to select the best-qualified job applicants. As such, the preference is valid only to the extent that it reflects superior job qualifications. Accepting the reasonableness of the legislative determination that military service is some sort of job qualification and that the substance of such qualification is not otherwise reflected in the veteran's civil service examination score, the court has sustained a preference for initial appointment where the applicant had already passed the qualifying exam,\textsuperscript{65} but has invalidated a ten-point promotional preference on the theory that it was necessarily excessive because the initial hiring preference was also ten points, and the advantage of service training diminishes as all employees learn their specific job duties.\textsuperscript{66} The court also invalidated a provision waiving a maximum age limit for veterans applying to the police force on the ground that if the legislature believed youthful vigor to be an essential job qualification, then it must necessarily be one for all applicants.\textsuperscript{67}

\begin{itemize}
\item 63. Hutcheson v. Director of Civil Serv., 361 Mass. 480, 281 N.E.2d 53 (1972). This narrow distinction turns on the prevalent rule that the three highest eligibles are certified for any single opening and the hiring authority may choose any one of the three. If another position comes open, the civil service commission adds the next-highest eligible to the two already certified, again giving the hiring authority a choice among the three highest-standing applicants. \textit{See also} note 388 \textit{infra}.\textsuperscript{68}

\item 64. \textit{See} text accompanying notes 56-59 \textit{infra}.\textsuperscript{69}

\item 65. Commonwealth \textit{ex rel.} Graham v. Schmid, 333 Pa. 568, 571 n.3, 3 A.2d 701, 703 (1938).\textsuperscript{70}

\item 66. Commonwealth \textit{ex rel.} Maurer v. O'Neill, 368 Pa. 369, 83 A.2d 25 (1951). Although the court's approach of accepting without demonstration the legislative determination that service is a recognizable job qualification while quarreling with the legislature's point allocation seems highly questionable (as much because of its logical inconsistency as its incursion into legislative territory under the guise of substantive due process), the Pennsylvania cases are noteworthy for their preoccupation with the issue of job-relatedness, an area that will be treated extensively in Sections II, III and VI B(1) \textit{infra}. \textit{See} text accompanying notes 77-184 & 313-17 \textit{infra}.\textsuperscript{71}

\item 67. Carney v. Lowe, 336 Pa. 289, 9 A.2d 418 (1939).\textsuperscript{72}
\end{itemize}
While most other courts have not followed the lead of the Pennsylvania court in refusing to attribute any but job-related purposes to the legislature, the proposition that the preference is justified because military service is a job qualification has long been a prominent one, despite the argument's patent implausibility. The prominence of this rather unconvincing justification is probably due to judicial unease with the more plausible "reward" rationale. The "reward" rationale has two versions. The broader one asserts simply that the legislature is free to reward its veterans, to pay off a debt of gratitude, or to compensate for past services in any way it chooses. This approach recognizes no distinction between a mustering-out bonus paid out of the state treasury and job preferences granted at the expense of other individual applicants. Since few would quarrel with the proposition that the state need not show any special public purpose in order to deplete its treasury to reward veterans, there can be no objection to the preference. A narrower version, that supported by the Massachusetts court, justifies rewarding veterans not as an end in itself but as a means of achieving another purpose, the general fostering of patriotism. Taking this approach, courts have suggested that the knowledge that the state gives employment preferences to honorably discharged veterans may inspire current soldiers to bravery, or at least obedience, and may encourage enlistment. The search for such a public purpose would seem an implicit recognition that the preference is different from a bonus and requires more justification than the mere expression of popular feelings of gratitude.


69. One possible response to this broad assertion is that the people are free to pay off any real or imagined debt so long as it is the people who are really paying. When, however, the people assuage their feelings by casting a heavy burden on a relatively small group of citizens (non-veteran civil service job applicants), the equal protection clause requires that the state offer more justification—specifically, that some sort of independent "public purpose" underlie the distribution of the reward.

70. See text accompanying notes 55-56 supra.


72. See note 69 supra.
The least utilized but seemingly most persuasive justification is that the preference is a measure intended to ease the veteran's transition from military to civilian life, to aid those whose work and social lives have been severely disrupted by military service. This rationale appears to have been first suggested by the Supreme Court in 1948 in the course of statutory interpretation of the Veterans' Preference Act of 1944. There are several possible reasons why courts have not attributed this purpose to the legislature. The preference is almost invariably a lifetime preference, a feature that tends to undermine the readjustment rationale and augment the reward rationale. Also, many of the preferences were enacted between wars, in periods during which there were no returning veterans.

In summary, an examination of the history of early constitutional challenges to veterans' civil service preferences shows that male challengers made substantive due process and equal protection arguments and that the courts, effectively applying a "rational basis" analysis, sustained the preferences on the grounds that the legislature reasonably believed or reasonably could have believed that military service is a job qualification, that veterans deserve a reward, that rewarding veterans serves other permissible state objectives, and that veterans are in need of readjustment assistance.

The rest of this article will consider this result from a different point of view: Does a female plaintiff's assertion that the preference has a differential impact on women's employment opportunities require that the reviewing court apply a different standard of review and, consequently, reach a different result? In order to explore fully all the issues raised by this question, it will be necessary first to explore (1) the operation of the preference in light of concepts developed under fair employment practice laws; (2) the relationship of those statutory concepts to fourteenth amendment analysis; (3) the meaning of "intent to discriminate" in de facto discrimination cases; and (4) whether the close relationship between the sexually disproportionate impact of the preferences and de jure, or explicitly sex-based,
discrimination in the armed forces requires that the preferences themselves be treated as de jure discrimination. The preferences will then be examined under available standards of equal protection review, with special attention devoted to the formulation of an appropriate constitutional and statutory standard for reviewing public job requirements that do not even purport to be job related, but are designed to effectuate other social goals. Finally, the article will survey recent litigation challenging state preferences as sexually discriminatory.

II. THE PREFERENCE AND FAIR EMPLOYMENT LAWS

In this section we will first consider the preference in the language and terminology of Title VII of the Equal Employment Opportunity Act, and then determine whether the preference is directly invalidated by Title VII or whether that statute's saving clause operates to preclude such a result.

The preference is a "test" within the Equal Employment Opportunity Commission [EEOC] Guidelines on Employee Selection Procedures. A test is "any paper-and-pencil or performance measure used as a basis for any employment decision. . . . The term 'test' includes . . . specific qualifying or disqualifying personal history or background requirements, [and] specific educational or work history requirements . . . ."80

77. More specifically, the "compelling social necessity" test developed in Section VI B(2) infra, text accompanying notes 317-36 infra, will be designed for those cases in which both of the following circumstances are present: (1) facially neutral public employment criteria operate to disproportionately exclude members of groups historically subject to de jure employment discrimination, and (2) either Title VII is applicable, or the challenge is constitutionally based and governmental intent to discriminate or other factors make it appropriate to treat the de facto effect as de jure discrimination. Excluded, because of the implications of Washington v. Davis, 96 S. Ct. 2040 (1976), are purely de facto constitutional cases, in which "mere rationality" is the appropriate standard of review. Washington v. Davis is discussed in text accompanying notes 155-84 infra.


80. 29 C.F.R. § 1607.2 (1975). It might be suggested that insofar as a job requirement does not even purport to be a "performance measure," the guidelines are inapplicable. It is suggested, however, that the Commission did not intend to exclude employment requirements unrelated to job performance. Rather, it merely did not con-
The Guidelines regulate the use of "any test which adversely affects hiring . . . of classes protected by Title VII." The preference adversely affects civil service hiring of women because the characteristic of being a veteran appears frequently and almost exclusively in the male population. Forty percent of working-age males are veterans. Less than one percent of working-age females are veterans. These statistics constitute ample proof of adverse effect. A finding of differential impact, often somewhat misleadingly denominated "discriminatory" impact, is not alone a violation of the statute. Once differential impact has been shown, the employer must justify his requirement or abandon it. The EEOC Guidelines provide:

§ 1607.3 Discrimination defined

The use of any test which adversely affects hiring [or] promotion . . . of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility . . . and (b) the person giving . . . the particular test can demonstrate that alternative suitable . . . procedures are unavailable for his use.4

§ 1607.4 Evidence of validity

(a) . . . where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.5

It seems clear that the preference could not meet EEOC validation guidelines. Assuming for the moment that Title VII's proscription of discriminatory job requirements that are not demonstrably job related cannot be circumvented by the employer's assertion that template the possibility that an employer would defend a discriminatory requirement on other than a job-related ground. There is nothing in the Act's general prohibition of employment discrimination to suggest a distinction between performance and nonperformance criteria. See text accompanying notes 317-22 infra.

81. 29 C.F.R. § 1607.3 (1975).
82. See note 15 supra.
83. See text accompanying notes 302-07 infra.
84. 29 C.F.R. § 1607.3 (1975).
85. 29 C.F.R. § 1607.4 (1975).
the challenged requirement is not even intended to be job related but instead serves some other goal, veterans' preferences would seem to fall squarely within one of the Act's central prohibitions. Title VII contains, however, a saving clause:

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.

While the clause does not save private employer preferences that are not required or authorized by law, its language does seem to preserve the civil service preferences with which we are concerned. There is, however, some basis for suggesting that the provision is not as broad as it appears. When the clause was enacted in 1964, Title VII did not cover federal, state or municipal employers. Logically, therefore, it is unlikely that the framers were even thinking about government jobs. This does not imply that the section was, therefore, devoid of meaning. There are several types of federal and state statutes that regulate the employment relationship between private employers and veterans. The most prominent is the Federal Veterans' Reemployment Rights Act, which requires that veterans be allowed to return to their preservice jobs. There are also a variety of state laws which require that private state contractors give special consideration to veterans.

There appears to be virtually no legislative history relating to the savings clause. The House Report merely repeats the clause but omits the term "preferences," arguably suggesting that the House Judiciary Committee, at least, was thinking about reemployment "rights" rather than employment "preferences."

Whatever the logic of the assertion that Congress was not initially thinking about state employer relationships, the courts could justifiably decline to narrow the provision, in view of subsequent legisla-

86. See text accompanying notes 317-35 infra.
90. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 26 (West Supp. 1972); N.H. REV. STAT. ANN. §§ 283:4-9 (1943).
91. "Section 713 provides that this title will not repeal or modify any Federal, State, territorial or local law creating special rights for veterans." H.R. REP. No. 914, 88th Cong., 2d Sess. 2407 (1964).
The 1972 amendments to the Civil Rights Act extended coverage to federal, state and municipal employees. The broad language of the 1964 savings clause appeared to cover all employment relationships in which a veterans' preference or right was granted by law. Indeed, even assuming that the 1972 drafters understood that the savings clause had originally been intended to serve only a narrow purpose in the regulation of private employment relationships, it is difficult to envisage how they could have amended the already encompassing language to indicate an intent to preserve preferences in public employment as well. It is suggested, therefore, that while a narrow construction of the savings clause would be logically defensible, it would seem to run counter to probable congressional understanding of the clause, if not at the point of initial enactment in 1964, then at the time of the 1972 amendments, which extended coverage to public employers. Thus, although the central thrust of Title VII does seem to reach veterans' preferences in civil service employment, the savings clause would appear to bar direct invocation of that civil rights statute.

92. See note 88 supra.

93. Looking to the seemingly unequivocal language of the savings clause, in a 1973 decision the EEOC determined that Title VII is not applicable when a state employment service gives referral preference to veterans in accordance with federal regulations establishing basic conditions for federal assistance to state employment agencies. While the complaint in question was made by a male non-veteran, the EEOC expressed the opinion that it would reach the same result were the complainant female. The EEOC did not look to the legislative history of the savings clause. EEOC Decision 74-64, 2 EMPL. PRACT. GUIDE (CCH) (8 Fair Empl. Prac. Cas.) ¶ 6419 (Dec. 7, 1973).

Prospective litigants should not, however, neglect the possibility that a state's preference provision may be vulnerable under a state civil rights statute. Absent any savings clause, a human rights statute may properly be construed implicitly to repeal a previously enacted veterans' preference statute.


Upon consolidated appeal, the New York Court of Appeals held that the state fair employment practices law requires that employee pregnancy disability be treated in the same manner as any other nonoccupational disability. The court avoided the problem of implied repeal by treating the human rights statute as supplemental to, rather than inconsistent with, the disability benefits statute. The court reasoned that the human rights law simply extended the coverage conferred by the disability benefits statute. 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976). This resolution would not be available in a state human rights law challenge to a veterans' preference provision.


Griggs v. Duke Power Co. 94 dealt with the problem of job requirements that, although facially neutral, tend to restrict the job opportunities of groups protected by Title VII. Black applicants for industrial jobs at Duke Power Company challenged the alternative requirement of a high school diploma or a specified minimum score on certain standardized intelligence tests, on the ground that the requirement was far more likely to disqualify blacks than whites. 95 The Court sustained the challenge, interpreting Title VII not only to ban intentional discrimination but also to regulate the use of “practices that are fair in form, but discriminatory in operation.” 96 The Court thus approved the EEOC’s position that once a job requirement is shown to have a differential impact on a protected group, the employer must show that the requirement bears “a demonstrable relationship to successful performance of the jobs for which it was used.” 97 Duke Power did not meet its burden of justification with its explanation that institution of the alternative requirement was based merely upon “the Company’s judgment that they generally would improve the overall quality of the work force.” 98 The Company’s failure to offer any proof of content or predictive validity 99 made it unnecessary for the Court to consider what quality of proof would have discharged the employer’s burden. 100 Nor did the Court have

95. Regarding proof of discriminatory impact, see text accompanying notes 302-09 infra.
96. 401 U.S. at 431.
97. Id.
98. Id.
100. In Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), the Court, for various reasons, found inadequate an effort retrospectively to validate tests originally adopted without any validation study. The Court also suggested that even if the tests were properly validated, plaintiff’s demonstration that there were available other suitable non-discriminatory tests would oblige the employer to abandon his use of a validated but discriminatory test. Id. at 425. See note 314 infra.
to consider the extent to which an employer might have a statutory duty to replace discriminatory but job-validated requirements with nondiscriminatory requirements. The Court, however, suggested that "[t]he touchstone is business necessity,"101 a standard that has been rigorously applied by the lower federal courts to invalidate test and experience requirements, seniority systems,105 an employer's policy of disqualifying applicants with a record of frequent arrests,106 and an employer's practice of discharging employees whose wages have been garnished.107

B. The Use of the Griggs Standard in § 1983 Cases: The Sui Generis Development

The Griggs Court did not purport to do anything more than interpret a statute. For some time, however, Griggs was understood by various courts of appeals to articulate a constitutional standard; and that transmigration of theory appeared to have been tacitly ratified by the Supreme Court.

Because public employees were not protected by Title VII until 1972,108 during the period between 1964 and 1972, suits sounding in Title VII were brought as constitutional cases under 42 U.S.C §§ 1981 and 1983. Complainants alleged that public employers deprived them of fourteenth amendment equal protection by utilizing employment requirements that tended to have a discriminatory impact upon a

101. 401 U.S. at 431.
The applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies....
103. See cases cited notes 109-11 infra.
104. See, e.g., United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir. 1969).
105. See, e.g., United States v. Jacksonville Terminal Co., 451 F.2d 418, 453 (5th
Cir. 1971), cert. denied, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp.,
446 F.2d 652 (2d Cir. 1971).
472 F.2d 631 (9th Cir. 1972).
108. See note 88 supra.
discrete group whose interests are specially protected by the equal protection clause. Judicial response to such claims was generally positive. The three leading cases in this area are Carter v. Gallagher,¹⁰⁹ Castro v. Beecher,¹¹⁰ and Chance v. Board of Examiners.¹¹¹ Until the Supreme Court, in Washington v. Davis,¹¹² explicitly rejected the wholesale importation of Title VII into the fourteenth amendment, it seemed to sanction this development. Castro and Chance are twice cited with approval in McDonnell Douglas Corp. v. Green.¹¹³

Where did the constitutionalized Griggs rule fit within the framework of equal protection? Was it a specific application of the "rational basis" test or the "strict scrutiny" test,¹¹⁴ or was it a hybrid? In Chance, complainants were black applicants for the positions of assistant principal and principal in the New York City school system. The district court¹¹⁵ granted their request for a preliminary injunction against any further certification from the current eligible list, after a showing that the utilization of certain qualifying tests had a substantial though not dramatic differential impact. The white pass rate was from 50 to 100 percent greater than that of blacks, but there was no evidence of intent to discriminate. The district court rejected the Board's suggestion that traditional constitutional analysis required that complainants show that there was no rational relationship between the

110. 459 F.2d 725 (1st Cir. 1972).
111. 458 F.2d 1167 (2d Cir. 1972). See also cases cited note 144 infra.

Even before Griggs had been decided by the Supreme Court, some district courts had applied the substance of that standard in § 1983 cases. See, e.g., Western Addition Community Organization v. Alioto, 330 F. Supp. 536 (N.D. Cal. 1971); Penn v. Stumpf, 308 F. Supp. 1238 (N.D. Cal. 1970); Arrington v. Massachusetts Bay Transp. Authority, 306 F. Supp. 1355 (D. Mass. 1969). As noted above, the original EEOC Guidelines were formulated in 1966, see note 79 supra, and appear to have played at least some part in the pre-Griggs § 1983 cases. See, e.g., Penn v. Stumpf, supra.

112. 96 S. Ct. 2040 (1976).
114. The "rational basis" or "relaxed" standard of review has, at least until recently, been thought to require that the challenger show that there is no reasonable relationship between the challenged provision and virtually any permissible legislative purpose. The "strict scrutiny" test, on the other hand, requires that the state show (1) a compelling interest in the purpose of the legislation, (2) a close fit between the purpose and the challenged means, and (3) that no less onerous means is available. This more stringent standard of review has generally been reserved for "suspect classifications" and "fundamental interests." See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065, 1076-1123 (1969). With respect to recent revitalization of the "relaxed" standard of review, see Green v. Waterford Bd. of Educ., 473 F.2d 629 (2d Cir. 1973); Gunther, Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); text accompanying notes 355-78 infra; cases cited note 358 infra.
qualifying examinations and the job requirements. Citing Griggs, the
district judge held that the racially discriminatory impact alone ren-
dered the exams constitutionally suspect, shifting the burden to the
Board to show that the exams were necessary to obtain persons quali-
ﬁed to perform the jobs. On appeal to the Second Circuit, the
Board repeated its argument that discriminatory impact resulting from
a racially neutral requirement established without intent to discrimi-
nate should not, for equal protection purposes, be deemed equiv-
alent to a “suspect classiﬁcation.” The court of appeals conceded that
the Board might be correct but found it unnecessary to reach the
issue. It sustained the injunction under the more lenient equal pro-
tection standard. Test validation, the court said, is merely an appli-
cation of the “rational basis” test. If the test is not validated, there
is no rational relationship between the means—the exam—and the
end—getting qualiﬁed personnel. A “strict scrutiny” analysis would
begin only at the point at which the tests were found to be job vali-
dated. Then a “strict scrutiny” analysis would require that the Board
show that no less discriminatory means were available.

Despite the court’s vigorous protestations, traditional rational
basis analysis does not seem capable of supporting such a result. Under the traditional test the burden would not shift to the Board to justify the exam professionally in terms of both general and racially
speciﬁc content and predictive validity. Instead, as the Board ar-

gued, it would be left to complainants to show that the Board had
no rational basis for believing that performance on the examination
would tend to reﬂect job qualiﬁcations.

The facts of Castro v. Beecher are similar to those of Chance.
Black and Spanish-surnamed applicants for positions on the Boston

116. 458 F.2d 1167 (2d Cir. 1972).
117. Id. at 1176-77.
118. While approving the result, the First Circuit did not ﬁnd the Chance analysis
119. Id.
120. See note 99 supra.
121. Compare, for example, application of the relaxed equal protection standard
in Brody v. McCoy, 259 F. Supp. 940 (S.D.N.Y. 1966), in which there was no alle-
gation of differential impact upon a protected class. A three-judge court brieﬂy dis-
missed the equal protection claim of New York court clerks that new promotion rules
bore very little relationship to job qualiﬁcations, observing that “[a]s everyone knows,
the fortuities of individual biographies may cause a standard like this to work regret-
able distinctions where there are no differences in the ‘real’ merit that a higher justice
than ours would single-mindedly weigh.” Id. at 942.
122. 459 F.2d 725 (1st Cir. 1972).
hiring practices. The court divided the practices into two categories, those which had been shown by plaintiffs to have a racially differential impact and those which had not. In the latter group were height and swimming test requirements. The court summarily sustained them on the ground that plaintiffs could not show that there is no rational basis for believing that height and ability to swim are related to the police officer's successful discharge of his duties. In the former group was the written examination. The pass rate was 65 percent for white applicants, 25 percent for blacks, and 10 percent for those with Spanish surnames. In view of plaintiffs' showing of the differential impact of this job requirement, the First Circuit adopted a more stringent standard of review:

As to classifications which have been shown to have a racially discriminatory impact, more is required by way of justification. The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance. It may not, to state the matter another way, rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job. In so concluding, we rely in part on the Supreme Court's opinion in Griggs v. Duke Power Co. . . .

The court then found that the public employer's failure to provide "validation studies relating the examinations to the policeman's job" was a fatal defect in the employer's effort to discharge its burden of justification.

In terms of equal protection doctrine, it is possible to conceptualize this constitutional absorption of Griggs in two different ways. At first blush, the Castro court's means-focused approach suggests that this is simply another instance of the federal judiciary's recent movement toward a revitalized rational basis test. Yet the persistence of the old toothless test, side by side with the Griggs standard, tends to belie this explanation. Since which test is applied depends on whether

123. Compare Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), rev'd, 520 F.2d 499 (6th Cir. 1975), cert. denied, 96 S. Ct. 2646 (1976), in which plaintiff challenged police officer height and weight requirements on the ground that they disproportionately excluded women. The district court found for plaintiff on both issues, but the court of appeals reversed on the height requirement. For discussion of the Sixth Circuit's approach to such cases, see note 144 infra.
124. 459 F.2d at 732.
125. Id. at 736.
126. See note 114 supra.
the job requirement tends disproportionately to disqualify members of a class especially protected by the fourteenth amendment, it seems plausible that we are dealing with some variant of the "suspect classification" approach. Under the rigorous "strict scrutiny" standard of review generally triggered by the identification of a suspect classification, the state must show a "compelling interest" in or a "compelling necessity" for its goals, a close fit between the challenged means and the goal, and the lack of suitable alternative means to effectuate the goal. The second requirement alone, the close fit, is the substance of the "revitalized" or "strict" rationality test. The second aspect of the strict scrutiny test seems particularly prominent in the public employment cases because courts necessarily assume compliance with the first requirement, that of "compelling necessity." Obviously, there exists an overriding public interest in hiring qualified public servants. It is equivalent to the private employer's "business necessity" of hiring employees who can perform the job.

The Castro court mused about whether it was applying the "strict scrutiny" test invoked by the complainants and concluded that it was, to the extent that plaintiffs' demonstration of racial impact required that the state's goal be an important one and that there be "substantial congruence of employment requirements to job performance." While the police department's failure to show such congruence made it unnecessary for the court to reach the third strict scrutiny requirement—that there be "no alternative means"—the court briefly considered the issue. It suggested that this last test should not be applied in its "full rigor to a racial impact case," but then went on to conclude that it would require a public employer to abandon a test that was job validated but had a disproportionate racial impact if an adequate nondiscriminatory test were available. What the court would not do was "strike down an otherwise properly justified means of selection in favor of a purely speculative alternative." This approach is, however, perfectly consistent with a "strict scrutiny" analysis. The "alternative means" test would not require such a result, nor indeed would the EEOC Guidelines.

127. See id.; Developments, supra note 114, at 1087-1103.
128. See Gunther, supra note 114.
129. See notes 101-02 supra & text accompanying notes 100-07 supra.
130. 459 F.2d at 733.
131. Id.
132. Id.
133. 29 C.F.R. § 1607.3 (1974).
Yet the strict scrutiny test is generally applied only when the classification is "suspect" or the abridged interest is "fundamental." Yet did the courts impose this standard, or a close variant of it, when the criterion, the job requirement, was facially neutral, there was no allegation of intent to discriminate, and the interest in public employment was not considered "fundamental"? The courts did not answer this question in a satisfactory manner. They suggested that it would be intolerable to hold public employers to a lesser standard under the fourteenth amendment than that required of private employers under Title VII. Yet it is not illogical or implausible for Congress to exercise its commerce clause power to regulate private employers more stringently than public employers. Congress has, for example, created private employee rights in both the Fair Labor Standards Act and the National Labor Relations Act, and the courts have not extended their substance to public employees through the fifth and fourteenth amendments. The difference is, of course, the substantial, though not perfect, congruence between the classes pro-

134. See note 114 supra.
135. See note 357 infra.
140. Indeed, recent legislative extension to state employers of the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (1970), as amended by Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6, 88 Stat. 55, was declared violative of the tenth amendment in National League of Cities v. Usery, 96 S. Ct. 2465 (1976). While the tenth amendment thus has been construed to operate as a limitation on the commerce power, it would appear that neither the tenth nor the eleventh amendment operates as a restraint on congressional power to legislate under the fourteenth amendment. See Fitzpatrick v. Bitzer, 96 S. Ct. 2666 (1976).
141. While sex discrimination is prohibited by Title VII, classification by gender has not yet been recognized as "suspect" by a majority of the Supreme Court justices. See text accompanying note 297 infra. In contrast, although aliens are not a protected class under Title VII, Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973), alienage is a "suspect classification" for equal protection purposes, Sugarman v. Dougall, 413 U.S. 634 (1973). The net result is that private employers may arbitrarily discriminate against aliens, but state and municipal employers may not prefer citizens to noncitizens unless citizenship is necessary for proper job performance. With respect to federal employment discrimination against noncitizens, see Hampton v. Mow Sun Wong, 96 S. Ct.
tected by Title VII and those protected by the fourteenth amendment. Yet congruence alone seems hardly a sufficient reason.

It is suggested that the courts' behavior was one more reflection of dissatisfaction with the limits of two-tier equal protection analysis. In an effort to extend some substantial protection to complainants' interest in racially neutral hiring practices, the courts turned away from equal protection's empty cupboard to the riches of an administrative agency's guidelines. This seemed a salubrious development in view of the availability of a workable standard of review and the conjunction of interests at stake. While there was no intentional discrimination, the impact of the state's practices was discriminatory. While the interest in public employment is not one of those characterized as "fundamental," it certainly is substantial. Although courts had declined in other contexts to apply a rigorous standard of review to discriminatory impact cases, seven of the eight circuit courts of appeals presented with the issue agreed that litigants showing that certain employment requirements tended to disadvantage their constitutionally protected class could command a heightened standard of review. The Second Circuit summarized this case law development thusly:

1895 (1976), in which a closely divided court (5-to-4) invalidated exclusionary Civil Service Commission regulations on the narrow ground that restrictions on alien employment serve no legitimate goal of the Commission. Assuming arguendo that Congress or the President might legitimately exclude aliens from public employment, the majority could perceive no constitutionally adequate relationship between the Commission's rules and "[t]he only concern of the Civil Service Commission [which] is the promotion of an efficient federal service." Id. at 1911.

142. See authorities cited note 114 supra.


The Sixth Circuit initially equated the fourteenth amendment and Title VII in Afro Am. Patrolmens League v. Duck, 503 F.2d 294, 301 (6th Cir. 1974), but later ex-
The public employment test cases are *sui generis* in that the classification is not made by the municipal body but results from a testing device which in fact results in an invidious discrimination since it disadvantages minority groups. Hence, while the right to public employment is not fundamental in an Equal Protection context . . . , there is a suspect (racial) classification which ensues. There have been so many of these cases in litigation that a viable test has emerged which . . . has wide judicial support. Where the plaintiffs have established that the disparity between the hiring of Whites and minorities is of sufficient magnitude, then there is a heavy burden on the defendant to establish that the examination creating the discrimination bears a demonstrable relationship to successful performance of the jobs for which they were used.\(^{144}\)

This development was, however, problematic. From the judicial perspective, it represented an anomalous development not susceptible to easy containment. In *Jefferson v. Hackney*,\(^{146}\) the Supreme Court had already declined to apply a heightened standard of review to a state "percentage-of-need" welfare provision that had a disparate impact on racial minorities. In the absence of any showing of state intent to cause the disparate impact, the Court applied only the minimum rationality test to a state scheme that paid a higher percentage of actual need to assistance categories populated predominantly by whites (the aged, blind and disabled) than to the category populated predominantly by blacks and chicanos (families with dependent children).\(^{147}\)


\(^{145}\) Bridgeport Guardians v. Bridgeport Civil Serv. Comm'n, 482 F.2d at 1337, *cert. denied*, 421 U.S. 991 (1975). However, an examination of the cases cited in note 144 *supra* indicates that in each case plaintiff's prima facie case was established by a showing that the challenged test or employment criterion disproportionately disqualified blacks or other minorities. While such impact was generally reflected in hiring figures, it was substantial disparity in the effect of the criterion, rather than in hiring, that was essential to plaintiff's prima facie case.

\(^{146}\) 406 U.S. 535 (1972).

\(^{147}\) Different welfare groups received different percentages of their members' standard of need. The aged (OAA) received 100 percent; the blind (AB) 95 percent; the disabled (APTD) 95 percent; and families with dependent children (AFDC) 75 percent. *Id.* at 537. AFDC recipients were preponderantly black and Mexican-American (85-87 percent). Yet minorities were also very heavily represented in the "preferred groups" (37 to 55 percent). *Id.* at 548. This situation differs from the veterans' preference, where women are virtually unrepresented in the preferred group (1.9 percent of all veterans are female). It is therefore possible to explain *Jefferson* in terms of failure of proof; that is, strong minority representation in the preferred group precluded any finding of discriminatory impact. This distinction, however, is weak both in view of the Court's subsequent reliance on *Jefferson v. Hackney* in *Washington v. Davis*, see text accompanying note 177 *infra*, and in terms of the proper definition of "discriminatory impact." See text accompanying notes 301-09 *infra*. 
It is difficult to maintain a principled distinction between the social and economic programs controlled by the Jefferson v. Hackney requirement of purposeful discrimination, and government employment, for which, under a constitutionalized Griggs standard, a showing of discriminatory impact alone would be sufficient to warrant a heightened level of equal protection review. The distribution of public jobs has many of the technical characteristics associated with programs of welfare and economic regulation, as well as being a variety of social and economic program. Relative qualification must be assessed and lines, necessarily imperfect, must be drawn. Public jobs represent a limited state resource whose distribution may achieve a variety of social goals. This is particularly evident in the veterans' preference.

While this article will devote considerable attention to assessing the permissibility of effectuating the social goals intended to be served by this particular device, the larger point remains: state policies regarding the creation and distribution of public jobs have traditionally reflected a wide variety of social and economic goals other than the obvious one of enlisting qualified persons to perform necessary governmental functions. Jobs have been created to relieve unemployment and quell civil disorder. Jobs have, in part, been created to provide the currency with which elected officials pay their active backers. During the Depression, Congress, ostensibly to maximize the number of households benefited by receipt of income from a federal job, enacted provisions that operated to exclude from government employment the spouses of government workers. During the same


149. See Section VI B et seq. infra.


152.

In any reduction of personnel in any branch or service of the United States Government or the District of Columbia, married persons (living with husband or wife) employed in the class to be reduced, shall be dismissed before any other persons employed in such class are dismissed, if such husband or wife is also in the service of the United States or the District of Columbia. In the appointment of persons to the classified civil service, preference shall be given to persons other than married persons living with husband or wife, such husband or wife being in the service of the United States or the District of Columbia.

period, the Massachusetts legislature considered enacting laws excluding married women from public employment, apparently on the theory that there was likely to be another wage earner in the home.\textsuperscript{153} It is conceivable that, in the future, some job priority might be allocated to welfare recipients, members of minority groups or the physically, emotionally, or intellectually handicapped.\textsuperscript{154} Thus, an attempted distinction between economic and social programs, on the one hand, and legislative determinations regarding the distribution of public jobs, on the other, seems weak both in terms of the technical or "line drawing" nature of both sorts of legislation and the similarity and even, at times, identity of social goals sought to be advanced by each.

C. Washington v. Davis

In Washington v. Davis,\textsuperscript{155} black applicants for the job of police officer in the District of Columbia challenged the utilization of Test 21, "an examination that is used generally throughout the federal service . . . and is designed to test verbal ability, vocabulary, reading and comprehension,"\textsuperscript{156} on the ground that it denied black applicants equal protection of the laws\textsuperscript{157} because a higher percentage of blacks (57 percent) failed the test than whites (13 percent).\textsuperscript{158} The plaintiffs relied on the Constitution; procedural problems foreclosed invocation of Title VII.\textsuperscript{159} Although apparently assuming that, in any

\textsuperscript{153} House Bills 292, 707, 893, 1408 and 1705. In Opinion of the Justices, 303 Mass. 631, 22 N.E.2d 49 (1939), the Supreme Judicial Court of Massachusetts found the provisions unconstitutional because they denied married women equality of treatment with unmarried women, in that marital status does not bear any substantial relation to need. 303 Mass. at 649-51, 22 N.E.2d at 61. A sixth bill, House Bill No. 556, would have prohibited the simultaneous public employment of both husband and wife. The court also found this bill unconstitutional as an unwarranted discrimination against certain married persons because marriage, or the lack thereof, to a public employee bears insufficient relationship to the underlying issue, the applicant's economic need for public employment. 303 Mass. at 654-55, 22 N.E.2d at 63.

Similar proposals were adopted elsewhere. For a discussion of economic emergency measures enacted during the Weimar Republic, see Koonz, Conflicting Allegiances: Political Ideology and Women Legislators in Weimar Germany, 1 Signs 663, 679-80 (1976).

\textsuperscript{154} See, e.g., German legislation discussed in note 41 supra.
\textsuperscript{155} 96 S. Ct. 2040 (1976).
\textsuperscript{156} 348 F. Supp. 15, 16 (D.D.C. 1972).
\textsuperscript{157} Since plaintiffs were challenging federal rather than state action, they could not invoke the fourteenth amendment. The due process clause of the fifth amendment does, however, contain "an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." Washington v. Davis, 96 S. Ct. at 2047.
\textsuperscript{158} 512 F.2d 956, 958 (D.C. Cir. 1975).
\textsuperscript{159} 96 S. Ct. at 2047 n.10.
event, Title VII standards were controlling, the district court nevertheless granted summary judgment to the defendants for two reasons. First, even though the test had not been demonstrated to be a reliable measure of subsequent job performance, it was "reasonably and directly related to the requirements of the police recruit training program," as measured by the trainees' performance on a test given at the end of the training program. In other words, as the court of appeals later noted, one written test served to validate another: "the validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in recruit school." The second factor was defendants' good faith. Plaintiffs did not allege that defendants acted with purpose or intent to disqualify black applicants, and the evidence negatived any such inference. A program of active recruitment and special assistance, in effect since 1969, had increased the proportion of new black recruits to 44 percent, approximately the percentage of area blacks in the eligible age group.

The court of appeals reversed, explicitly holding that Title VII guidelines were applicable in a constitutionally based public employment case. With respect to the government employer's other recruitment activities, the court, citing Griggs, stated that "such efforts are irrelevant to the issue—the discriminatory effect of Test 21 itself." The government's effort to validate Test 21 was inadequate for a variety of reasons. Even though the government had not offered any evidence to discount the strong possibility that all the government had shown was that "a written aptitude test will accurately predict performance on a second round of written examinations," the court was willing to assume that the test was predictive of progress at recruit school. High grades at recruit school, however, were not shown to be correlated with job performance. The government's study suggested that the contrary was true. Indeed, the significance of a high grade at recruit school was belied by the Police Department's failure to rely

161. Id. at 17.
162. The district court opinion is not clear with respect to the measure of performance. The court of appeals opinion, however, describes all of the defendants' evidence.
163. 512 F.2d at 963 (footnote omitted).
164. 348 F. Supp. at 16.
165. Id. at 17.
166. 348 F. Supp. at 16.
167. 512 F.2d at 957-58 n.2.
168. Id. at 960.
169. Id. at 962.
upon it for any purpose other than to validate Test 21. Nor had any
effort been made to assess the likely recruit school or job performance
of those who had failed Test 21.\textsuperscript{170}

The Supreme Court reversed the court of appeals and reinstated
the judgment of the district court.\textsuperscript{171} Throughout the entire course
of the litigation, all parties had apparently assumed that Griggs\textsuperscript{172}
was controlling. The federal defendants had merely argued that the
Griggs standard has been improperly applied in this case because
Test 21 had been adequately validated.\textsuperscript{173} The Supreme Court, how-
ever, sua sponte, questioned whether Title VII standards were ap-
plicable in a constitutional challenge to a government practice that
adversely affects the public employment opportunities of a group
historically subjected to purposeful job discrimination.\textsuperscript{174} Justice
White, writing for seven members of the Court, answered in the nega-
tive, citing, inter alia, Wright \textit{v.} Rockefeller,\textsuperscript{175} Keyes \textit{v.} School Dis-
trict No. I\textsuperscript{176} and Jefferson \textit{v.} Hackney.\textsuperscript{177} Racial impact will not
command a heightened standard of review unless there is evidence
capable of supporting an inference that the racially differential re-
sult was intended. In this case the evidence negatived any such infer-
ence. The applicable standard of review, that of "mere rationality,"
was easily met. Test 21 evaluated oral and written communicative
ability. Police officers clearly need some of each.\textsuperscript{178}

\textit{Washington v. Davis} is susceptible to very narrow interpretation;
and the Court left open that possibility by also relying on the gov-
ernment's showing of affirmative efforts to recruit black officers and
the government's proof that Test 21 was related to test success at
training school.\textsuperscript{179} This second two-pronged basis for decision would
limit its reach to those relatively rare instances in which the govern-
ment employer had validated the challenged employment criterion
and had both tried and succeeded in producing an arguably fair

\ \footnotesize{\textsuperscript{170} Id. at 961-65.}
\ \footnotesize{\textsuperscript{171} 96 S. Ct. at 2044, 2056.}
\ \footnotesize{\textsuperscript{172} See text accompanying notes 94-101 supra.}
\ \footnotesize{\textsuperscript{173} 96 S. Ct. at 2047 n.8.}
\ \footnotesize{\textsuperscript{174} Id. at 2046-47.}
\ \footnotesize{\textsuperscript{175} 376 U.S. 52 (1964). In \textit{Wright}, the Supreme Court rejected a challenge to
a New York congressional apportionment statute that produced racially homogeneous
districts, because the challengers did not prove that the legislature intended the statute
to have a racially segregative effect.}
\ \footnotesize{\textsuperscript{176} 413 U.S. 189 (1973), discussed in text accompanying notes 222-27 infra.}
\ \footnotesize{\textsuperscript{177} 406 U.S. 535 (1972), discussed in text accompanying notes 146-47 supra.}
\ \footnotesize{\textsuperscript{178} 96 S. Ct. at 2050.}
\ \footnotesize{\textsuperscript{179} Id. at 2051.}
result in terms of minority representation in the incoming work force. The broad language of the opinion, however, suggests that the Court intended to cut off the effect-focused sui generis development in the area of public employment, as well as parallel developments in the areas of public housing, zoning, and urban renewal.\[180\] The 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.\[181\] For most fair employment litigants challenging facially neutral employment criteria, \textit{Washington v. Davis} simply means that greater efforts will have to be made to comply with Title VII procedural requirements.\[182\] The decision is, however, important with regard to state veterans' preferences, which are specifically excluded from the reach of Title VII.\[183\]

With respect to the standard of constitutional review appropriate in a challenge to veterans' employment preferences, \textit{Washington v. Davis} makes clear that if the sexually differential result is perceived as presenting merely an instance of discriminatory impact rather than ultimately involving a sex-based classification, a heightened level of equal protection review would be inappropriate unless there were some element of intent to cause the sexually discriminatory result. Alternatively, to avoid the necessity of showing purposeful state activity, the sexually differential result must be demonstrated to be effectively a product of a sex-based classification rather than simply the result of a facially neutral law.\[184\]

\[180\] The Court lists a series of lower court cases implicitly overruled by its decision in \textit{Washington v. Davis}. Id. at 2050 & n.12.


\[183\] \textit{See} text accompanying notes 85-93 \textit{supra}. \textit{Washington v. Davis} is also, of course, highly significant in the areas of public housing, zoning and urban renewal. \textit{See} 96 S. Ct. 2040, 2050 n.12.

\[184\] Stated otherwise, \textit{Washington v. Davis} is totally inapplicable if the exclusionary criterion—here, veterans status—is successfully characterized as a sex-based rather than a facially neutral criterion. (This possibility is discussed in text accompanying notes 246-77 \textit{infra}.) Once a classification is found to be explicitly sex- (or race-) based, legislative intent to produce a sexually (or racially) differential effect is, quite properly, presumed. The constitutional inquiry proceeds along different lines. \textit{See} text accompanying notes 277-99 \textit{infra}.
The first part of the next section will explore the meaning of "intent to discriminate" and the extent to which such intent may properly be attributed to a legislature which enacted a veterans' employment preference. The second part will consider the alternative approach: that such an intent-focused inquiry is unnecessary because the preference's direct connection with de jure discrimination in the armed forces makes it appropriate to treat the preference itself as a de jure, or explicitly sex-based, classification.

IV. ALTERNATIVE PATHS TO A HEIGHTENED STANDARD OF EQUAL PROTECTION REVIEW

A. Intent to Discriminate

While the facts of Washington v. Davis did not require that the court identify the basic requisites of a showing of intent, the subject is addressed in Justice White's opinion and taken up in Justice Stevens' concurrence. Justice White repeatedly states that the ultimate issue is whether defendants consciously and purposefully intended to disqualify black applicants. While he acknowledges that in some contexts the total absence of blacks may warrant an inference of purposeful discrimination or, at least, a shifting of the burden of proof to the state to explain such absence in racially neutral terms, his inquiry would still seem to focus upon the subjective state of mind of the legislators or public officials. Justice Stevens takes care to leave open several other possibilities:

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 decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the

185. While Justice White cites Keyes to the effect that "the differentiating factor between de jure segregation and so-called de facto segregation ... is purpose or intent to segregate," he repeatedly speaks only of racially discriminatory purpose. See 96 S. Ct. at 2048-49. While use of the disjunctive in Keyes can be understood to suggest that something less than purpose might suffice to constitute intent (see criminal law distinction between "purposely" and "knowingly," infra note 189), this possibility does not find expression in Justice White's opinion.

186. 96 S. Ct. at 2048-49.
actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process.\textsuperscript{187}

Stevens seems to be suggesting that the requisite "intent" should be understood to encompass not only a desire to cause a certain result but also the legislature's knowledge (or, more accurately, presumed knowledge) that such result is substantially certain to ensue: "[F]or normally the actor is presumed to have intended the natural consequences of his deeds."\textsuperscript{188} This tort law definition of intent\textsuperscript{189} would, of course, be useful in a challenge to the veterans' preference. Unlike \textit{Jefferson v. Hackney},\textsuperscript{190} where the defendants did not even know the racial makeup of the various categorical assistance classes when they set up their percentage-of-need scheme, and \textit{Washington v. Davis},\textsuperscript{191} where the racially differential impact of the test was incapable of apprehension when the test was created, it is common knowledge that veterans compose a class that is almost entirely male. The early preference statutes clearly reflected the knowledge that the class was then composed solely of males.\textsuperscript{192} Unlike the factual situations presented in \textit{Jefferson v. Hackney}\textsuperscript{193} and \textit{James v. Valtierra},\textsuperscript{194} the occurrence of some significant sexual impact is not a variable of time, place or circumstances.\textsuperscript{195}

\textsuperscript{187} Id. at 2054.
\textsuperscript{188} Id.
\textsuperscript{189} W. PROSSER, LAW OF TORTS § 8 (4th ed. 1971); \textit{Restatement (Second) of the Law of Torts} § 8A. Similarly, criminal liability for consequences substantially certain to ensue from an actor's behavior is indicated by use of the word "knowingly." Compare "purposely," which indicates that the actor is liable only when he consciously desires to cause those consequences. \textit{See Model Penal Code} § 2.02 (Prop. Off. Draft 1962).
\textsuperscript{190} 406 U.S. 535 (1972).
\textsuperscript{191} 96 S. Ct. 2040 (1976).
\textsuperscript{192} \textit{See, e.g.}, the Massachusetts provision, \textit{discussed in note 55 supra} & text accompanying notes 54-55 supra.
\textsuperscript{193} 406 U.S. 535 (1972).
\textsuperscript{194} 402 U.S. 137 (1971).
\textsuperscript{195} In \textit{James v. Valtierra}, 402 U.S. 137 (1971), the Court sustained a California constitutional provision requiring that all low-rent housing projects be approved by community election:
\[O]f course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.
\textit{Id.} at 142. Likewise, in \textit{Jefferson v. Hackney}, 406 U.S. 535 (1972), the Court noted that there was nothing intrinsically discriminatory in the grant system.
\[G]iven the heterogeneity of the Nation's population, it would only be an
Utilization of a test of presumed knowledge seems far more problematic in an equal protection context than in tort law. In tort law, for both normative and evidentiary reasons, intent is inferred from the actor’s knowledge of the consequences. Persons ought to apprise themselves of the consequences of their behavior and, more importantly, it is socially desirable that they refrain from action when harmful consequences to others reasonably may be anticipated. As a factual matter, intent to cause a result generally can be inferred from knowledge of the consequences.

Normative and evidentiary considerations do not, however, point in the same direction when the subject is legislative intent. The initial creation and ultimate passage of social legislation often involve deferring the needs of some in order to secure satisfaction of the needs of others. A program that benefits some may operate directly to the detriment of others. Legislative experimentation and risk-taking are generally felt, however, to be necessary conditions for social progress. To the extent that it is this consideration that underlies the Supreme Court’s insistence upon “intent” to cause the disparate impact, there seems no persuasive reason for broadening the definition of “intent” to include “presumed knowledge of the likely consequences” as well as “desire to cause those consequences,” because a standard of presumed knowledge would restrict legislative activity almost as much as the rejected standard of “disparate impact.” If, on

---

196. Congressional enactments may implicitly or even explicitly express this process. Consider, for example, the Child Development Programs provisions of the Economic Opportunity Amendments of 1971, S. 2007, 92nd Cong., 1st Sess. (ultimately vetoed by President Nixon, S. Doc. No. 48, 92nd Cong., 1st Sess., December 10, 1971). While Congress found that “comprehensive child development programs . . . should be available as a matter of right to all children,” § 501(a)(2), it found the needs of some children (the poor) and some single parents or mothers (students or those gainfully employed outside the home) more pressing than the needs of other children and parents. See § 501(a)(3) & (4). Accordingly, it provided that such groups would have first access to such federally funded programs. See § 515(a).

197. Consider, for example, an increase in the minimum wage. See 29 U.S.C. § 206 (Supp. 1975). While improving the wages of some employees, an increase is generally understood to eliminate, to some extent, the jobs of other poorly paid employees—those whose jobs are simply “not worth” the new minimum wage. See generally L. Burgess, Wage and Salary Administration in a Dynamic Economy 22-23 (1968).

198. See text accompanying notes 171-86 supra.
the other hand, one is willing to forego a certain measure of legislative latitude in order to avoid certain socially undesirable consequences, then it seems more appropriate to focus upon the actual impact of the challenged legislation than upon whether the legislature foresaw or should have foreseen the likely consequences of its action.\footnote{199}

Furthermore, the fact of legislative knowledge or probable knowledge of a consequence often does not provide an adequate \textit{factual} basis from which to infer a desire to bring about that consequence. Often a variety of conflicting inferences are more plausible. The legislature may have carefully weighed all the consequences and decided that the possible benefits were greater than the probable costs. The legislature may have been aware of but indifferent to certain consequences. The veterans' preference is illustrative. It is unlikely that most state veterans' preferences represent a demonstrable manifestation of legislative intent to exclude women from civil service positions.\footnote{200} The original legislators in Massachusetts, on the contrary, sought to avoid this result when it could be avoided at little cost to the primary legislative goal. Under the first Massachusetts provision, the preference could not be exercised in jobs considered more suitable for women than men.\footnote{201} When rigid de jure occupational sex-segregation was abandoned, it was legislative indifference to the sexually differential operation of the preference, rather than intent to exclude women, that was most likely responsible for failure to reconsider its desirability. Indeed, in matters of sexual (as opposed to racial) differentiation, indifference has been the traditional hallmark of discriminatory legislation, whether it involved explicitly sex-based classification or facially neutral criteria that yielded sexually differential results. Furthermore,

\textsuperscript{199} One reason tort law looks to foreseeability rather than effect alone is that it generally would be unfair to hold the actor economically responsible, for the unforeseeable consequences of his acts. Relief sought against legislative and administrative acts is, however, generally prospective, \textit{i.e.}, injunctive. Potential problems of unfairness arising from utilization of an impact standard are essentially problems of the appropriateness of certain remedies. Judicially developed doctrines of sovereign, legislative and executive immunity have been effective in avoiding arguably undesirable or unfair money awards against public officials and the public purse. \textit{See generally Imbler v. Pachtman, 96 S. Ct. 984 (1976); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1326-1423 (2d ed. 1973).}

On the desirability of utilizing an impact standard, see note 245 \textit{infra} and discussion in text accompanying notes 199-204 \textit{infra}.

\textsuperscript{200} Indeed, to the extent that de jure sex segregation was practiced—as it was in Massachusetts, for example—enactment of the preference would make no additional contribution to the achievement of this goal.

\textsuperscript{201} \textit{See note 55 supra} & text accompanying notes 54-55 \textit{supra}.
it would not even be fair to suggest that this indifference is based on a callous lack of concern for the well-being of the female sex. Rather, it is founded upon stereotypic views about woman's role, place and condition. In the context of the veterans' preference, for example, why ought the enacting legislatures have given much weight to its impact on female job opportunities when the legislators believed that women generally ought not and did not engage in any but familial domestic employment and were suitably supported by fathers or husbands? The persistence of these beliefs, despite increasing indications to the contrary, is probably the primary reason for continued legislative indifference to the sexually disparate impact of the preference. While these observations may suggest the desirability of "impact" rather than "intent" focused constitutional protection, particularly in the area of sex discrimination, they do not support the assertion that, as a factual matter, intent to cause the sexually segregative or differential consequence can properly be inferred from the legislature's presumed knowledge of the likely consequences.

In addition to the normative and evidentiary problems posed by attempting to utilize the tort law standard in equal protection analysis, difficulties of application arise when "knowledge" is substituted for "desire to cause the result." Since legislation, unlike a tortious act, can always be repealed, should not subsequently acquired knowledge that the legislation produces a racially or sexually differential impact create a duty to repeal? If mere knowledge of the consequences rather than a desire to cause those consequences were the operative factor, knowledge acquired at any time ought to create liability thenceforth. Proof of the racially or sexually discriminatory impact of certain legislation presented in the course of litigation challenging such legislation ought to charge the legislature with the requisite "intent." This is not, of course, the state of current case law.

---


203. Anticipated resistance from veterans' groups has probably been another strong factor discouraging legislative restriction or elimination of the preferences. See note 412 infra & text accompanying notes 411-12 infra.

204. In Jefferson v. Hackney, 406 U.S. 535 (1972), while the fact that the defendants did not know the racial make-up of the various welfare assistance categories when they set up the percentage-of-need scheme formed part of the basis for the Court's finding that there had been no intent to cause a racial discrimination, the defendants' acquisition of knowledge during the course of the trial had no constitutional significance. See also Washington v. Davis, 96 S. Ct. 2040 (1976).
The relationship between the foreseeability of discriminatory effect and a finding of intent to cause that effect has been explored extensively, though not definitively, in the northern\textsuperscript{205} school desegregation cases. In material respects the resemblance between racially and sexually discriminatory job impact and northern school segregation is close. Each is the result of ostensibly neutral practices: specific job qualifications in employment, and school districting and neighborhood school policies in educational systems. Both are often related to some more-or-less attenuated form of de jure discrimination. For the veterans’ preference, it is the historical exclusion of women from the armed forces; for school segregation, it tends to be racial zoning and the practices of public housing, urban renewal and FHA officials.\textsuperscript{206} While the obvious effect of school segregation is a “dual system,” a dual system also results from facially neutral employment policies that have disparate racial and sexual impact. With respect to sex, the situation has been characterized as “occupational segregation”\textsuperscript{207} and a “dual labor market.”\textsuperscript{208}

\textsuperscript{205} The southern school desegregation cases may be useful when dealing with a state civil service that has a strong and recent history of explicit de jure sex segregation and still maintains a “dual system” in the sense that most job classifications are sex segregated. See text accompanying notes 206-08 infra. Following the southern school cases, such states would have an affirmative obligation to dismantle their segregated systems, see Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and a court order suspending the operation of even neutral rules, the preference, for example, would be appropriate, see Wright v. City Council of City of Emporia, 407 U.S. 451 (1972).

A determination of the appropriateness of such an approach requires a careful analysis of civil service rules and practices over the last three or four decades, as well as an examination of the extent to which present distribution of state jobs by sex is attributable to past de jure sex discrimination. Research in Massachusetts, for example, revealed that de jure legislatively authorized sex-segregation, in the form of job requisitions calling for one sex or the other and sex-segregated job lists, persisted until 1963, and that almost all job categories are still presently occupied by one sex or the other (the state conceded that virtually all of its female employees are clerical workers). See Brief for Plaintiff at 207-28, Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976). Anthony is discussed generally in text accompanying notes 394-411 infra.

While it is not anticipated that many states will present either such a dramatic picture of persistent and recent de jure sex-segregation or such clear-cut present day occupational segregation, this possibility should not be overlooked.

\textsuperscript{206} This relationship with prior de jure discrimination is discussed in detail in Section IV B infra. See text accompanying notes 245-77 infra.


\textsuperscript{208} See Weisskoff, supra note 207. Unlike employment discrimination, the creation of dual systems of education does not absolutely deprive some blacks of all education. The creation of a narrow, overcrowded labor market for women has, however, been offered as an explanation of their relatively high unemployment rates. See id.
Before turning to the relationship between foreseeability and segregative intent, it is worth emphasizing a point implicit in the discussion so far and one made explicit in the desegregation cases. Segregative intent does not involve any notion of malice toward or disdain for black students. Thus, a school board may not prescribe intentionally segregated "quality" education for both races even if it honestly believes that black children can be better educated in a segregated environment.\footnote{See United States v. School Dist. of Omaha, 521 F.2d 530, 535, 538 n.14 (8th Cir. 1975), \textit{cert. denied}, 423 U.S. 946 (1975).} Nor may the intentional assignment of black teachers to black schools be justified on the basis that black students need same-race role models.\footnote{See id. at 538 n.14.}

There are at least three ways in which the foreseeability of segregative consequences has contributed to a finding that school board officials intended to bring about the segregative result. Predictability of consequences, in combination with other facts, may give rise to an inference of intent to segregate.\footnote{See, e.g., Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 352 (9th Cir. 1974); Davis v. School Dist. of City of Pontiac, 443 F.2d 573, 576 (6th Cir. 1971); Morgan v. Hennigan, 379 F. Supp. 410, 481, \textit{aff'd sub nom.} Morgan v. Kerrigan, 509 F.2d 580 (1974), \textit{cert. denied}, 421 U.S. 963 (1975).} This approach would seem unexceptionable to both the majority and the concurrence in \textit{Washington v. Davis}.\footnote{See \textit{id.} at 538 n.14.} Alternatively, the foreseeability of segregative results has been used to shift the burden of proof to the school board. The board must show that segregative intent was not a factor in its decision to perform foreseeably segregative acts.\footnote{See, e.g., \textit{United States v. School Dist. of Omaha}, 521 F.2d 530, 538 (8th Cir.), \textit{cert. denied}, 423 U.S. 946 (1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178, 182 (6th Cir. 1974), \textit{cert. denied}, 421 U.S. 963 (1975).} This approach seems to have been approved by even the conservative plurality of four (per Chief Justice Burger) in \textit{Milliken v. Bradley}.\footnote{See text accompanying notes 184-88 supra.} A district court case utilizing this method, \textit{Davis v. School District of City of Pontiac},\footnote{418 U.S. 717, 741 n.19 (1974).} was cited with approval by the Supreme Court in \textit{Keyes v. School District No. 1, Denver, Colorado}.\footnote{309 F. Supp. 734, 743-44 (E.D. Mich. 1970), \textit{aff'd}, 443 F.2d 573 (6th Cir.), \textit{cert. denied}, 404 U.S. 913 (1971).} \textit{Keyes} itself involved such a shifting of the burden of proof, albeit after a showing of intent to segregate with respect to one part of the school system.\footnote{413 U.S. 189, 210 (1973).} While, as a practical matter, allocation of the burden of proof may be decisive, such a shift-
ing of the burden is not inconsistent with a requirement that segre-
gative intent ultimately be found. Indeed, Washington v. Davis itself may be read as a case involving a shifting of the burden of proof on the issue of segregative intent after plaintiff had made an initial showing of discriminatory impact. The Court relied alternatively on the government's proof, through its validation of Test 21 and its good faith effective action to achieve fair minority representation, of its lack of intent to effect racial discriminaton.\textsuperscript{219}

The third and most radical approach to school segregation would find that the intent requirement is satisfied by proof that the segregative consequences were foreseeable. Under this analysis, the court declines to make any inferences about the subjective state of mind of governmental actors. Two such cases are the Second Circuit's Hart v. Community School Board of Education, N.Y. School District No. 21 and the Fifth Circuit's Cisneros v. Corpus Christi Independent School District. Hart is worth some serious consideration because, unlike Cisneros, it was decided after Keyes. Keyes dealt with a court's capacity to generalize to an entire city system purposeful discrimination found with respect to one geographical area. Because its ultimate holding involved the interrelationship of a variety of complex factors, its discussion of the significance of a finding of intent to discriminate can be viewed as dictum. The language is clear, however, and represents the view of all but two (Douglas and Powell) of the participating justices. Writing for the majority, Justice Brennan said: "We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to discriminate." In their separate opinions, Justices Douglas (concurring) and Powell (concurring in part, dissenting in part) felt that they had joined issue with the majority on whether a distinction ought to be made between purposeful (de jure) and impact (de facto) discrimination. Justice Powell wrote:

\begin{quote}
I would not, however, perpetuate the de jure/de facto distinc-
\end{quote}

\begin{itemize}
\item \textsuperscript{218} 96 S. Ct. 2040 (1976).
\item \textsuperscript{219} See text accompanying notes 178-80 supra.
\item \textsuperscript{220} 512 F.2d 37 (2d Cir. 1975).
\item \textsuperscript{221} 467 F.2d 142 (5th Cir. 1972), cert. denied, 413 U.S. 922, reh. denied, 414 U.S. 881 (1973).
\item \textsuperscript{222} 413 U.S. 189 (1973).
\item \textsuperscript{223} Id. at 208.
\item \textsuperscript{224} Id. at 214.
\item \textsuperscript{225} Id. at 217.
\end{itemize}
tion nor would I leave to petitioner the initial tortuous effort of identifying "segregative acts" and deducing "segregative intent." 226

The Court today . . . clings tenuously to its distinction. It searches for de jure action in what the Denver School Board has done or failed to do, and even here the Court does not rely upon the results or effects of the Board's conduct but feels compelled to find segregative intent . . . . 227

In Hart, 228 the NAACP complained of purposeful discrimination in one New York City school. The trial court found for plaintiffs but explicitly did not find any "intent or desire" to segregate. 229 The Second Circuit affirmed, treating the absence of such finding as immaterial in view of the trial court's finding that the segregative effect of the school board's acts was foreseeable. 230 The court of appeals characterized the Keyes language as dictum because it had not been necessary in Keyes to distinguish between intentional acts of school authorities that produce reasonably foreseeable segregative results, on the one hand, and acts segregative in motive, on the other. 231 The Second Circuit also reformulated the de facto/de jure distinction in terms of conditions "created by factors apart from conscious activity of government" 232 (de facto) and conditions "caused or maintained by state action" 233 (de jure): "Unless the Supreme Court speaks to the contrary, we believe that a finding of de jure segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequences of causing educational segregation . . . ." 234

The Second Circuit's position, tenuous when announced, seems even less viable after Washington v. Davis. 235 Both Justice Powell in his concurrence in Keyes and the Second Circuit in Hart relied upon the methodology of Wright v. Council of City of Emporia, 236 which disapproved the division of a segregated school system already under an order to desegregate. In determining whether such action was con-

226. Id. at 224.
227. Id. at 230.
228. 512 F.2d 37 (2d Cir. 1975).
229. Id. at 44.
230. Id. at 51.
231. Id. at 49.
232. Id.
233. Id.
234. Id. at 50.
236. 407 U.S. 451 (1972). In Keyes, Justice Powell discusses Wright at 413 U.S. at 231-32. In Hart, the Second Circuit discusses Wright at 512 F.2d at 50.
sistent with the outstanding order, the Supreme Court looked to racial impact rather than discriminatory purpose. The significance of that case was severely limited by Washington v. Davis, which distinguished Wright on the ground that reliance on impact alone is only appropriate when the issue is simply interference with a remedial order, that is, when "[t]here [is] no need to find an independent constitutional violation."

After Washington v. Davis the message is inescapable: in order to characterize the differential effect of facially neutral state practices as discrimination for equal protection purposes, there must be a finding of governmental intent to cause the discriminatory effect. While foreseeability of the consequences may be a factor from which to draw an inference of discriminatory intent and may shift to the state the burden of negating such intent, foreseeability of effect does not in itself seem sufficient to make out a case of de jure school segregation.

In addition to corroborating the necessity of a judicial finding of intent to cause the resultant discrimination, the school desegregation cases offer two seemingly legitimate means of minimizing the plaintiff's burden: foreseeability of result may be used as a basis for inferring intent and as a burden shifting device. Neither approach will prove uniformly fruitful, but they do suggest some possibilities worth exploring. In the case of the veterans' preference, foreseeability of result will generally be the only basis for an inference of intent. There may, however, be other indications of legislative intent to exclude women from employment opportunities. The contemporaneous passage of a so-called "protective law" patently a device for protecting "male" jobs from female competition, or a law limiting female participation in public employment might, together with the foreseeable result of the operation of a preference justifies an inference that the preference was designed not only to reward veterans but also to reserve desirable job classifications for men and to exclude women. Illustrative of such a provision "protective" of male jobs is the Michigan statute sustained in Goesaert v. Cleary. The Supreme Court upheld the statutory exclusion of women from the bartending profession, rejecting as im-

237. 96 S. Ct. 2040 (1976).
238. Id. at 2049.
239. See the discussion of Goesaert v. Cleary, 335 U.S. 464 (1948), in text accompanying notes 241-43 infra.
240. See, e.g., the provisions discussed in note 153 supra.
material an offer of proof that the legislative purpose had been to secure the profession for men.\textsuperscript{242} Not only would the Michigan provision certainly fail today\textsuperscript{243} but, assuming that such legislative purpose were established, the provision’s contemporaneous passage with a veterans’ preference statute might be sufficient to justify an inference that in addition to the obvious purpose of rewarding veterans, the legislature also intended to secure jobs for men. Upon such a showing of related de jure discrimination, successful invocation of the burden shifting device would seem to compel an inference of intent to discriminate, since the state would have the seemingly undischargeable burden of negating a purpose to preserve jobs for males.

Yet it is not clear whether a showing of the foreseeability of the sexually discriminatory impact of the veterans’ preference should operate, like a demonstration that a school board knew or should have known that its acts would cause or maintain segregation, to shift to the government the burden of negating a presumption that this result was intended. Two factors would seem controlling: the degree of likelihood that the presumption is correct, and the parties’ access to the evidence. With respect to the comparative likelihood that there was discriminatory intent, the possibility seems stronger in school segregation cases. It is important to remember, however, that it is merely intent to cause the consequences, and not malice, with which we are concerned. While malice toward the victim may enhance the likelihood of intent to exclude or segregate, other feelings, for example, stereotypic views about women’s roles, may be effective substitutes for malice.\textsuperscript{244} Evidentiary considerations do not, however, argue for such burden shifting. It seems appropriate to require a school board to produce evidence that would negative the possibility of intent to effect discrimination, because such evidence is composed of a mass of details peculiarly within the school board’s knowledge (for example, why it drew a district line down one street rather than another, why it assigned a teacher to a particular school). With respect to the vet-

\textsuperscript{242} Id. at 466-67.

\textsuperscript{243} The Michigan provision violates Equal Employment Opportunity Commission Title VII Guidelines. See 29 C.F.R. § 1604.2(b) (1975). This section of the Guidelines has been approved in numerous court decisions. See, e.g., Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971). See also Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972); district court cases cited id. at 1084 n.6.

More important, the provision seems incapable of surviving this decade’s Supreme Court sex discrimination cases discussed in text accompanying notes 277-99 infra. Cf. Sail’er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 485 F.2d 529, 95 Cal. Rptr. 329 (1971).

\textsuperscript{244} See text accompanying notes 198-203 supra.
erans' preference, on the other hand, to the extent that the legislature's intent on a matter of general interest is at all ascertainable, it is generally as available to the plaintiff as to the defendant.

In summary, the school cases give some content to the meaning of intent to discriminate and suggest two ways in which proof of foreseeability of result, while not satisfying the intent requirement, may contribute to a finding of such intent. Additionally, it now seems clear that despite the urging of some of its members, the Supreme Court has declined to adopt the alternative "constitutionalized Griggs" approach: it does not believe that a heightened standard of equal protection review is appropriate for facially neutral policies that affect substantial interests, such as public employment and integrated education, and which have a highly disparate negative impact on discrete groups historically the victims of widespread de jure discrimination. Thus, standing alone, the sexually disparate operation of the veterans' preference will not trigger a heightened standard of review unless there is also adequate evidence from which an inference can be drawn that the preference was intended to create or maintain "male only" job categories as well as to reward veterans.

B. The Veterans' Preference as Sex-Based Rather than De Facto or "Impact" Discrimination

The preference ought not to be viewed in vitro but should instead be related back to the civil service applicant's capacity to acquire the qualifying criterion—military service sufficient to warrant the preference. The difference in numbers between male and female veterans is directly attributable to federal government discrimination in the armed forces. Women have always been ineligible for the draft.

245. See, e.g., text accompanying notes 222-38 supra. As Justice Powell pointed out, what difference can it make to a black child whether his segregated education results from a demonstrable governmental intent to cause a dual system? See Keyes v. School Dist. No. 1, 413 U.S. 189, 217-33 (1973) (Powell, J., concurring in part and dissenting in part). Similarly, what difference can it make to a female attorney forever barred from state civil service in her profession as a lawyer whether her state's veterans' preference was enacted by purehearted legislature A, wishing only to reward veterans, or sexually chauvinistic legislature B, wishing, as well, to reserve certain job categories for males? Not only is the unevenness of result disturbing, but the distinction between intent to exclude, on the one hand, and callous indifference (the school cases) or possibly goodhearted but ignorant indifference (veterans' preference), on the other, seems both elusive and illusive.


247. While many would consider it a benefit (even a "blessing") to have never
brief and narrow exceptions, women were not permitted to enlist until 1948. From 1948 to 1967, women were limited by statute to a maximum of two percent of the personnel of the armed forces. Women are subject to more stringent enlistment qualifications than men. Women's opportunities for training, advancement and retention always have been and still are very much restricted in the armed forces. It should not be deemed significant that some parts of the armed forces may be starting to abandon their discriminatory policies. The effect of prior de jure discrimination on the operation of the preference will persist until all those women denied equal armed services opportunity have departed from the labor force.

Exemption from the draft should not be analogized to the individually requested special treatment accorded to certain persons, such as conscientious objectors. Cf. Johnson v. Robison, 415 U.S. 361 (1974). Women never asked to be exempted. It cannot be denied that most women, if called, would have served.

248. See Note, supra note 246, at 1533; sources cited id. n.1.

249. See Note, supra note 246, at 1533. Until November 1967, there was a two percent statutory bar. The two percent limit is still maintained by the Army. See 32 C.F.R. § 580.4(b) (1975). Women have never even achieved that percentage; they presently compose 1.9 percent of total personnel. Note, supra note 246, at 1533. It should not be concluded that this shows a lack of interest on the part of women. As indicated in the text accompanying note 250 infra, entrance requirements are more stringent for women than men, suggesting an "oversupply" of women. Corroboration is found in Callahan v. Laird, Civil Action No. 71-500-M (D. Mass., Nov. 27, 1974), a case in which the differential requirements have been challenged. An Air Force colonel explained why the standards for women are higher: "We have had and we continue to have roughly twice as many women applying as we are able to actually take on board. We don't have an excess of men over what we can take." Transcript of Deposition of Lt Colonel James W. Ward, U.S.A.F., taken December 12, 1972, by counsel for plaintiffs in Callahan v. Laird, Civil Action No. 71-500-M (D. Mass., Nov. 27, 1974), at 37, 44, 45, reported in K. DAVIDSON, R. GINSBURG & H. KAY, SEX-BASED DISCRIMINATION 110 & n.27 (1974).

250. See Note, supra note 246 at 1539-43; K. DAVIDSON, R. GINSBURG & H. KAY, supra note 249.

251. See generally Note, supra note 246, at 1533, 1557. The popular press recently devoted much attention to the opening, in 1976, of a limited number of places for women at the armed forces' academies. See, e.g., NEWSWEEK, July 12, 1976, at 24-25.

The abandonment of discriminatory policies may, however, shed some light on the question of whether such discrimination was ever necessary or justified. See note 275 infra and accompanying text.

252. See generally Note, supra note 246, at 1533, 1557. The popular press recently devoted much attention to the opening, in 1976, of a limited number of places for women at the armed forces' academies. See, e.g., NEWSWEEK, July 12, 1976, at 24-25.

The abandonment of discriminatory policies may, however, shed some light on the question of whether such discrimination was ever necessary or justified. See note 275 infra and accompanying text.

forces' history of de jure sex discrimination be limited to those women who tried to enlist and who would have been successful in their enlistment effort had they been men. The existence of the quota and the knowledge that women's opportunities for service advancement and retention are relatively poor have undoubtedly deterred female enlistment. Women should not be required to have attempted to acquire lengthy experience under a regime of de jure sex discrimination in order to point out its relationship to challenged de facto discrimination.

There have been instances in which the Supreme Court deemed it material that the differential impact of a facially neutral requirement arose from a prior de jure discrimination. For example, in *Louisiana v. United States*, the Supreme Court invalidated a new "objective" voting qualification test because it would have perpetuated the effects of a prior discriminatory system in which whites, but not blacks, had been allowed to register. It was not deemed significant that the prior discrimination was not unlawful when it occurred. In *Gaston County v. United States*, the Court, interpreting the broad constitutional language of the 1965 Voting Rights Act, held that it was appropriate for the trial court to invalidate an otherwise unexceptionable state literacy requirement because the state had previously provided inferior education for black residents now of voting age. The same result has been reached in Title VII cases in which facially neutral criteria tend to perpetuate pre-Act employment discrimination. Although it is true that voting, unlike public employment, has been characterized, for fourteenth amendment purposes, as a fundamental right, and Title VII, as *Washington v. Davis*.

---

257. The Court was interpreting the phrase "that no such test or device has been used . . . with the effect of denying or abridging the right to vote on account of race or color." 395 U.S. at 287 (quoting from 42 U.S.C. § 1973b(a)). For a persuasive argument that *Gaston County* expresses constitutional criteria, see Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 S. Ct. Rev. 379, 420-21.
indicates, is more than a restatement of the equal protection clause, these cases would seem still to indicate that the existence of de jure racial classifications that are causally related to the racially differential impact of ostensibly neutral provisions will result in the invalidation of those otherwise unexceptionable facially neutral provisions.

The issue of the significance of related de jure discrimination has also been raised, albeit not definitely resolved, in the northern school segregation cases. In *Milliken v. Bradley*, for example, the district court looked at government action and inaction at all levels—federal, state, and local—in housing as well as education. In affirming the trial court's findings, the Sixth Circuit explicitly declined to rely upon evidence of de jure housing segregation, apparently because there was adequate proof of intentionally segregative acts by school officials. In affirming the challenged finding of intentional segregation in the city of Detroit, the Supreme Court did mention, without comment, the district court's reliance on the segregative acts of other government officials in the city of Detroit. Justice Stewart, discussing in his concurrence the instances in which an interdistrict remedy would be suitable, included intentionally discriminatory governmental acts in public housing and zoning, as well as in education.

In *United States v. School District of Omaha*, the Eighth Circuit discussed the significance of de jure public and private housing discrimination, endorsing the analysis of the Fourth Circuit in *Brewer v. School Board of Norfolk*:

In light of the conclusive evidence of intentional segregative practices by the school district, we have not addressed ourselves to the appellant's contention that the public and private racial discrimination in housing provides an alternate ground for ordering all-out school integration. However, we do subscribe to the Fourth Circuit's reasoning:

* * * If residential racial discrimination exists it is immaterial that it results from private action. The school board

262. 338 F. Supp. at 587.
263. 484 F.2d at 242.
264. *Id.* at 221, 227.
265. 418 U.S. at 724.
266. *Id.* at 755.
268. 397 F.2d 37 (8th Cir. 1968) (en banc).
cannot build its exclusionary attendance areas upon private racial discrimination.  

The Ninth Circuit was more cautious. It understood Keyes specifically to reserve the issue of whether it is sufficient to show intentional discriminatory action by someone other than the school board resulting in racially divided neighborhoods, to which the school board applies a “neutral” neighborhood school policy. . . . Engrafting a neighborhood school policy onto such involuntary neighborhoods may be sufficient ratification of the illicit intent of others to preclude the necessity for showing a purpose by the school board itself to segregate.

If evidence of public housing discrimination will arguably transform otherwise de facto school desegregation into de jure discrimination, evidence regarding the armed forces’ exclusionary and differential treatment of women should be of at least equal value in showing that the veterans’ preference is, in fact, de jure sex discrimination. Unlike evidence of public housing discrimination, which generally involves unwieldy proof of the written and unwritten policies and acts of public housing and federal loan officials, evidence of federal exclusion of women from and, later, severe limitation of women in the armed forces is clear, unequivocal and simple to adduce. The only salient difference, it may be argued, between racial discrimination in housing by public officials and federal sex classifications in the army is that some or all of the latter have not and even might not be declared unlawful. It is suggested, however, that one is as presumptively invalid as the other. In view of the Supreme Court’s per-

---

269. 521 F.2d at 537 n.11 (quoting from Brewer, 397 F.2d at 41-42). The Eighth Circuit’s reliance on Brewer is, however, misplaced; Brewer, like Wright v. City of Emporia, discussed in text accompanying notes 236-38 supra, involved the acceptability of a school board desegregation plan required to remedy a prior judicial finding of intentional school segregation.

270. 413 U.S. 189 (1973). Keyes is discussed in text accompanying notes 222-28 supra.

271. Johnson v. San Francisco Unified School Dist., 500 F.2d 349, 351 n.1 (9th Cir. 1974). See also Kelly v. Quinn, 456 F.2d 99, 106 n.7 (9th Cir. 1972).

272. In terms of the veterans’ preference, it is unnecessary to consider the more difficult issues involved in creating a constitutionally significant relationship between private housing discrimination and facially neutral school board districting policies.

273. Even state racial discrimination in housing is only presumptively invalid. There are circumstances in which racial classification in public housing might conceivably survive constitutional scrutiny. Permissible state goals might include maintenance of racial balance and avoiding “white flight.”
sistent emphasis on the necessity of individualized rather than sex-based determinations, it seems clear that were such massive sex-based generalizations to occur in any other area of government employment, all or most of them would be deemed a denial of equal protection. It is, however, conceivable that the vital defense mission of the armed forces might be considered a factor that ought to limit severely the role of judicial oversight, not because sex-based classifications are reasonably necessary to that mission, but because judicial interference in the internal operation of the armed forces might generally impede its efficiency or morale. Whether a reviewing court might ever reach this conclusion should not, however, bar consideration of the reasonableness of such sex-based classifications in the context of a challenge to the veterans' preference. A court's determination of this issue in a veterans' preference case will not interfere with the internal operation of the armed forces. To the extent that the sex-based classifications generally are not constitutionally supportable, their influence should be narrowly confined to the institution whose supposed needs are such as to insulate them from what would otherwise be the applicable standard of review. A cordon sanitaire should be drawn around the armed forces' utilization of sex-based classifications. Their influence should not be permitted to spill over into the civil sector, as it does in the case of the veterans' preference.

The preference's relation back to an explicitly sex-based classification indicates that the preference itself should be treated as a sex-based classification or, alternatively, that the relation back should be treated simply as a factor that makes it appropriate for a reviewing court to adopt something more than the minimal standard of equal protection review. The first approach would allow the court to apply the standard of review that has, since Reed v. Reed, uniformly produced the result of invalidating explicitly sex-based legislative classifications that negatively affect members of the female sex. Utilization of the second approach would allow for more variation in the choice of a governing standard.

274. See text accompanying notes 278-96 infra.
275. Indeed, their "necessity" is belied by the recent but growing trend to abandon them. See note 252 supra.
V. THE APPLICABLE STANDARD OF REVIEW

The suggestion that the appropriate standard of review may be the one used in cases of explicitly sex-based classifications detrimental to women requires some elaboration. The precise content of this standard of review unfortunately has not been as succinctly defined as the "strict scrutiny" test applicable to classifications based explicitly on race or alienage.\(^\text{278}\) The Supreme Court's opinions in the seven significant sex discrimination cases decided during this decade\(^\text{270}\) reveal a reasonably coherent judicial approach, albeit one not subject to easy and brief encapsulation.

First, every challenge to an explicitly sex-based classification patently detrimental to women has been successful, whether or not there was a demonstrably rational basis for such classification.\(^\text{280}\) Challenges to sex-based classifications imposing a detriment on males have not been successful,\(^\text{281}\) indicating the emergence of a bifurcated standard of review in sex cases.\(^\text{282}\)

The bases for such judicial differentiation would seem to be the historic position of women as subordinate or secondary and their exclusion from major areas of occupational, social and political life. Related to this historic perspective is the self-fulfilling quality of most of the ostensibly rational generalizations upon which laws detrimental to equal female participation are based. Thus, in \textit{Reed v. Reed},\(^\text{283}\) the Idaho Supreme Court apparently sustained the state's statutory preference for males as estate administrators on the ground that, generally, men are more likely than women to have acquired business experience.\(^\text{284}\) The United States Supreme Court, declining even to consider this proffered rationale, implicitly held it constitutionally incapable of supporting a gender-based distinction.

This approach was quite proper in view of the circularity of the state court's analysis. If the state is permitted to generalize on the basis

\(^{278}\) See text accompanying notes 126-27 \textit{supra}.

\(^{279}\) See \textit{note 277} \textit{supra}.


\(^{283}\) 404 U.S. 71 (1971).

of sex, women are locked into sex role stereotypes that relegate them to a subordinate role in all areas of life. More particularly in this case, if the statute prefers men to women, the statute is itself perpetuating the generalization upon which it is based and upon which it relies for its constitutional justification. Similarly, in Weinberger v. Wiesenfeld, the challenged statutory provision, which made working women unable to acquire social security protection for their dependent spouses, had the effect of making working women less economically productive than working men, and hence fueled the generalization upon which the social security provision was based: that women are less likely than men to be the primary family breadwinner. The provision challenged in Stanton v. Stanton also displayed this circularity. Utah law required parental support for male children until age 21, while terminating the support obligation for female children at age 18. The asserted rationale was that males are more likely than females to require extended training because males are more likely than females to be gainfully employed outside the home and to assume primary family support obligations. State maintenance of sexually differentiated child support obligations, however, perpetuates the very generalization upon which the differentiating provision is based. Receiving less training than men makes women less fit than men for gainful employment outside the home. The early termination of both support and training makes it highly likely that a woman will look to a better trained man for her support.

The Court's intolerance of sex-based generalizations detrimental to women seems to be predicated on two separable considerations. The first involves accuracy. While the generalizations are broadly true, in that they are more likely than not to predict individual or family circumstances, the generalizations are not correct for a substantial and rapidly growing percentage of women. The second, concomitant consideration, more profound but less explicitly articulated, seems to be an (as yet novel) underlying assumption that law, unlike biology, simply may not operate in such a way as to assign or support the assignment of narrow gender-related roles to women. When a sex-based classification is challenged, the Court examines the underlying gender-based assumptions, as well as the effect of the provision and such as-

287. Cf. id. at 15.
288. See note 202 supra.
sumptions upon women's opportunities for sexually equal social, political and occupational experience.289

The gender-based assumptions that underlie legislative indifference to the disparate sexual impact of the veterans' preference are precisely those assumptions operative in Wiesenfeld290 and Stanton.291 Women do not engage in gainful employment outside the home. Their economic needs are satisfied by male relatives. In the case of the early Massachusetts preference legislation, which sought to preserve the employing authority's capacity to hire women,292 a different but related assumption was operative. The occupational spheres of men and women are separate and sex segregated. Men are entirely unsuited and women eminently suited for certain jobs, such as typist, file clerk and charperson.

The effect of the veterans' preference upon women's opportunities for sexually equal occupational experience is the perpetuation of those underlying assumptions upon which both early legislative concern about and later legislative indifference to the operation of the preference were based. The preference operates indirectly to maintain patterns of occupational sex-segregation at a time when both constitution and statute would prohibit the direct achievement of such a result. Since the preference operates only in those jobs that men consider desirable, women's civil service opportunities are largely limited to those jobs traditionally deemed suitable for women, jobs that are uniformly low paid and lacking in prestige. Limited employment opportunities, in turn, discourage long-term work force participation and encourage dependency upon male relatives. The underlying legislative assumptions are self-fulfilling prophecies.

If the veterans' preference is effectively equivalent to an explicitly sex-based classification because of the preference's relation back to de jure discrimination in the armed forces, then the appropriate inquiry, in view of case law development from Reed to Stanton,293 asks not whether the discrimination is rationally based but rather what sort of legislative goal is constitutionally capable of supporting a rationally based gender discrimination detrimental to women. Since in each case the Court has invalidated the challenged gender distinction, the most

289. This is done explicitly in Stanton v. Stanton. See 421 U.S. at 14-15.
292. See note 55 supra & text accompanying notes 54-55 & 200-02 supra.
293. See cases cited note 277 supra.
we can say at this point is that certain legislative goals are not capable of supporting gender classifications detrimental to women. Reed, Frontiero,294 and Wiesenfeld find inadequate the state's administrative-convenience interest in using gender-based generalizations to avoid an individualized inquiry into the underlying issue (business competence in Reed, dependency upon the covered wage earner in Frontiero and Wiesenfeld). Stanton and Taylor v. Louisiana295 are susceptible to similar characterization. In Stanton, the state was avoiding individualized inquiry into the child's need for support by utilizing a combination of age- and sex-based generalizations. In Taylor, which involved the defendant's sixth amendment right to a fair jury, and not the class right of women to jury participation, the state made female jury service voluntary rather than obligatory in order to avoid determining whether each woman had child care and household duties sufficient to warrant excusing her from this civic duty. The Supreme Court has had no occasion to indicate what sort of rationale, if any, would support an explicitly sex-based generalization detrimental to women.296

That the majority of the Court has declined to assimilate sex to race and alienage in order to invoke the "strict scrutiny" standard of review in the absence of any occasion compelling it to do so297 does not mean that the Court would not do so in a proper case. It is therefore appropriate to begin a constitutional analysis of the veterans' preference at this level of review and then to work downwards and try on for fit a "strict rational basis" analysis,298 the least a constitu-

296. Not all instances of gender classification are reducible to matters of administrative convenience. Would, for example, rationally based fears for women's safety support a street and employment curfew for women in high crime (rape) areas, or exclusion of women from jobs involving frequent opportunities for intimate contact with male supervisors? Cf. Eslinger v. Thomas, 476 F.2d 225 (4th Cir. 1973), in which the court disapproved a South Carolina provision barring employment of females as state senate pages. The asserted rationale was, however, avoidance of the appearance of impropriety, rather than a rationally based expectation of sexual abuse. See id. at 231.

297. In Frontiero v. Richardson, 411 U.S. 677 (1973), Justices Brennan, Douglas, Marshall and White agreed that "classifications based upon sex, like classifications based upon race, alienage, and national origin, are inherently suspect and must therefore be subjected to close judicial scrutiny." Id. at 682. Concurring in the plurality's invalidation of a sex-based classification, Justices Stewart, Powell, Berger and Blackmun found such "suspect classification" characterization unnecessary on the facts of the case. Id. at 691-92.

298. See note 114 supra & text accompanying notes 356-58 infra.
tional court should do in view of the causal relationship between de jure armed forces discrimination and the discrimination effected by the veterans' employment preferences.

VI. EXAMINATION OF THE VETERANS' PREFERENCE UNDER A "STRICT SCRUTINY" ANALYSIS

Application of strict scrutiny analysis brings us back to the substance of Griggs v. Duke Power which, as we saw earlier, effectively imposes this heightened standard of review under Title VII in cases of de facto discrimination. It would seem, therefore, that a Griggs analysis would be most helpful in a constitutionally based employment case in which the facts warrant strict scrutiny review. The following analysis will employ the Griggs approach insofar as it helps to give content to the strict scrutiny standard and will also utilize it as a model for developing a conceptual basis for dealing with those justifications for the preference that do not even purport to be job related.

A. Proof of Sexual Impact and Definition of the Affected Class

Since the ultimate discrimination in the case of the veterans' preference is a de facto discrimination, it is necessary to show the sexually disparate impact of the preference. While a showing that women have been and still are totally excluded from entire job categories because

300. See text accompanying notes 94-133 supra.
301. Several varieties of public employment discrimination arguably would warrant fourteenth amendment strict scrutiny review: cases involving state utilization of explicitly race- or sex-based classifications; situations in which the racially or sexually disparate impact of facially neutral employment criteria is causally related to de jure race or sex discrimination; and instances in which facially neutral employment requirements rationally related to job performance (e.g., Test 21 in Washington v. Davis, 96 S. Ct. 2040 (1976)) are adopted or maintained for the purpose of excluding blacks or women.

What approach would have been proper, for example, if plaintiffs in Washington v. Davis had demonstrated that Test 21 had been chosen because of its known disparate racial impact? It would seem that, even so, the test would survive challenge if it met the "strict scrutiny" or EEOC Guideline test—that is, if it were compellingly necessary to test for certain characteristics, if Test 21 did in fact test for those characteristics, and if no other substitute test were available. A case involving such purposeful choice of an otherwise unexceptionable test is Baker v. Columbus Municipal Separate School Dist., 462 F.2d 1112 (5th Cir. 1972). Query the standard of review applicable to the Baker facts after Washington v. Davis.
of the operation of the preference is strategically desirable for its dramatic effect,\textsuperscript{302} the Supreme Court in \textit{Griggs} required much less as a demonstration that a job criterion has a racially disproportionate effect.

Proof of sexual impact need not involve elaborate statistical data. \textit{Griggs} makes it clear that it is not necessary to trace the effect of the challenged requirement through the employer's actual hiring decisions. Nor is it a defense for the employer to assert that regardless of the effect that the preference necessarily has on those competitions in which men and women vie for scarce positions,\textsuperscript{303} women occupy, nonetheless, their proportional share of all civil service jobs.\textsuperscript{304} Finally, it is immaterial that some or many males are also disadvantaged by the preference because they are not veterans.\textsuperscript{305} To show that a job

\begin{itemize}
\item \textsuperscript{303} The intensity and frequency of impact vary, of course, with the nature of the preference, the extent to which job competitions are competitive, and the number of competitions involving both men and women. The last factor is one that is likely to increase steadily as de jure and de facto sex-segregated work classifications are successfully challenged. Jane Picker, plaintiff's attorney in Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), \textit{cert. denied}, 44 U.S.L.W. 3715 (U.S. June 15, 1976), noted that the most intractable impediment to opening police and fire department jobs to women is the veterans' preference. Ms. Picker reports that the Women'sLaw Fund, of which she is an officer, feels that equal access to police and fire jobs would represent a very significant gain to lower-income women, particularly black women. Where else, she queries, can one earn $12,000 a year with only a high school equivalency diploma? Speech to the Women's Law Association, Harvard Law School, March 21, 1974.
\item \textsuperscript{304} Contra, Feinerman v. Jones, 356 F. Supp. 252 (M.D. Pa. 1973), \textit{discussed in} text accompanying notes 383-94 infra. The court there suggested that evidence that women occupy their "fair share" of all civil service positions is inconsistent with the assertion that a particular job criterion is unlawfully discriminatory. \textit{Id.} at 261. Cf. Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), \textit{cert. denied}, 44 U.S.L.W. 3715 (U.S. June 15, 1976), \textit{rev'd in part} Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973). Compare Washington v. Davis, 96 S. Ct. 2040 (1976), which, while ultimately finding lawful the challenged police officer examination, concedes the "discriminatory impact" of a "test which excluded a disproportionately high number of Negro applicants," despite evidence that the percentage of blacks ultimately hired reflects their representation in the relevant work force. \textit{Id.} at 2044-45. Thus, while Washington v. Davis unsettled prior case law with respect to the legal significance of a showing that an employment criterion operates with "racially disproportionate impact," it did not alter the pre-existing understanding of the term. \textit{See also} Reed v. Reed, 404 U.S. 71 (1971), in which the Supreme Court was not impressed by the state's assertion that the effect of the challenged provision was statistically insignificant, \textit{i.e.}, that women, because of their longevity, were often appointed administrators. The Court narrowly focused its attention on those instances in which the challenged statute did bar women, "those situations where competing applications for letters of administration have been filed by both male and female members of the same entitlement class . . . ." \textit{Id.} at 75.
\item \textsuperscript{305} For example, in \textit{Griggs} most white males were also unable to meet the diploma requirement. \textit{See} 401 U.S. at 430 n.6. In Washington v. Davis, 96 S. Ct. 2040 (1976), some white applicants also failed the test.
\end{itemize}
requirement has differential impact, *Griggs* requires only that complainants be members of a protected class and that they show that the attribute occurs substantially less frequently in their class than it does in the rest of the population. Thus, in *Griggs* the Court determined that the high school diploma requirement was racially discriminatory—that is, had a differential racial impact—from state census statistics showing that while 34 percent of all white males had completed high school, only 12 percent of all black males had done so.\textsuperscript{300} The Court concluded that the standardized tests had a differential impact from an EEOC study elsewhere, which found a 58 percent white pass rate and a six percent black pass rate.\textsuperscript{307} It was no defense that other (less attractive and less competitive) jobs in the employer’s plant were open to persons not possessing the required attributes or that a substantial number of whites were also disadvantaged by the requirements. It should, therefore, be sufficient to show that approximately 40 percent of all working-age males are veterans, while fewer than one percent of females are veterans.\textsuperscript{308}

The appropriate plaintiff is, of course, a female non-veteran who, but for the preference, would have been certified.\textsuperscript{309} In view of some recent cases, it is worth mentioning that the female non-veteran need not (and, indeed, should not) represent all persons and interests injured by the veterans’ preference. In *Castro v. Beecher*,\textsuperscript{810} the district court refused to recognize as a class the black and Spanish-surnamed plaintiffs on the ground that the written qualifying exam disadvantaged all those who were not “mainstream white” and that the class would have to include all those similarly disadvantaged. The First Circuit rejected this approach, noting that a more comprehensive social analysis does not “preclude recognition of a less comprehensive claim.”\textsuperscript{311} Such a narrow approach is, indeed, necessary under a system

\textsuperscript{300} 401 U.S. at 430 n.6.

\textsuperscript{307} *Id.* See generally Blumrosen, *supra* note 59, at 91-93.

The Court assumed, absent any suggestion to the contrary, that the incidence of the characteristic in the population would be accurately reflected in the particular job applicants. This would appear to be equally true in the case of veterans’ preferences.

\textsuperscript{308} See note 15 *supra*.

\textsuperscript{309} It is generally appropriate to speak of “certification” rather than “appointment” because the prevalent “rule of three” allows the appointing authority to choose among the three highest ranking applicants. *See* Feinerman v. Jones, 356 F. Supp. 252, 257 (M.D. Pa. 1973); notes 65 *supra* & 388 *infra*. It might be fruitful to explore the racial and sexual impact of the “rule of three.”


\textsuperscript{311} 459 F.2d 725, 731 (1972).
in which certain classes are specially protected by the fourteenth amendment. If specially protected classes are subsumed in broader groups composed of all those disadvantaged by a given requirement, all will sink together with the "relaxed" rational basis test. This was the result in *Koelfgen v. Jackson*.<sup>312</sup> Plaintiffs purporting to represent at least ten distinct classes challenged a Minnesota statute that granted an absolute public employment preference to veterans. Among the plaintiffs were good-government groups interested in effective civil service, male non-veterans, male veterans ineligible to claim the preference and, finally, female non-veterans. The three-judge court limited and consolidated the various plaintiffs into one manageable class—"[a]ll those non-veterans who have been denied employment solely because of the operations of the Veterans' Preference Provisions . . . and all those . . . who have been denied promotion, solely because of the operation of the [Minnesota] Veterans' Preference provisions"<sup>313</sup>—and then proceeded to make short shrift of this omnibus class under a flaccid "rational basis" standard. By subsuming female non-veterans in the class of all non-veterans, the court avoided any consideration of the sexual-impact issue. It is desirable, therefore, to pose squarely the question of sexual impact by presenting a woman plaintiff deprived by the operation of the preference of a job opportunity she would otherwise have had, and by confining the class she represents to similarly situated female non-veterans.

**B. Applying the Griggs/"Strict Scrutiny" Standard of Review to the Veterans' Preference**

1. The veterans' preference as a job qualification. We have observed that the Griggs test is analogous to the "strict scrutiny" test. It effectively assumes that finding qualified persons to perform jobs is a "compelling interest" and then proceeds to require that the employer show a close fit between the means, the challenged requirement, and

---


<sup>313</sup> 355 F. Supp. at 248.
the end, finding qualified persons to perform the particular job. Finally, if the employer does discharge his burden of showing that the requirement is adequately job related, the plaintiff may still prevail by demonstrating the availability of a suitable, racially neutral means of achieving the same end.\textsuperscript{314}

It seems clear that the veterans' preference could not be validated under this standard. It is not formulated with reference to any particular civil service job. It has never been tested for content or predictive validity.\textsuperscript{315} The efforts of good-government groups to abolish the preference\textsuperscript{316} suggest that it probably tends to impede the formation of a qualified civil service.

2. What standard should be applied to discriminatory criteria that do not even purport to be job related?\textsuperscript{317} Griggs dealt with hiring requirements that purported to be job related. It did not consider the extent to which a public or private employer can sustain a job requirement that does not even purport to be job related but is based instead on some substantial policy ground. Presumably, Duke Power, a private employer, could not have justified its high school diploma requirement on social policy grounds.\textsuperscript{318} But could a state

\textsuperscript{314} The third aspect of "strict scrutiny" analysis, the "no-alternative-means" test, is reflected in EEOC Guideline § 1607.3, 29 C.F.R. § 1607.3 (1974), reproduced in text accompanying note 85 supra. The Supreme Court has, in dictum, partly approved this aspect of the Guidelines. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975). Note, however, that EEOC Guideline § 1607.3 allocates to the employer the burden of establishing the absence of alternative means, while Albermarle assigns this burden to the plaintiff.

\textsuperscript{315} See note 99 supra.

\textsuperscript{316} The plaintiffs in Koelfgen \textit{v.} Jackson included the Minneapolis Model City Program Planning and Policy Committee and the League of Women Voters of Minneapolis. A Massachusetts legislative commission recommended changing from an absolute preference to a limited five- and ten-point system. It was of the opinion that anything more does "substantial damage to sound merit principles." Report of Special Commission, House No. 5100, at 37 (June 1967).

\textsuperscript{317} This inquiry is directed to discriminatory public employment requirements in situations covered by Title VII, as well as those, such as the veterans' preference, not covered by Title VII but meriting a heightened standard of review.

\textsuperscript{318} See Chastang \textit{v.} Flynn & Emrich Co., 365 F. Supp. 957 (D. Md. 1973). Male employees utilized Title VII to challenge their employer's pension plan, which provided earlier vesting rights for female employees. Defendants replied that the provisions were adopted to redress the disadvantaged economic status of females in the foundry and in the plant. \textit{Id.} at 965. Though a proper factual basis for this argument was lacking, the court rejected the theory as well: "Even if a desire to compensate women for their inability to perform the higher paying heavy manual jobs in the foundry were the reason for the discriminatory vesting provisions of the retirement plan, there is no evidence that such discriminatory compensation was 'necessary to the safe and efficient operation of the business.'" \textit{Id.} at 966 (quoting Robinson \textit{v.} Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971) ).

Query whether a private employer's policy of giving employment preference to
justify under Title VII the same requirement with respect to its civil service employees, despite a differential impact on blacks, on the ground that encouraging young people to stay in school would ease unemployment and contribute to intelligent exercise of the franchise?

At first glance it would seem that a distinction might reasonably be drawn between private and public employers: private employers may be restricted to the justification of business necessity, while public employers should be permitted to work out social policy goals through the distribution of public jobs, even when such distribution has a discriminatory impact upon constitutionally or statutorily protected groups. Yet the 1972 congressional extension of coverage to state and federal employers would seem to suggest, at least with respect to Title VII, that one uniform rule should be formulated for all employers.

There are a variety of possible approaches. The strictest rule would recognize only business necessity as a justification for discriminatory job requirements. (Such a rule would not, of course, invalidate remedial orders and affirmative action plans or "goals" designed to remedy clearly identified past discrimination in that particular job or industry.) This rule would seem consistent with the literal language of Title VII, as well as with recent Supreme Court language reiterating the Griggs "business necessity" requirement and reviving the original commerce clause merit-oriented rationale for the statute's enactment:

There are societal as well as personal interests on both sides of the equation. The broad, overriding interest shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

---

veterans is violative of Title VII. It would seem so. See EEOC Guidelines, 29 C.F.R. §§ 1607.3, 1607.4 (1975), reproduced in text accompanying notes 84-85 supra.


(a) It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire . . . any individual, or otherwise to discrimi-
   nate against any individual with respect to his compensation, terms, conditions,
   or privileges of employment, because of such individual's race, color, religion,
   sex, or national origin.

Although this strict rule probably does express the meaning of Title VII, a rule barring social policy justification may not be constitutionally required in cases to which Title VII does not apply directly.

Title VII seems to have provided at least part of the impetus for two divergent, but perhaps reconcilable, constitutional developments. On the one hand, there has been growing judicial intolerance of questionable public job requirements. Although the Supreme Court has declined to accord procedural due process protection to the individual's interest in his particular public job unless state law creates some property right in that job, it has recently, under a variety of theories, invalidated discriminatory public job requirements not required by business necessity. In Sugarman v. Dougall, the Court found New York's statutory exclusion of aliens from civil service jobs violative of the equal protection clause. Applying a heightened standard of review, apparently on the basis that alienage is a "suspect classification," the Court rejected the state's alternative arguments that citizenship is a civil service job qualification, and that a state may properly reserve scarce jobs for United States citizens. In Cleveland Board of Education v. LaFleur, the Court invalidated rules requiring pregnant teachers to commence maternity leave four to five months in advance of expected delivery dates. While the Court reached its result by locating a "fundamental interest" in "freedom of personal choice in matters of marriage and family life," the net result was invalidation of a sexually discriminatory, non-job-related requirement—that school teachers be persons not more than five months pregnant. Resolving a conflict between two circuits, the Supreme Court recently adopted the Seventh Circuit's position that

---

324. 413 U.S. 634 (1973).
325. Justice Blackmun refrained from uttering the words "suspect classification," but all the indicia are there. See also the companion case, In re Griffiths, 413 U.S. 717 (1973), in which Justice Powell was less coy. Id. at 721-22. See generally Justice Rehnquist's dissent in Sugarman, 413 U.S. at 651.
326. 413 U.S. at 643-45. See also Hampton v. Mow Sun Wong, 96 S. Ct. 1895 (1976), discussed in note 141 supra.
328. Id. at 639.
329. Compare the Supreme Court's due process rationale with the equal protection analyses of LaFleur below, 465 F.2d 1184, 1188 (6th Cir. 1972), and Green v. Waterford, 473 F.2d 629 (2d Cir. 1973).
the first amendment prohibits a newly elected public official from discharging public job holders affiliated with the opposition party unless the positions in question are policy-making ones, for which party affiliation and loyalty are job-related requirements.\footnotemark[330]

On the other hand, the lower courts have demonstrated a willingness to find a constitutional basis for one sort of non-job-related requirement—that of race—in "affirmative action" plans required by state and federal agencies.\footnotemark[331] This trend is probably at least partially attributable to the judiciary's exposure in Title VII litigation to the seriousness and pervasiveness of employment discrimination. The Supreme Court has not yet dealt with the equal protection problems raised by such "quota hiring" and "preferential admissions."\footnotemark[332] If the Court rejects the "strict rule" formulated above—that is, determines that the equal protection clause does not require that "business necessity" be the only permissible justification for a discriminatory public job requirement—it might adopt a rule allowing for special treatment of only those historically disadvantaged groups to whom the Court has accorded special fourteenth amendment protection.\footnotemark[333] Such a rule would permit affirmative action plans for underrepresented minorities or women, even when such plans were adopted without any reference


\footnotetext{332} DeFunis v. Odegaard, 416 U.S. 312 (1974), presented the issue, but the case was ultimately declared moot.

\footnotetext{333} The theory underlying such a rule would probably be that temporary expedients are necessary to right massive failures of distributive justice and that the fourteenth amendment should not operate as a bar to efforts to achieve the kind of justice the amendment was intended (and has grown) to secure. See Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); Morris, Equal Protection, Affirmative Action and Racial Preferences in Law Admissions: DeFunis v. Odegaard, 49 WASH. L. REV. 1, 26-31 & sources cited at 1 n.2 (1973). See also Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. CHI. L. REV. 723 (1974); Karst & Horowitz, Affirmative Action and Equal Protection, 60 VA. L. REV. 955 (1974).
to palpable past discrimination in the particular job or industry. It would not allow the veterans’ preference, however, because it does not operate to effectuate the purposes of the fourteenth amendment and, instead, tends economically to disadvantage an already disadvantaged group.\textsuperscript{334}

Finally, the most permissive rule not inconsistent with the "business-necessity" doctrine of Griggs would allocate to the public employer who invokes a social policy rather than a business necessity ground for his challenged discriminatory hiring criterion the burden of showing a compelling social necessity for the criterion. It has been suggested that Griggs is essentially a variant of the "strict scrutiny" test, which does not require an initial showing of "compelling interest" merely because the employer's interest in finding qualified personnel is properly assumed to be "compelling."\textsuperscript{335} When, however, business necessity is not the basis for the hiring criterion, it is appropriate to ask whether the policy justification is compelling, that is, to require that the employer assume the burden not only of showing a close and substantial fit between the means and the goal but also of initially showing that the goal is a compelling one.

3. Applying the "compelling social necessity" test.\textsuperscript{336} Some guidance is available from those federal and state cases\textsuperscript{337} that sustain various racial minority preference programs on the ground of compelling social necessity. While none of these cases has adequately dealt with the basic issue of identifying a compelling public interest in achieving racially proportional job distribution, all the cases have required, as a basic minimum, a showing that the preferred group is one that is dramatically disadvantaged, in the sense that it does not have its "fair share" of the jobs or opportunity for which group members are now being preferred.\textsuperscript{338}


\textsuperscript{335} See text accompanying notes 128 & 129 supra.

\textsuperscript{336} In the following discussion, the "compelling social necessity test" embraces the second and third prongs of strict scrutiny analysis—"close nexus" and "no alternative means"—as well as the first aspect, "compelling state interest."

\textsuperscript{337} See cases cited note 331 supra.

\textsuperscript{338} In Altshuler, the court noted that minority members composed 40 percent of the general population but only four percent of building trade union membership. 490
VETERANS' PREFERENCE

Assuming that the legislative and judicial history of the challenged preference would allow utilization of the civilian readjustment rationale, it is this justification that seems most likely to qualify in terms of "compelling social necessity." It is indisputable, of course, that veterans must undergo a transition from military to civilian life. But this is not all that the state must show to meet the compelling justification test. The state also must demonstrate that returning veterans as a group are disadvantaged persons, that despite all their other (true) benefits—including educational and vocational benefits and unemployment insurance—they need special employment preferences to put them on a par with similarly situated non-veterans. It appears that the state would have difficulty in making such a demonstration.

In surveying the entire veteran population, Levitan and Cleary found:

Veterans as a group are better educated and more affluent than their nonveteran counterparts. Veterans have attained a median educational level of 12.5 years schooling, compared with the 12.1 years attained by male nonveterans; this reflects the military's selection processes. The income differential is even greater. The veteran's median income in 1970 was $8,660, surpassing the median income of nonveteran adult males by $2,800.

With respect to Vietnam veterans during the generally high unemployment period of 1969-1972, Levitan and Cleary found that the unemployment rate for Vietnam veterans did exceed that of 20- to 29-year-old male non-veterans, in amounts ranging from one-half to two

F.2d at 18. In DeFunis, the Washington Supreme Court focused on the fact that "minorities have been, and are, grossly underrepresented in the law schools—and consequently, in the legal profession—of this state and this nation." DeFunis v. Odegaard, 82 Wash. 2d 11, 32, 507 P.2d 1169, 1182 (1973) (en banc).

See note 74 supra & accompanying text.

See text accompanying notes 25-40 supra.

341. S. LEVITAN & K. CLEARY, supra note 1, at 6. The most recent Annual Report of the Administrator of Veterans Affairs (year ending June 30, 1975) shows a similar gap in median educational achievement (12.6 years for veterans, 12.3 years for non-veterans) but a greater difference in 1974 calendar year earnings ($11,360 median income for veterans, $7,430 for non-veterans). ANNUAL REPORT at 13. The Report suggests, however, that the difference in income can be explained partly by variances in age distribution: if age is held constant, differences are reduced considerably. See id. at 3.

Another reason for the favorable economic position of veterans may be that blacks and other racial minority groups are underrepresented in the veteran population. While 10.7 percent of American males over 16 are non-Caucasian, only 7.7 percent of all veterans are non-Caucasian. Only 8.8 percent of Vietnam era veterans are non-Caucasian. See S. LEVITAN & K. CLEARY, supra note 1, at 4-5.
percent. Such differences are not, however, dramatic in a period of high unemployment. Furthermore, it is impossible to determine the extent to which the unemployment rate of returning veterans is inflated by the ready availability of substantial unemployment benefits. In any event, in 1974 and 1975, the latest years for which data is available, unemployment rates of male non-veterans age 20 to 34 exceeded those of male veterans of the same age (that is, Vietnam era veterans).

Finally, the earnings of Vietnam era veterans exceed those of their non-veteran counterparts:

In 1970, young veterans (20-24 years old) employed full time earned over $800 more than young nonveterans. The earnings differential of older (25-29 year old) veterans and nonveterans who worked full time was less than $100 annually. Veterans who did not work during the year had incomes about six times greater than comparable non-veterans. This was because the veterans' reported income was inflated with military pay and veterans' benefits.

It is, of course, difficult to estimate the contribution of the veterans' preference to this favorable picture. The proper subject for inquiry is not how many veterans used the preference to obtain a position for which they would not otherwise have been selected but rather how many of those preferred veterans would not otherwise have obtained any satisfactory job. It would seem a difficult question to answer and one that should compose part of the state's burden of showing that veterans are or would be (absent the preference) a disadvantaged class.

It should be noted that in our effort to determine whether

---

342. Id. at 107.
343. During this period, the unemployment rate for veterans ranged from four to nine percent; for comparably situated non-veterans, it ranged from 3.5 to 7.5 percent. Id.
344. See generally id. at 119-21.
345. For the year ending June 30, 1974, 5.1 percent of (Vietnam era) veterans age 20 to 34 were unemployed. The figure for same-age non-veterans was 5.4 percent. For the year ending June 30, 1975, 9.7 percent of veterans age 20 to 34 were unemployed, as compared to ten percent for non-veterans of the same age. ANNUAL REPORT at 4.

With respect to all male veterans for the year ending June 30, 1975, 4.7 percent were unemployed, as compared to 8.3 percent of all male non-veterans.
346. S. LEVITAN & K. CLEARY, supra note 1, at 113. With respect to more recent figures, the 1975 ANNUAL REPORT indicates that for veterans under 35 (nine out of ten Vietnam era veterans are under 35), median educational level was 12.8 years and median income was $9,550. For non-veterans, the figures were 12.9 and $7,350, respectively. When age was held constant, the difference in earnings diminished to $720—non-veterans earned eight percent less than same-age veterans.
veterans\textsuperscript{347} can properly be understood to be a disadvantaged group, one with a special problem that merits selecting them out for special treatment, their situation has been contrasted with that of comparably situated male non-veterans. A more devastating comparison between veterans and similarly situated female non-veterans, the class challenging the preference, has not been made because the problem should not be envisaged as a contest between classes to determine which is the more disadvantaged (in which case female non-veterans would certainly prevail),\textsuperscript{348} but as an inquiry to determine whether veterans can under any circumstances be deemed to be an economically disadvantaged class. In view of their generally favorable position vis-à-vis male non-veterans, the claim of veterans to disadvantaged class status appears highly tenuous.

It would seem that the true basis for the veterans' "readjustment kit"\textsuperscript{349} is not that veterans as a class have more severe problems than any other group, but that they should not have to endure the difficulties that others face. Generally, education is limited by personal resources, but veterans deserve subsidized education. A high general unemployment rate may be tolerable, but veterans deserve jobs.\textsuperscript{350} It is suggested, therefore, that upon close examination the readjustment rationale turns out to be nothing more than the old reward rationale. And however laudable the desire to reward, it cannot satisfy the proposed "compelling social necessity" test. Even the more sophisticated version of the reward rationale, that which locates a public interest in rewarding veterans,\textsuperscript{351} could not survive a "strict scrutiny" test, because the state's interest in encouraging enlistment, bravery and obedience, while perhaps compelling,\textsuperscript{352} is only remotely served by the

\textsuperscript{347} All of the above comparisons have been between male veterans and male non-veterans. No data have ever been collected on female veterans. The 1975 ANNUAL REPORT explains that the female sample would have been too small to be reliable. The Veterans Administration has, however, requested such information as part of the 1980 census. \textit{Id.} at 3 n.1.

\textsuperscript{348} Regarding the earnings gap between men and women, as well as women's comparatively unfavorable unemployment rates, see U.S. DEP'T OF LABOR, WOMEN'S BUREAU BULLETIN NO. 297, 1975 HANDBOOK ON WOMEN WORKERS at 125-31, 64-72. \textit{See} Kahn v. Shevin, 416 U.S. 351, 353 (1974).

\textsuperscript{349} See S. LEVI TAN & K. CLEARY, supra note 1, at 113.

\textsuperscript{350} Indeed, a substantial portion of veterans' assistance has been characterized as a system of "preferential welfare." \textit{Id.} at 171-74. This ultimate conclusion is not, of course, possible in the case of the veterans' preference, because it is not a true benefit. The only way to extend the preference to all is to abolish it.

\textsuperscript{351} \textit{See} text accompanying notes 68-72 supra.

\textsuperscript{352} While the federal government could certainly claim such a "compelling" interest in view of Congress' art. I, § 8 power to "raise and support armies," the state's interest seems considerably more remote. \textit{See} sources cited note 71 supra.
preference and certainly could be effectuated more readily by such alternative means as more pay or bonuses.

In sum, the veterans' preference is highly vulnerable to a strict scrutiny analysis. It could survive the first step of such a test only if a court were to adopt the most permissive rule still consistent with the Griggs "business necessity" approach by holding that a sexually discriminatory non job-related hiring criterion can be justified by "compelling social necessity"—and then were to find that the mere existence of the veteran's transitional (readjustment) period is tantamount to a showing of compelling social necessity. In any event, most preference statutes would fail to meet the second criterion of the strict scrutiny test, that there be a close fit between the means and goal. Whatever the readjustment needs of the typical returning veteran, they cannot be said to persist throughout his entire lifetime. It would seem, therefore, that the strict scrutiny test would, at the very least, require that the preference be pared down to the readjustment period. The entire preference should be invalidated, however, because veterans as a class are not socially or economically disadvantaged in any way sufficient to demonstrate a "compelling social necessity" for the special treatment accorded them by the preference.

VII. EXAMINATION OF THE VETERANS' PREFERENCE UNDER A "RATIONAL BASIS" TEST

It seems quite clear that the preference can survive the traditional relaxed "rational basis" test. State preferences have emerged unscathed from such an examination in two recent federal cases. Even though a court might decline to apply a "strict scrutiny" analysis, some heightened standard of review is appropriate in view of the preferences' relation back to de jure gender discrimination and the substantiality of the interest at stake, public employment. The con-

353. See text accompanying notes 330-33 supra.
354. See note 114 supra.
357. The "right to work" is not, of course, a "fundamental right." See note 114 supra. The dictum of Truax v. Raich, 239 U.S. 33, 41 (1915), has not borne fruit: "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the
junction of these two factors would seem to warrant the most searching “rational basis” model now available, the “new equal protection” test described by Professor Gunther: “Judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of overinclusive and underinclusive classifications is notably reduced.”

Under such a test, the preference is vulnerable in terms of overinclusiveness and inconsistency of legislative goals.

Overinclusive satisfaction of the legislative goals should be considered a serious defect here because the preference is not a true “benefit,” for which overinclusiveness is a relatively harmless fault—here every exercise of the preference imposes a direct burden on another individual. A true benefit does not impose a direct burden on any person; its cost is simply the expenditure of public funds. True veterans’ benefits include the “GI Bill” and veterans’ pensions. These benefits may be distributed overinclusively to the extent that they are enjoyed by those who do not need them. But such overinclusive distribution is relatively unobjectionable because their conferral does not impose a detriment on, nor would their withdrawal improve the relative position of, any other person.

It was noted earlier that the methodology and goals of the civil service tend to be inconsistent with the concept of the preference and
that the preference is actually or effectively just one of a body of civil service rules. The civil service approach is one of relative qualification, yet the preference is granted so long as the veteran obtains the minimum passing grade. The goal of civil service competition is to obtain the best qualified civil servants. Insofar as military service is not a true job qualification, the purpose of the preference is to reward veterans for their service without regard to their relative job qualification.

Keeping in mind the problems of overinclusivity and inconsistent purposes, let us now evaluate each of the preference's ostensible goals. It has repeatedly been asserted that the preference is given in order to obtain qualified civil servants and that military service is a job qualification. This rationale is often undercut by an element of overinclusivity. The veterans' preference is frequently given to persons who have never served in the military, namely to "Gold Star" mothers, widows of deceased veterans and wives of disabled veterans. Also, the degree of the preference is generally increased for disabled veterans. While there may be legitimate reasons for giving employment preferences to disabled veterans, disability is not an indicium of heightened job qualification. Finally, the assertion that military service is a qualification for all civil service jobs (yet one so impalpable that it is not reflected in the veteran's exam score) is sufficiently implausible to shift to the state the burden of showing that it is true.

It would seem, therefore, that the "job-related qualification" rationale would not withstand any but the most cursory scrutiny. Further, it is possible to argue that if this justification fails, then the preference fails, because the goal of obtaining the most qualified civil servants is the only permissible goal of a civil service provision. It has been observed that the range of constitutionally permissible goals for a given


363. See note 4 supra.

364. While the traditional rational basis test has not been understood to require that the state substantiate the generalizations that underlie its legislative classifications, the Court has recently indicated that the state may be required to do so. In United States Dept of Agriculture v. Moreno, 413 U.S. 528 (1973), the Court invalidated the "anti-hippie" rule that denied food stamps to persons living in households in which some of the members are unrelated. The government suggested that many persons living in such households are not really "needy." The Court chided the government for its failure to "substantiate" this not unreasonable generalization. Id. at 535. See also Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 651-57 (1974) (Powell, J., concurring); Frontiero v. Richardson, 411 U.S. at 689. It is not clear that a majority in Frontiero would have invalidated the challenged provision had the government proved that the regulations actually did save money.
statute is often narrower than the range of proper legislative goals. Thus, for example, traffic safety statutes cannot properly be concerned with promoting certain kinds of delivery services or subsidizing agriculture. Additionally, the Supreme Court has shown an increasing tendency sharply to question secondary legislative goals that appear to be inconsistent with the primary purpose of the legislation. While it is true that this approach tends to ignore the multi-purpose nature of much legislation, it is one that has been used with some degree of success.

The second legislative goal, that of rewarding veterans, is the most difficult to handle under a "rational basis" analysis. It seems clear that the state may reward veterans, at least in some ways. But it also seems only fair that the state should directly shoulder the expense of such rewards. There can be no objection to true veterans' benefits, those that come out of the public treasury. There seems, however, gross un-

---


368. Thus in Moreno, 413 U.S. 528 (1973), the Court paid little attention to the government's legitimate interest in avoiding "abuse" of the food stamp program when the effect of the challenged provision was to deny benefits to some needy persons and it was the primary purpose of the statute to aid needy persons. In Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972), the Court declined to consider the proffered state goal of discouraging illegitimacy, noting that it "bears . . . no significant relationship to those recognized purposes . . . which workmen's compensation statutes commendably serve." See generally New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973); Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972), aff'd mem., 409 U.S. 1069 (1972). See also the discussion of Reed and Frontiero in The Supreme Court—1972 Term, 87 Harv. L. Rev. at 124 (1973), and of Reed in Getman, The Emerging Constitutional Principle of Sexual Equality, 1972 Sup. Ct. Rev. 157, 162.

369. For persuasive criticism of this approach, see Legislative Purpose, Rationality, and Equal Protection, 82 Yale L.J. 123 (1972). Yet note how difficult it is to reconcile the general purpose of civil service rules and the purposes of the veterans' preference in accordance with the author's model of multi-purpose definition. The reason for this may be that unlike true multi-purpose legislation, the veterans' preference is simply an anomalous rule engrafted onto a pre-existing set of rules. True multi-purpose legislation reflects a background of policy trade-offs without which there might not have been any legislation at all. Id. at 144. This aspect of political feasibility is what prompts courts to refrain from searching examination of apparently inconsistent purposes. See, e.g., Von Stauffenberg v. District Unemployment Comp. Bd., 459 F.2d 1128, 1130 (D.C. Cir. 1972); Romero v. Hodgson, 319 F. Supp. 1201 (N.D. Cal. 1970), aff'd mem., 403 U.S. 901 (1971). This is not, however, a problem with the veterans' preference. It was not a policy trade-off for the (generally pre-existing) set of merit-oriented civil service rules.
It is not clear that this objection is obviated by the state's alternative argument that the true goal of the reward is not satisfaction of the public need to express gratitude but rather the creation of an incentive for military bravery, obedience and enlistment. While there may be a more substantial public purpose in this goal than in gratification of public sentimental feeling, the essential unfairness remains. Unlike the job-qualification and readjustment goals, there seems to be no nexus between the motive to reward and the form that the reward takes, the job preference. Why a reward at the expense of a few when any other sort of reward would do? One might argue that the preference, unlike other "rewards," is so contingent a possibility for the soldier or prospective enlistee that, for constitutional purposes, the goal (bravery, obedience, enlistment) is too attenuated to support the means (the preference). Or, one might assert that because there is no special nexus between the goal and the means, the state should confine itself to the variety of less onerous means, including bonuses, pensions, and tax rebates. It is true, of course, that the duty to utilize alternate means is generally reserved for "strict scrutiny" cases. Yet the Supreme Court has occasionally used it in "rational basis" cases.

370. In many instances, this more refined "incentive" rationale may not even be available to the state because the preferences have typically been enacted or updated after the period of the veterans' service. Thus the Massachusetts statutes, discussed in text accompanying notes 44-45 supra and in note 51 supra, created a preference for Civil War veterans long after that war had ended. The federal preference was initiated for returning veterans as World War II was drawing to a close. See note 38 supra & accompanying text. See also Brief for Plaintiffs at 184-85, Anthony v. Massachusetts, 415 F. Supp. 485 (D. Mass. 1976).


372. It may also be noted that in terms of the reward rationale alone, the preference is underinclusive. The reward goes only to those who desire and meet minimum qualifications for civil service jobs. This defect, however, is characteristic of most veterans' benefits—for example, the "GI Bill" helps only those who wish further education; VA mortgages benefit only those who desire and can afford a house. Standing alone, underinclusivity does not seem a significant defect. In the context of assessing alternative means, however, the fact that the measure does not even effectively accomplish its ostensible goal would seem to tip the balance in favor of utilizing less onerous means.

373. See note 114 supra.

Some of the recent sex cases\textsuperscript{375} may also be explained in terms of a duty to utilize less onerous means. It may be, however, at least under a “rational basis” analysis, that rewarding veterans at the expense of a few is terribly unfair but constitutionally permissible.

It is difficult to forecast judicial treatment of the final legislative goal—aiding veterans to adjust to civilian life—without reference to the history of the particular challenged preference. A reviewing court may be unwilling to attribute this goal to the legislature if authoritative pronouncements of the state judiciary neglect\textsuperscript{376} or repudiate\textsuperscript{377} such a goal, or if the preference was enacted when there were no returning veterans. Assuming, however, that a reviewing court is willing to attribute to the legislature the goal of helping veterans readjust to civilian life, then the means are constitutionally defective. The preference is overinclusive in that it lasts the veteran’s entire lifetime. If readjustment were adjudged the only sustaining goal, the net result would probably be judicially required legislative curtailment of the duration of the preference to the maximum amount of time that could reasonably be understood to represent a readjustment period.\textsuperscript{378}

In summary, the prospect of challenging preferences under the “rational basis” standard is less than promising. The possibilities of success lie in persuading the court to define narrowly the range of permissible legislative goals, to decline to attribute unarticulated goals to the legislature, to look to the actual history of the preference provision, and to treat both overinclusivity and underinclusivity as serious defects.

\textbf{VIII. A Problem of Remedies}

Assuming that the essential fault of the preference lies in its sexually discriminatory impact, it might appear that the proper remedy is not to abolish the preference entirely but merely to devise a system in

\textsuperscript{375} See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971).


\textsuperscript{377} Consider the Pennsylvania Supreme Court’s approach, discussed in text accompanying notes 63-68 supra.

which its sexual impact is neutralized. Should we, therefore, return to the original Massachusetts concept of granting veterans a "preference to all other persons, except women"? The Massachusetts provision, however, assumed sex-segregated lists and positions. It would appear that such a sex-limited preference would be impossible to implement today. Assume, for example, three job applicants for one position. The first, a male non-veteran, earns a score of 90. The second, a female non-veteran, earns a score of 88. The third, a male veteran, earns a raw score of 86 but is entitled to a veteran's preference of five points. Who is first on the final list?

This sort of problem is actually present in every fair employment case in which it is asserted that some job test or other hiring criterion has a discriminatory impact upon a protected group. Since the objection is not merely that the criterion is not job validated but also (necessarily) that the use of the criterion results in discriminatory impact, it would seem possible to preserve the criterion with respect to those who cannot claim any discriminatory impact. Yet the courts frame broad remedial orders that seem to grant a windfall to those beyond plaintiff's class. Such windfall results are actually necessary to avoid new litigation. Since impact is a comparative standard, the lifting of an onerous burden solely from a disadvantaged group necessarily means that the previously advantaged group is now disadvantaged. Thus, for example, while a uniform minimum height and weight requirement will almost certainly advantage men, the exemption solely of women from such a requirement will disadvantage men. This would be true if operation of the veterans' preference were restricted to competitions among male applications. Male non-veterans, 60 percent of the adult male working population, could legitimately complain that the veterans' preference and the exemption for women combine discriminatorily to limit the employment opportunity of males. In conclusion, the apparent impossibility of fashioning a workable remedy solely for women and the conceptual problem of creating a new disadvantaged class by eliminating a job requirement for only

---


380. See, e.g., the order in Castro v. Beecher, 459 F.2d at 737, that the racially discriminatory exam be scrapped and replaced by a new job validated test. This order benefited many persons who are not "mainstream white," as well as those mainstream whites who are otherwise qualified but cannot, for some reason, pass the old test. Id. at 730. (Castro, of course, appears to have been wrongly decided. See note 180 supra & text accompanying notes 155-84 supra. This does not, however, affect the appropriateness of such an order in a proper case.)
the currently disadvantaged class indicate that the proper remedy is total invalidation of the preference.

IX. RECENT LITIGATION CHALLENGING THE PREFERENCE AS SEXUALLY DISCRIMINATORY

In the past four years, three efforts\(^{380,1}\) have been made to challenge a state veterans' preference on the basis of its discriminatory impact on women's public employment opportunities. In *Koelfgen v. Jackson*,\(^{381}\) the claim that the Minnesota absolute preference had a disparate impact on women's public employment opportunities did not survive the court's consolidation of all the various classes of plaintiffs into one class, "[a]ll those non-veterans who have been denied employment solely because of the operations of the Veterans Preference provi-
sions . . ."\(^{382}\)

In *Feinerman v. Jones*,\(^{383}\) the plaintiff was a woman who had been hired provisionally as an "information writer" in the Pennsylvania Department of Education. She later took the Civil Service Test and received a score of 91.57, the second highest grade. But, because of the application of the ten-point bonus granted to any veteran receiving a passing grade, she was not among the three highest-ranking eligibles certified to the appointing authority to fill the position,\(^ {384}\) and, therefore, she was dismissed from her job. She challenged the preference as de facto discrimination, using the since-discredited constitutionalized *Griggs* analysis.\(^{385}\) The three-judge court found that she had failed to make an adequate showing of discriminatory impact. What she had shown was that "[o]f the total females appointed [to civil service pos-
tsions], a little over two percent were veterans while approximately 35 percent of the males appointed were veterans."\(^{386}\) In light of the evidence that almost 48 percent of the total number of civil service appointees were women, the court deemed fatal the plaintiff's failure to show how many women had been deprived of positions because of the preference and how many men had received their job on account of the

---

380.1 *See* Author's Note (†) following this article.
*Koelfgen* is discussed in text accompanying notes 312-13 supra.
382. 355 F. Supp. at 248.
384. The "rule of three" is discussed in notes 63 supra & 388 infra.
385. *See* text accompanying notes 94-184 supra.
386. 356 F. Supp. at 261.
The court's skepticism about the existence of substantial impact seems disingenuous in the context of a ten-point preference and a maximum raw grade of 100. Absent evidence that many better paid jobs were truly non-competitive (that there were as many openings as qualified applicants), an inference of substantial impact seems unavoidable. If women were not in fact applying for jobs from which they were historically barred by operation of the ten-point preference, it would be unfair to conclude that there had been no impact on female job opportunities. In such case, the negative impact simply occurred at a time prior to application.

In any event, the court's proof requirements were erroneous. While the standard of review triggered by a showing of racial or sexual impact will depend on a number of variables, the definition of racial or sexual impact does not fluctuate with those variables. The issue is: What percentage of plaintiff's group possesses the required characteristic and what percentage of the comparison group has it? Thus, in *Washington v. Davis*, a showing that four-times as many blacks as whites failed the policeman's exam was considered adequate to support a finding of disparate racial impact despite the government's showing that the percentage of blacks ultimately chosen for training closely approximated their representation in the relevant population.

387. *Id.*

388. To require that plaintiff show that many women have applied for and been denied certain male-female competitive positions raises the strong possibility that prior sex discrimination, in various forms, will undercut plaintiff's case. Women, like blacks, should be presumed to know that certain jobs are effectively unavailable to them, and to act accordingly. Thus, in the area of race discrimination, it has never been a defense to an employer's utilization of racially discriminatory employment criteria that blacks, in any event, seldom or never applied for the job. See, e.g., *Cypress v. Newport News Gen. & Nonsectarian Hospital Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967); *Lea v. Cone Mills Co.*, 301 F. Supp. 97 (M.D.N.C. 1969).

One study may indicate that the "rule of three," which allows the appointing authority to fill a single position with any one of the three highest-rated candidates, also has operated to exclude women from positions considered suitable for men. *New York Women, A Report and Recommendation from the Governor's Committee, State of New York* 53 (1964). Knowledge of this practice should be imputed to potential female applicants. Additionally, social attitudes have long discouraged women from applying for jobs considered suitable for males. To permit the result of such attitudes effectively to undercut the case of a woman who does wish to make such application seems clearly incorrect.

389. See text accompanying notes 74-298 *supra*. Briefly, those variables include: whether the challenge is based on Title VII or the equal protection clause; whether a showing of state intent to cause the discriminatory impact has been made; and whether the impact (de facto) discrimination is a direct result of a related *de jure* discrimination.

390. 96 S. Ct. 2040 (1976).

391. See note 304 *supra* & text accompanying notes 301-09 *supra*. 
Also of interest in Feinerman was the court's apparent acceptance of the state's assertion that "the Armed Forces are open to all women" and its consequent failure to give any weight to prior de jure discrimination in the armed forces. Finally, assuming *arguendo* that plaintiffs had made out a case of impact discrimination, the court resolved that the test of mere rationality was the appropriate standard of review. In view of its appraisal of the practices of the armed services, this determination was correct.

The most carefully mounted and documented case to date, *Anthony v. Massachusetts*, was successful in its challenge to the Massachusetts absolute veterans' preference. The three-judge court split, two-to-one, in its decision to invalidate the preference. The rather lengthy opinion records the ruminations of a liberal court searching for a theory that would disallow a seemingly socially outrageous result.

While legislative declassification of most of the plaintiffs' jobs made the veterans' preference inapplicable and mooted their cases, the demonstration of the impact of the absolute preference on these relatively desirable job classifications seems to have had a dramatic effect upon the court.

Plaintiff Anthony is an attorney who was a provisional appointee to a state counsel position. When a state-wide exam was announced, she was required to take it for permanent appointment to the position of Counsel I, in which category nineteen jobs were available. She received a grade of 94, which tied her with several others for the highest score. She was, however, ultimately ranked 77th on the list, behind 76 veterans, all of whom were men and 74 of whom had lower scores on the unassembled exam. She was joined by plaintiff Noonan who had also received a grade of 94 and who at the time of the exam, although having been hired to perform all the duties of counsel in the

---

393. Id. at 261.
395. District Judge Tauro authored the opinion in which Circuit Judge Campbell joined. District Judge Murray concurred in finding *Anthony* moot and dissented on the merits in *Feeney*.
396. 415 F. Supp. at 492-95.
397. Id. at 497-98.
398. The examination was an "unassembled exam," one which does not utilize "pencil and paper" testing. Instead, evaluative criteria included educational credentials, prior work experience and professional recommendations.
State Labor Relations Commission, had instead been offered and had accepted an inferior appointment as Labor Relations Examiner in order to avoid the imminent operation of the preference in the state-wide Counsel I exam. Anthony and Noonan were joined by another similarly situated female applicant, Gittes.

Plaintiff Feeney had served the Commonwealth since 1963. She had an extensive history of unhappy experience in her efforts to rise to a position worthy of her apparently considerable abilities. She was always high on the examination list but was never certified because of the operation of the preference. The preference ultimately cost her not only her opportunity for advancement but also her opportunity for state employment because during the pendency of the suit she was laid off from the civil service job to which the preference had confined her, and she was still unemployed a year later. To demonstrate that their experience was not atypical, the plaintiffs submitted fifty other recent eligible lists, all of which showed similar losses by women of certification opportunities that they would have had but for the operation of the preference. While women had received 43 percent of all appointments made from 1963-1973, the state defendants conceded that they were generally hired as clerks and secretaries, low-status and low-pay positions for which men rarely apply. The court found that "[i]n practical application, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently forecloses, on average, 98 percent of this state's women from obtaining significant civil service appointments." 4

Plaintiffs documented the extent and pervasiveness of de jure sex discrimination in the armed forces, both in terms of initial entry and conditions of service. Although the court dwelt at length on this evidence and treated it as a highly salient feature of the operation of the preference, it did not make clear its constitutional significance. This lack of clarity is probably due to the court's (retrospectively) erroneous failure to differentiate between de jure discrimination, which is explicitly sex-based, and de facto discrimination, which merely involves the disparate impact of facially neutral criteria. The court, following

399. This discrepancy between job title and actual job duties is often challenged as a form of explicitly sex-based discrimination. For example, among persons performing the same duties, males are often classified as higher paid "administrative assistants" and women as lower paid "secretaries." Ironically, in this case under-classification was necessary to save plaintiff's job from another form of sex discrimination.

400. 415 F. Supp. at 498.
its own circuit's *NAACP v. Beecher*,\textsuperscript{401} merged the two forms of discrimination and applied a fairly rigorous standard of review, even though it neither concluded that the "one-two punch" rendered the preference de jure sex discrimination nor made a finding that there had been any legislative intent to exclude women from civil service positions.\textsuperscript{402}

If the court believed it was dealing with a simple impact case, its standard of review was too rigorous.\textsuperscript{403} There is, however, ample language indicating that the court believed that in operation the preference more closely resembled a sex-based than a facially neutral criterion:

Theoretically, women are not barred from qualifying as preferred veterans. Yet, the formula's impact, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women.\textsuperscript{404}

If the court did in fact conclude that the criterion was sex-based, then it applied an appropriate standard of review.\textsuperscript{405}

The court made short shrift of the rationale that the preference is job related, that is, that military service is a job qualification. It noted that "[o]n the contrary, it suspends the application of . . . job-related criteria and substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently."\textsuperscript{406} More problematic were the reward and readjustment rationales. With respect to both, the court inquired whether there were alternative or less onerous means\textsuperscript{407} of rewarding veterans and providing readjustment assistance. With respect to the first goal, it is clear that there are many more direct and effective means of rewarding citizens for military service. Regarding readjustment assistance, the court found the lifetime preference durationally overbroad and

\textsuperscript{401} 504 F.2d 1017 (1st Cir. 1974), \textit{cert. denied}, 421 U.S. 910 (1975).
\textsuperscript{402} The court explicitly found the contrary. 415 F. Supp. at 495.
\textsuperscript{403} \textit{See} text accompanying notes 155-246 \textit{supra}.
\textsuperscript{404} 415 F. Supp. at 495.
\textsuperscript{405} \textit{See} text accompanying notes 247-97 \textit{supra}.
\textsuperscript{406} 415 F. Supp. at 497.
\textsuperscript{407} While this query is generally considered the third part of the "strict scrutiny" test, the Supreme Court has, on occasion, utilized it as part of the lesser "strict rationality" test, effectively using the inquiry to determine whether there is a constitutionally adequate nexus between the legislature's goal and its means. \textit{See} note 114 \textit{supra} \& text accompanying notes 371-76 \textit{supra}.
thus excessively onerous. It suggested that a time limit and diminu-
tion of the extent of the preference might render it constitutional.408

While a time limit would obviate the problem of overinclusiveness
with respect to the goal of readjustment assistance, it is not clear that
a five- or ten-point preference would be any more acceptable than an
absolute preference. As the dissent pointed out, application of a five-
point preference would have disqualified Ms. Feeney, the only plaintiff
whose case was not rendered moot, as surely as the absolute prefer-
ence.409 Even if a reduction in the amount of the preference would
effect a corresponding diminution of the veterans' preference's overall
impact on women's public job opportunities, the amount of the pre-
ference ought not to have any constitutional import if some substantial
negative impact remains. Assuming arguendo that the readjustment
rationale would support a short-term preference for returning veterans,
the fact that a five-point preference might be "less onerous" for women
is not constitutionally significant because a reduced preference would
also be less effective in accomplishing the legislative goal of easing
readjustment to civilian life. The degree of onerousness becomes a
consideration only when the state goal could be accomplished equally
well by a short-term preference. To say, without reference to legisla-
tive purpose, that a point system would be "less onerous" than an
absolute preference is not a constitutionally adequate reason for re-
jecting the latter while approving the former.

This shortcoming of the court's analysis does not, however, detract
from the correctness of its decision. The only legislative purpose that
could not be achieved by alternative means was readjustment assis-

408. 415 F. Supp. at 499.
On August 23, 1976, Francis X. Bellotti, the Massachusetts Attorney General,
filed an appeal in the Supreme Court. Massachusetts v. Feeney, 45 U.S.L.W. 3163
(U.S.) (No. 76-265). The Attorney General represented in his jurisdictional statement
that the appeal was filed on behalf of the Massachusetts Personnel Administrator and
Civil Service Commission, the state officers against whom the trial court judgment was
entered. The Administrator and the Commission subsequently advised the Supreme
Court that the appeal was without their authorization and against their wishes. In
addition, the Governor of Massachusetts requested the Attorney General not to appeal
the district court judgment. The Supreme Court, on its own motion, certified to the
Supreme Judicial Court of Massachusetts the question of whether Massachusetts law
allows the Attorney General to prosecute the appeal without the consent and against
the will of the state officers against whom the judgment was entered. Massachusetts v.
Feeney, 45 U.S.L.W. 3343 (U.S. Nov. 8, 1976).

409. 415 F. Supp. at 507 n.14. In combination with a time limitation, however, the
impact on women might be much less severe. In a conversation with this author, plaintiff
Gittes reported that many of the veterans on the Counsel I list were World War II
veterans.
tance, and that goal was too narrow to support a lifetime preference. The court's gratuitous reference to an alternative point system does, however, raise the question of how a court ought to deal with a carefully tailored provision that serves the goal of readjustment both as narrowly and as effectively as possible. Since such a provision ought to satisfy the "no alternative or less onerous means" test, a court would have to decide whether the relationship between the preference and federal de jure discrimination is such as effectively to render the preference a form of de jure discrimination, and, if so, whether it is appropriate to characterize de jure discrimination against women as "suspect" for equal protection purposes. If a court so concludes, it would then be appropriate for it to evaluate the legislative goal in terms of the "compelling social necessity" test discussed earlier in this article.⁴¹⁰

Even though the invalidated Massachusetts provision was atypical, insofar as it provided an absolute rather than a point preference, Anthony v. Massachusetts is not limited to absolute preferences, because what the court found fatal was the preference's durational aspect. Like the Massachusetts preference, virtually all state and federal preferences⁴¹¹ last for the life of the veteran. If readjustment assistance is the only state goal capable of supporting the preference in view of its sexually discriminatory effect, then all veterans' preferences are equally vulnerable to the argument that they are durationally overbroad.

X. Conclusion

The veterans' preference in civil service employment survived its litigious beginning to become a generally accepted and little discussed fact of American life. Recent statutory and constitutional developments make it appropriate to reconsider the preference from a new perspective. In the terminology of fair employment practice law, the preference is a sexually discriminatory job requirement because the characteristic of being a veteran appears frequently and almost exclusively in the male population. This sexually discriminatory impact seems particularly objectionable in view of its relation back to explicitly sex-based discrimination against women by the armed forces and the

⁴¹⁰ See text accompanying notes 316-54 supra.
⁴¹¹ See notes 4-5 supra. Some preferences may, however, be claimed only once during the veteran's lifetime. See, e.g., N.Y. Civ. Serv. Law § 85(4) (McKinney 1973).
patent lack of relationship between military service and civil service job qualification.

Of the two modes of curtailing or eliminating the preference, legislation and litigation, this paper has focused on the latter because veterans form a very powerful lobby. But the equal protection argument, as this article indicates, is not a simple one. Constitutional curtailment or invalidation of a state preference requires favorable resolution of a series of as yet unresolved issues. Restriction or elimination of such preferences would, however, seem consistent with the premise underlying the major sex discrimination cases of this decade: gender-based legal classifications may not operate to curtail women's opportunities for full participation in economic, social and political life.

412. While a hypothetical legislature considering, for the first time, the desirability of an employment preference for veterans might reject such a proposal because it would undercut other legislative efforts to ensure women equal public job opportunities, including equal pay and fair employment practices acts, it seems unrealistic to expect legislatures to repeal existing preferences and thereby incur the wrath of politically active veterans groups, particularly when, as here, there is no fiscal savings incentive. As discussed in text accompanying notes 40-41 supra, the preference is highly economical: it imposes no direct or measurable costs on the public treasury.

