Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem

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Introduction

Personnel Administrator of Massachusetts v. Feeney (1979) was the first sex discrimination case under the equal protection clause to turn squarely on the issue of the discriminatory impact of a facially neutral statute.[1] There, the U.S. Supreme Court considered a challenge to Massachusetts' absolute veterans' preference for state civil service positions. Previously, the Court had held that, absent the use of an explicit racial category, discriminatory purpose or intent must be proved in race discrimination claims under the equal protection clause.[2] Further, discriminatory impact alone was not sufficient to invoke heightened scrutiny, the stricter constitutional test that a facially neutral classification can invoke. However, the Court said that discriminatory impact can be an important element in proving discriminatory intent.[3] Justice Stevens, concurring in *Washington v. Davis*, had suggested that the tort rule which presumes a person to intend the natural, probable and foreseeable consequences of his or her actions is relevant to the

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1. 442 U.S. 256 (1979) [hereinafter cited as *Feeney*]. Geduldig v. Aiello, 417 U.S. 484 (1974) had raised the issue of whether the failure of a state disability insurance scheme to include disability resulting from pregnancy violated the equal protection clause. The Court held that the distinction between pregnant and non-pregnant persons is not a sex-based classification, since the class of non-pregnant persons includes some women as well as all men. Since this means that the distinction is not a *facially* gender-based distinction, the Court should have gone on to consider the issue of the provision's discriminatory impact on women. However, it did not do so.

2. Washington v. Davis, 426 U.S. 229 (1976) [hereinafter cited as *Davis*]; Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) [hereinafter cited as *Arlington Heights*].

3. *Davis*, 426 U.S. at 242; *Arlington Heights*, 429 U.S. at 266.

determination of discriminatory intent under the equal protection clause.[4]

In addition to confronting the intent question, *Feeney* presented the opportunity for elucidation of the Court's "intermediate" standard of review for gender based distinctions[5] in the context of an ostensibly "neutral" statute. Also, because the case turned on the challenged statute's extreme and foreseeable impact on women's employment opportunities in the state's civil service, *Feeney* raised the issue of whether Justice Stevens' suggestion would prevail: whether the foreseeability of a statute's discriminatory impact is sufficient to prove discriminatory purpose, especially when alternative measures were available.

The Court rejected the argument that a discriminatory purpose was established by the foreseeability of the statute's extreme disproportionate impact on women, holding that discriminatory intent must be proven *in addition to* discriminatory impact, although proof of discriminatory impact might be one factor from which discriminatory purpose may be inferred.[6]

Part I of this article analyzes *Feeney* and criticizes the Court's rule on philosophical grounds. It is suggested that in its articulation of the *Arlington Heights* test, the *Feeney* Court regresses from a Wittgensteinian to a Cartesian conception of the relation between mental and physical events. In so doing, it adopts a philosophically outdated and inadequate view of the nature of human action and mental phenomena. Part II assesses the significance of *Feeney* in light of both the recent history of the Court's "motive" test and later developments in the Court's use of this test. It is argued that, as a result of *Feeney*, the discriminatory intent standard has been rendered virtually useless as a test of race and gender discrimination. Finally, the article examines the appropriateness of an "intent" requirement in equal protection cases.

I. The *Feeney* Decision

A. Internal Analysis

1. The Case Below

In *Feeney*, plaintiff challenged on equal protection grounds[7] a

4. *Davis*, 426 U.S. at 253.

5. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976).

6. *Feeney*, 442 U.S. at 274.

7. The suit was filed under the equal protection clause of the Constitution rather than under Title VII of the Civil Rights Act because Title VII contains an exemption for veterans' preference statutes. 42 U.S.C. § 2000e-11 (1976).

Massachusetts statute providing for an absolute lifetime preference for veterans, their surviving spouses and their parents for all jobs in the state's classified civil service.[8] Applicants were competitively scored on a test and an "eligibles" list was drawn up of those who had passed.[9] Disabled veterans, able-bodied veterans, and surviving spouses and parents of veterans killed in action were ranked on three separate lists, in order of their scores.[10] The names on each of these three lists were ranked above all non-veterans.[11] When a vacancy occurred, a list of "certified eligibles" was drawn up consisting of the top several scores of the overall ranking.[12] One of these individuals, at the appointing authority's discretion, would then be chosen for the job.[13] An eligible non-veteran could never rank ahead of a veteran, no matter how much higher his or her test score was.[14] The preference could be exercised an unlimited number of times during a veteran's lifetime.[15]

The statute's effect was that, during the period 1963-1973, fifty-four percent of the men appointed to civil service jobs had veteran's status, while only 1.8% of the women appointed were veterans.[16] While forty-three percent of those appointed were women, a large percentage of the women appointed served in lower grade, lower paying positions for which males had traditionally not applied.[17] In addition, some females obtained their positions through a practice, since discontinued, of requesting only females for certain jobs.[18]

The district court noted that, while the statute's purposes were to encourage service in the armed forces, reward those whose lives had been disrupted by military service, and provide assistance during the transition from military to civilian life,[19] its negative impact on women was the result of a number of federal statutes and regulations limiting the opportunities for women to serve in the armed forces. Between 1948 and 1967, armed forces positions for women were limited to two percent of total personnel.[20] At the time of the trial, the Army still maintained a two percent limit.[21] Between the end of World War I and 1942, only nurses

8. *Feeney*, 442 U.S. at 259.
9. *Id.* at 263.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 263-64.
14. *Id.* at 263.
15. *Id.* at 262.
16. *Id.* at 270.
17. *Id.*
18. Anthony v. Commonwealth, 415 F. Supp. 485, 488 (D. Mass. 1976) [hereinafter cited as *Anthony*].
19. *Id.* at 496.
20. *Id.* at 489.
21. *Id.*

were allowed to enlist.[22] In addition, until recently the enlistment criteria for women were more stringent than those for men with respect to age, parental consent, and mental and physical aptitude test scores.[23] Women were also required to undergo more extensive application and screening procedures, including requirements for personal references and attractive appearance.[24] Additionally, married women and women with minor children were prohibited from enlisting.[25]

The district court concluded that the "practical consequence of the operation of these federal military prescriptions in combination with the veterans' preference formula is inescapable. . . . few, if any, women will ever achieve a top position on a civil service eligibility list, for other than positions traditionally held by women."[26]

Plaintiffs were three attorneys who had unsuccessfully sought permanent civil service positions and Helen Feeney, a non-veteran who had scored highly on the tests for several administrative positions but had not been certified for the positions because of the preference.[27] Carol Anthony's experience was typical of the three attorney plaintiffs: Anthony was initially hired as a temporary attorney.[28] When she took the examination for the corresponding permanent position, she received (in a tie with one other applicant) the highest score of any applicant.[29] On the eligibles list, however, Anthony ranked fifty-seventh, behind fifty-four male veterans with scores lower than hers.[30] Later, twenty more male veterans were put on the eligibles list ahead of her, nineteen of whom had scores lower than Anthony's.[31]

Helen Feeney received the second highest score on the exam for Assistant Secretary of the Board of Dental Examiners in 1971, but was ranked sixth behind five male veterans, four of whom had scores lower than her score.[32] She was not certified and a male veteran with a lower score got the position.[33] In 1973, Feeney scored third on the exam for Head Administrative Assistant at Solomon Mental Health Center, but was ranked fourteenth behind twelve male veterans, eleven of whom had lower scores.[34] She was not certified for the position.[35] In 1974, Feeney

22. *Id.*
23. *Id.* at 489-90.
24. *Id.* at 490.
25. *Id.*
26. *Id.*
27. *Id.* at 490-92.
28. *Id.* at 490.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 492.
33. *Id.*
34. *Id.*
35. *Id.*

scored seventeenth on an exam for Administrative Assistant positions but was ranked seventieth, behind sixty-four veterans, sixty-three of whom were male and fifty of whom had scores lower than hers.[36]

The district court rendered its first decision in 1976.[37] Because plaintiffs had sought an injunction against continued enforcement of the statute, the case was heard by a three judge court.[38] The district court held that the claims of the three attorney-plaintiffs were moot because the Massachusetts legislature in 1975 had removed all appointments for state and municipal legal positions from the provisions of the state civil service law.[39]

In a 2-1 decision based on the statute's extremely burdensome *impact* on women applicants, the district court found for Helen Feeney.[40] The court found it significant that the statute absolutely and permanently prevented ninety-eight percent of the state's women from obtaining significant civil service positions due to circumstances beyond their control and unrelated to the objective assessment of job qualification.[41] The court relied on the First Circuit's rule in *Boston Chapter, NAACP v. Beecher*[42] and *Castro v. Beecher*,[43] that under the equal protection clause and Title VII of the Civil Rights Act, if a job selection procedure has a racially disproportionate impact, the burden shifts to the employer to show that the means are substantially related to job performance. Under such heightened scrutiny of the closeness of the "fit" between means and ends, the availability of alternative means of rewarding veterans which would not have such an absolute and permanent impact on women applicants made the state's chosen means constitutionally impermissible.[44] Such "less drastic" alternatives include a point preference or a time-limited preference.[45]

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36. *Id.*

37. *Id.* at 485.

38. 28 U.S.C. § § 2281, 2282, *repealed by* 90 Stat. 1119 (1976). Appeal of the district court's ruling was therefore directly to the Supreme Court. 28 U.S.C. § 1253 (1976). A temporary restraining order had been issued prohibiting defendants from making or preparing to make recommendations for the positions sought by plaintiffs, pending the outcome of the litigation. *Anthony*, 415 F.Supp. at 487-88.

39. *Anthony*, 415 F.Supp. at 495. While the court did not give the reason for this legislative change, it is reasonable to assume that it was related to the *Anthony* litigation.

40. *Id.* at 499.

41. *Id.* at 496.

42. 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

43. 459 F.2d 725 (1st Cir. 1972) [hereinafter cited as *Castro*]. These cases involved actions under the equal protection clause because Title VII had been extended to cover public employees only in 1972. In NAACP v. Beecher, the U.S. Attorney General had filed a later action under Title VII. 504 F.2d at 1019.

44. *Anthony*, 415 F.Supp. at 499.

45. *Id.* Justice Murray, dissenting, would not have applied heightened scrutiny because

On appeal,[46] the U.S. Supreme Court reversed and remanded the case to the district court for further consideration in light of its decision in *Davis*.[47] In promulgating its rule that proof of discriminatory impact alone is not sufficient to establish an equal protection violation because discriminatory *purpose* or *intent* is required, the *Davis* Court had specifically disapproved a number of circuit court cases holding that the disproportionate racial impact of a statute or official practice was sufficient to prove race discrimination violative of the equal protection clause without regard to discriminatory purpose.[48] Among these was *Castro*, a case on which *Anthony* had relied.[49]

On remand, the district court reaffirmed,[50] concluding that the discrimination affected by the veterans' preference was *intentional*,[51] under *Davis* and *Arlington Heights*.[52] Judge Tauro's opinion focused on *Davis*'s suggestions that evidence of disproportionate impact is highly relevant to the inference of discriminatory intent.[53]

He also pointed to Justice Stevens' concurring statement in *Davis* that

> 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

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the statute was neutral on its face, setting up the classes of "veterans" and "non-veterans," where the latter class contained men as well as women. It was therefore "an even less compelling claim for sex discrimination than *Geduldig v. Aiello* . . . where only women were in the group burdened by the classification" (of pregnant and non-pregnant persons). *Id.* at 504. Under the "rational basis" test, the statute would survive, since it has a worthy purpose which it substantially serves. *Id.* at 507.

46. Following the district court's decision in *Anthony*, the Massachusetts Civil Service Commission and the state personnel administrator, the defendants in the case, asked the attorney general not to appeal. Their request was joined by the governor. However, both houses of the legislature passed resolutions urging appeal to the U.S. Supreme Court. The attorney general then filed a notice of appeal with the Supreme Court, whereupon the commission and the personnel administrator asked the Supreme Court to dismiss the appeal because it was taken without their authorization and contrary to their request. The Supreme Court certified the procedural question to the Massachusetts Supreme Court, which held that the attorney general's action was consistent with his authority under state law. Feeney v. Commonwealth, 373 Mass. 359, 336 N.E.2d 1262 (1977).

47. 434 U.S. 884 (1977).

48. *Davis*, 426 U.S. at 244-45.

49. *Id.* at 244 n. 12. The laundry list of disapproved cases also included Chance v. Board of Examiners, 458 F.2d 1167 (2nd Cir. 1972) in which the Second Circuit had adopted the same Title VII rule as did *Castro*.

50. Feeney v. Commonwealth, 451 F.Supp. 143 (D. Mass. 1978).

51. *Id.* at 149-50.

52. 429 U.S. 252 (1977). In *Arlington Heights*, the Court reaffirmed and elaborated the standard of *Davis*.

53. 451 F.Supp. at 146.

> presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation.[54]

Judge Tauro's opinion distinguished between the statute's *motive*—to reward military service—and its *intent*.[55] The means by which the veterans' preference statute sought to achieve its motive of rewarding veterans and the inevitability, foreseeability, and severity of its consequences for women demonstrate that the statute's *intent* was to benefit veterans at the expense of women.[56] Judge Tauro argued that the Massachusetts legislature either knew, or should have known, of regulations and policies limiting women's opportunities for military service on the basis of criteria not relevant to women's fitness for civilian service.[57] He reasoned that the 1971 repeal of an exemption for certain stereotypical "female jobs" showed that the legislature was aware of the statute's discriminatory impact.[58] The existence of less drastic alternative methods for aiding veterans[59] and the absence of any attempt to mitigate the effects of the statute on women through affirmative action recruitment programs, buttressed Judge Tauro's finding that the state had intentionally sacrificed women's career opportunities.[60] Finally, since it is not necessary, according to *Arlington Heights*, to prove that the discriminatory purpose was the sole or dominant purpose of the challenged scheme,[61] Judge Tauro concluded that the *Davis-Arlington Heights* test was satisfied.[62]

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54. *Davis*, 426 U.S. at 253.

55. 451 F.Supp. at 150.

56. *Id.* at 146.

57. *Id.* at 148.

58. *Id.* at 148 n. 9. Judge Tauro brushed aside the dissent's contention that the "natural and foreseeable consequences" test of intent was rejected by the Supreme Court when it remanded U.S. v. Texas Education Agency, 532 F.2d 380 (5th Cir. 1976) for reconsideration in the light of *Davis* and *Arlington Heights*. *Id.* at 147 n. 7. Justice Powell's concurring opinion suggested that the Fifth Circuit may have "imput[ed] to school officials a segregative intent far more pervasive than the evidence justified," Austin Independent School District v. U.S., 429 U.S. 990, 991 (1976), citing the court of appeals' statement that school officials "may not constitutionally use a neighborhood assignment policy that creates segregated schools in a district with ethnically segregated residential patterns" because "[a] segregated school system is the foreseeable and inevitable result of such an assignment policy." *Id.* at 991-92. Judge Tauro, however, refused to presume that the Supreme Court used a remand order "to abrogate the basic principle that a person is deemed to intend the natural, probable and foreseeable consequences of his actions." 451 F.Supp. at 147 n. 7.

59. 451 F.Supp. at 150.

60. Nor had there been any recent increase, as in *Davis*, in the percentage of women appointed to civil service positions. *Id.* at 149.

61. *Arlington Heights*, 429 U.S. at 265.

62. 451 F.Supp. at 150.

Judge Campbell, concurring, distinguished between the statute's *goals* and its *intent*.[63] The statute's goal was to aid veterans, but its intent includes its inevitable consequences. While apparently a neutral measure with merely incidental discriminatory impact, the inevitability and the absoluteness of the statute's consequences belied that appearance. Since ninety-eight percent of its preferred class was male, the statute's effect was the same as if it were based on sex.[64] When the discriminatory impact of a statute is that certain, it cannot meaningfully be described as unintended.[65] Judge Campbell linked the means by which an intended goal is effectuated with the intent of the legislature. Society may not aid veterans at the cost of abolishing equal employment opportunities for women where alternative methods are available[66] which would not force one group to pay a disproportionate share of the cost. Examples of such alternatives are tax supported contributions for veterans or a point preference system.[67]

Judge Murray, dissenting, argued that the statute did not treat similarly situated men and women differently because it disadvantaged a large percentage of men as well as women.[68] Judge Murray rejected the majority's tests for inferring intent from impact.[69]

For Judge Murray, intent means "motive" or "motivation" in the sense of what "prompted passage of the law."[70] Foreseeability and the legislature's actual awareness of the disproportionate impact are not enough to prove intent under the *Davis* standard. Thus, for purposes of the equal protection clause, inevitable consequences can be considered unintended if they did not *prompt* the law's passage. Since plaintiff failed to show that the veterans' preference statute would not have been enacted but for its discriminatory effect on women, no showing of discriminatory intent had been made.[71] Thus, the majority's version of the facts did not conflict with Judge Murray's finding that the legislature perceived the statute's impact on women as "extremely regrettable but unavoidable."[72] For Judge Murray, "motive" means the statute's desired result which caused the legislature's action; while this result may entail discriminatory effects, it is only the desired result, not the totality of the statute's effects,

63. *Id.* at 151.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 152.
69. *Id.*
70. *Id.* at 156.
71. *Id.*
72. *Id.* at 156 n. 9.

which must pass constitutional muster.[73]

Judge Murray argued that the tort law presumption that a person intends the natural foreseeable consequences of her actions does not apply to scrutiny of state legislative action by the federal courts.[74] Principles of federalism require that states be permitted to experiment with different solutions to social and economic problems without federal interference; discriminatory motive should not inferred lightly in such contexts.[75] He concluded that unlawful intent may be inferred from discriminatory impact only if the discriminatory impact, however inevitable, constitutes a clear pattern unexplainable on non-discriminatory grounds.[76]

According to Judge Murray, this test is not met in *Feeney*. Even accepting plaintiff's argument that military service is not related to job performance (an argument which Judge Murray rejects), the preference serves other legitimate goals besides that of obtaining qualified state employees.[77] There is no reason to believe that the legislature "departed from usual considerations in enacting the preference,"[78] since there was little absolute difference between the scores of those certified with the veterans' preference and the scores that would have resulted without the

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73. Judge Murray cited Justice Stewart's concurring opinion in United Jewish Organizations v. Carey, 430 U.S. 144 (1977) [hereinafter cited as *Carey*], in support of this definition of "motive." 451 F.Supp. at 153 n. 3. In *Carey*, the Supreme Court rejected a constitutional challenge to a race-conscious New York redistricting statute alleged to contravene § 5 of the Voting Rights Act. 42 U.S.C. § 1973c (1976). In purposely creating black majorities of a certain percentage in certain voting districts in Brooklyn, the statute split the vote of the Hasidic Jews in the Williamsburgh area into two senate and two assembly districts. 430 U.S. at 152. Concurring in the Court's rejection of the challenge, Justice Stewart joined by Justice Powell applied the *Davis* and *Arlington Heights* test. *Id.* at 179. They argued that the redistricting statute was not passed with the purpose of minimizing the voting strength of a minority or of the white voters in the county, and pointed out that the *awareness* of race on the part of the legislature when it drew up the statute did not equal discriminatory intent. *Id.* at 180.

74. 451 F.Supp. at 155.

75. *Id.* Judge Murray cited Paul Brest's article, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 129-30, in support of this point. This point is also made by Grace Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 Buffalo L. Rev. 1, 37 (1977) and was noted in *Feeney*, 442 U.S. at 279 n. 25.

76. As examples of such a "clear pattern," Judge Murray cited Yick Wo v. Hopkins, 118 U.S. 356 (1886); and Gomillion v. Lightfoot, 364 U.S. 339 (1960) (invalidating a state act which changed the boundaries of Tuskegee, Alabama from a square shape to a twenty-eight sided figure, eliminating nearly all black voters from the city).

77. 451 F.Supp. at 154.

78. *Id.* at 155-56. Judge Murray here cites Brest, *supra* note 75, at 121-22. Professor Brest explained one form of inference of discriminatory motive: when the decisionmaker failed to consider such factors as the costs of a proposal, its conduciveness to the ends

preference.[79] Thus, there was no reason to believe that the veterans' preference operated to lower the quality of the employee pool.

To Judge Tauro's and Judge Campbell's emphasis on the availability of less restrictive alternatives, Judge Murray responded that modifying the preference would also reduce its effectiveness.[80] Thus, the preference's absoluteness does not demonstrate discriminatory intent, but rather that proper motives underlay the statute.[81]

Finally, Judge Murray noted that three veterans' preference statutes had been upheld against an equal protection challenge after *Davis*.[82] While all three courts distinguished *Anthony* as involving a stronger discriminatory impact on women than the statutes at issue, one court noted that the impact approach used in *Anthony* had been rejected in *Davis*.[83] And in all three cases the courts found no intent to harm women.[84]

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sought, or the availability of less costly alternatives to the community as a whole or to a particular segment of the community. In such cases the decision does not appear rational or even marginally meritorious in its own right. *Gomillion* is again the paradigm. There is reason to believe that the veterans' preference would *fail* Brest's test, since alternatives less costly to the female segment of the community are available and the legislature does not seem to have considered them.

79. 451 F.Supp. at 155 n. 8. The test scores cited support Judge Murray's point for only *one* of the three positions applied for by Feeney.

80. *Id.* at 156.

81. *Id.*

82. Bannerman v. Department of Youth Authority, 436 F.Supp. 1273 (N.D. Cal. 1977) [hereinafter cited as *Bannerman*]; Branch v. Du Bois, 418 F.Supp. 1128 (N.D. Ill. 1976) [hereinafter cited as *Branch*]; and Ballou v. State Dept. of Civil Service, 148 N.J. Super. 112, 372 A. 2d 333 (1977), *aff'd*, 75 N.J. 365, 382 A.2d 1118 (1978) [hereinafter cited as *Ballou*].

83. *Bannerman*, 436 F.Supp. at 1280.

84. *Branch* and *Bannerman* involved equal protection challenges to veterans' preference provisions which awarded additional points to veterans' scores on interviews or exams. *Bannerman*, 436 F.Supp. at 1275; *Branch*, 418 F.Supp. at 1130. Both cases distinguished *Anthony* in that they did not involve an absolute statutory preference. 436 F.Supp. at 1281, 418 F.Supp. at 1132. In *Ballou*, New Jersey's veterans' preference system was challenged. 148 N.J. Super. at 119, 372 A.2d at 335-36. The facts were striking: plaintiff scored 99.999, the highest score among applicants for the position of Coordinator of Federal and Social Programs in the Division of Consumer Affairs, a position which she had held on a temporary basis for three years. The next highest score was 82.500. Since the recipient of that score was a veteran, his appointment was mandatory. Plaintiff had developed and directed the Consumer Affairs Social Assistance Program from its inception. In order to ensure continuity she was appointed "Confidential Agent" at her previous salary. Many of the duties of the permanent position were then assigned to her rather than to the veteran who took her old position. *Id.* at 115-16, 372 A.2d at 334. The court of appeals initially remanded the case to the state Civil Service Commission for a plenary hearing giving "careful examination" to the "detailed facts and circumstances" concerning the manner in which the statutory preference had operated and its effects on civil service appointment. *Id.* at 116, 372 A.2d at 335. The Commission found that the absolute preference system, by

2. The Supreme Court Decision

a. Majority Opinion

On appeal, the Supreme Court reversed the district court's holding and upheld the constitutionality of the Massachusetts veterans' preference statute. Justice Stewart's majority opinion extended the *Davis-Arlington Heights* rule to claims of gender-based discrimination.[85] The Court held that a facially neutral law which adversely and disproportionately affects women is unconstitutional under the equal protection clause only if that impact can be traced to a discriminatory *purpose*.[86] Further, the Court will apply the heightened scrutiny of its "substantial relationship" test, a test the Court has found appropriate for non-neutral, gender-based classifications, only if a discriminatory purpose is shown.[87]

According to Justice Stewart, any challenge of a facially gender-neutral statute on grounds of disproportionate adverse impact entails a two-step inquiry. First, the Court must determine that the statutory classification is really neutral, and not overtly or covertly based on gender. Next, if the statute is neutral, the Court must determine whether the adverse effect "reflects invidious gender-based discrimination;" that is, whether it necessarily implies discriminatory purpose or motivation.[88]

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which any veteran who passes the exam is "floated to the top of the list," discriminates excessively in basing treatment on factors other than merit, and "has had a distorting, depressing and adverse effect" on civil service appointments and on the merit system of appointments to classified positions. *Id.* Nevertheless, the court then distinguished *Anthony* on the grounds that *Ballou* had not shown " 'near blanket permanent exclusion of all women from a major sector of employment' " and because the Civil Service Commission had not found "sufficient evidence to prove that women are discriminated against by the veterans' preference to any substantially greater degree than are all non-veterans." *Id.* at 123-24, 372 A.2d at 339. Therefore plaintiff's rights to relief rested on her membership in the class of "non-veterans" and not in the class of "women," and only the "rational basis" test applied. In addition, the appellate court applied the *Davis* rule and held that disproportionate impact was not sufficient to invoke a heightened level of review where there was no claim of discriminatory purpose. *Id.* at 125-26, 372 A.2d at 339. The New Jersey Supreme Court affirmed, pointing to the U.S. Supreme Court's remand of *Anthony* in light of *Davis* as indicating that the appellate court had anticipated the correct legal standard. 75 N.J. 365, 372; 382 A.2d 1118, 1121 (1978).

85. *Davis* and *Arlington Heights* both involved claims of racial discrimination.

86. *Feeney*, 442 U.S. at 274.

87. *Id.* at 272-73.

88. *Id.* at 274. The first step in the inquiry presumably determines whether the ostensibly neutral classification is a *pretext* for invidious gender based discrimination; the second step determines whether the *purpose* of the classification is invidious discrimination. Justice Stevens, concurring, questioned whether there is any difference between these two inquiries. *Id.* at 281. Justice Stevens was correct in raising this question. If the statutory classification *appears* neutral but is really a pretext for invidious discrimination, then what

Justice Stewart agreed with Judge Murray's dissenting opinion in rejecting the district court's "foreseeable consequences" test of discriminatory intent.[89] Discriminatory purpose implies more than intent as *volition* or intent as awareness of consequences. "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[90] That is, the discriminatory effect must have been "a collateral goal"[91]—one of the *reasons for* the action. In this context, Justice Stewart maintained that proof of discriminatory intent "must necessarily usually rely on objective factors, several of which were outlined in *Arlington Heights v. Metropolitan Housing Dev. Corp.* . . . What a legislature . . . is 'up to' may be plain from the results its actions achieve. . . . "[92] It is clear, however, that these "objective factors" are of concern only as *signs* or *symptoms* of the purpose or desired end. They are not the purpose itself, nor are they in any sense *constitutive* of the purpose.

Thus, in determining whether the state acted because of the discriminatory consequences, disproportionate impact provides an important starting point. A strong inference can be drawn from disproportionate impact, namely, that the statute's results were desired. "But in this inquiry . . . an inference is a working tool, not a synonym for proof;" that inference "fails to ripen into proof" if the impact is an unavoidable consequence of a legislative policy always deemed legitimate, and if all other evidence shows that the statute's discriminatory impact was not its purpose.[93]

The Massachusetts veterans' preference statute, to the *Feeney* Court, presents such a case. The statute itself is facially neutral; it defines "veteran" in gender neutral language. Since the class of "non-veterans" contains a large percentage of men, the statute's operation cannot be explained on grounds of gender-based discrimination. Therefore, unlike

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has happened is that a facially neutral classification has been promulgated with a covert discriminatory purpose. The Court's language as it began to apply the test shows that the two inquiries cannot be separated. Having established that the distinction between veterans and non-veterans is not a pretext for gender discrimination, the Court went on to make the following statement: "If the impact of this statute could not be plausibly explained on a neutral ground, impact itself would signal that the real classification made by the law was in fact not neutral." *Id.* at 275. Determining non-neutrality was supposed to be the *first* step of the inquiry. However, determining whether the impact of a statute has a non-neutral explanation is the test for invidious *purpose*—the purported *second* step.

89. Not surprisingly, Justice Stewart cited his concurrence in *Carey*, on which Judge Murray had based his dissent. *See supra* note 73.

90. *Feeney*, 442 U.S. at 279.

91. *Id.*

92. *Id.* at 279 n. 24.

93. *Id.* at 279 n. 25.

Yick Wo v. Hopkins,[94] the veterans' preference was not enacted as a pretext for gender-based discrimination. Instead, explanation of the statute's impact lay in its stated purposes. The distinction underlying the statute was not *really* a distinction between men and women, but between veterans and non-veterans.[95]

The Court acknowledged that military enlistment policies "may well have" discriminated on the basis of sex, citing *Frontiero v. Richardson*[96] and *Schlesinger v. Ballard*.[97] The significance of this fact, however, was brushed aside with the statement that "the history of discrimination against women in the military is not on trial in this case."[98] The Court restricted the scope of historical and social inquiry in determining legislative intent. The statute was thus circumscribed, the Court dismissing as irrelevant to the issue of discriminatory intent factors making up the context in which it was passed and has operated, focusing only on its expressed legislative history. An examination of that expressed history revealed that the statute was not enacted and re-enacted for the purpose of keeping women in stereotyped, pre-defined civil service jobs; it was always extended to "any person" who was a veteran.[99]

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94. 118 U.S. 356 (1886).

95. *Feeney*, 442 U.S. at 275-76. Although this argument sounds reasonable, the same argument was made in Geduldig v. Aiello, 417 U.S. 484 (1974), *see supra* note 1, where the disadvantaged class was of necessity *exclusively* female. To buttress this argument the Court stressed the district court's initial finding, reaffirmed on remand, that the statute served legitimate and worthy purposes, and that the absolute preference was not established for the purpose of discriminating against women. 442 U.S. at 276-77. In addition, the Court follows Judge Murray in turning around the district court majority's arguments that the availability of a less burdensome form of preference showed that the state intentionally discriminated against women in bringing about the more burdensome impact. According to Justice Stewart, "[d]iscriminatory intent is simply not amenable to calibration. It either is a factor that has influenced the legislative choice or it is not." *Id.* at 277. Thus plaintiff's admission that a more limited preference could be sustained defeats her claim regarding the state's intentional incorporation of the historical gender-based military personnel practices into state employment policies. *Id.* at 276. If the state so acted *intentionally*, the degree of preference would make no consitutional difference. Intent is here conceived of as the kind of state of affairs which does not admit of degrees. It is "all or nothing"—either the legislature had it or it did not. One example of such a state of affairs is an *event*, which either *occurs* or *does not*.

96. 411 U.S. 677 (1973) (the armed forces required female members to show that their spouses were dependent to obtain living allowances and benefits, but spouses of male members of the armed forces were assumed to be dependent).

97. 419 U.S. 498 (1975) (differential treatment of male and female officers under the "up or out" policy was designed to compensate for limitations on professional opportunities for women in armed forces).

98. *Feeney*, 442 U.S. at 278.

99. The Court pointed out that shortly after the Women's Army Auxiliary Corps (WAAC) was founded in 1942, the preference was extended to members of the WAAC, as well as to women serving in official military units by means of a broad definition of "veteran." *Id.* at 279 n. 26, 268 n. 17.

The Court dismissed plaintiff's argument that a former statutory exemption for "women's requisitions" demonstrated discriminatory intent on the part of the state legislature with a reference to the "consistent statutory recognition of the contribution of women to this Nation's military efforts."[100]

Justice Stevens, joined by Justice White, concurred on the ground that, whether the claim of discrimination is phrased in terms of "pretext" or in terms of "discriminatory intent," the large number of males disadvantaged by the statute was sufficient to disprove invidious gender-based discrimination.[101] He did not comment on the majority's rejection of the "foreseeable consequences" test of intent advanced in his own concurring opinion in *Davis*.[102]

b. Dissent

Justice Marshall, joined by Justice Brennan, rejected the Court's test for discriminatory intent. Without rejecting the Court's requirement of proof of a causal relationship between the injury and discriminatory intent or purpose, Justice Marshall proposed different rules of inference *to* discriminatory purpose from discriminatory impact.[103]

Justice Marshall began by reminding the majority that the illegitimate purpose need not be the *sole* or dominant purpose of the challenged statute, but rather need only have played "an appreciable role in shaping the legislative enactment."[104] Thus, the fact that a legislature intended to benefit one group does not foreclose equal protection analysis; it is enought that the legislature *also* intended to disadvantage another group.

Justice Marshall stressed the need for *objective* indicia of intent.[105] Factors mentioned in the Court's earlier decisions include the degree, inevitability and foreseeability of the disproportionate impact, and the availability of reasonable alternatives.[106] Where the foreseeably dis-

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100. *Id.* at 280 n. 27. The Court also brushed aside the district court majority's argument that the statute was overtly non-neutral since it established the job preference on the basis of a non-job-related characteristic. This claim was disposed of with a reiteration of the district court's finding that the legislative choice was "legitimate" because its goals were "worthy." *Id.* at 276. *See also* Blumberg, *supra* note 75, at 60.

101. *Feeney*, 442 U.S. at 281.

102. *Davis*, 426 U.S. at 252-53.

103. *Feeney*, 442 U.S. at 283.

104. *Id.* at 282. Justice Marshall here cited the rule of *Arlington Heights*, 429 U.S. at 265-66, and Professor Ely's article, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205 (1970).

105. Justice Marshall cited United States v. O'Brien, 391 U.S. 367 (1968) [hereinafter cited as *O'Brien*] and Palmer v. Thompson, 403 U.S. 217 (1971) [hereinafter cited as *Palmer*], as preceding Supreme Court decisions emphasizing the difficulty of ascertaining subjective intent. *Feeney*, 442 U.S. at 283.

106. For cases applying these factors, see Goss v. Board of Education, 373 U.S. 683

proportionate impact is *as great* as in the present case and is the result of a "long history of policies severely limiting women's participation in the military," Marshall argued, the burden should rest on the state to show that sex-based considerations played no part in the choice of the challenged legislative scheme.[107] Shifting the burden of proof is particularly appropriate here because the degree, inevitability and foreseeability of the disproportionate impact demonstrates that the statute is neutral in form only, and not in application, because it reserves a major sector of public employment " 'to an already established class which, as a matter of historical fact, is ninety-eight percent male.' "[108]

The state, in his assessment, did not meet this burden of demonstrating that sex-based considerations did not determine its choice of legislative scheme.[109] The legislative history suggests that the legislature was aware of the statute's adverse impact on women but, except for traditionally "female" jobs, declined to mitigate it. The exemption for jobs " 'especially calling for women' " was an essential part of the veterans' preference scheme and operated in conjunction with the absolute preference to create a gender-based, civil service hierarchy in which women workers were relegated to traditionally "female" occupations.[110] The preference scheme thus both reflects and perpetuates archaic assumptions about women's roles, assumptions which the Court has held invalid in previous sex discrimination decisions.[111]

The severe impact of the statute on women's public employment opportunities, particularly in light of the less discriminatory alternatives available, implies that the statute is not gender neutral.[112] Justice Marshall noted that only four states other than Massachusetts have an absolute veterans' preference. The other states, along with the federal government, grant only point or tie-breaking preferences which do not foreclose opportunities for women.[113] Justice Marshall concluded that the majority "displays a singularly myopic view of the facts established below" in maintaining that " 'nothing in the record' evinces a 'collateral

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(1963); Monroe v. Board of Commissioners, 391 U.S. 450 (1968); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

107. *Feeney*, 442 U.S. at 283-84.

108. *Id.* at 284, citing Judge Campbell's concurrence in *Feeney v. Commonwealth*, 451 F.Supp. at 150.

109. *Feeney*, 442 U.S. at 284.

110. *Id.* at 284-85.

111. *Id.* at 285. Justice Marshall cited as examples Orr v. Orr, 440 U.S. 268 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

112. *Feeney*, 442 U.S. at 285.

113. *Id.* at 282 n. 2.

goal' " of keeping women in stereotyped roles in the state civil service.[114] Nor is the percentage of males disadvantaged by the statute dispositive as to its neutrality: while forty-seven percent of men over eighteen are veterans, only .8% of women in that age group are veterans.[115]

Justice Marshall argued that, where a statutory scheme visits a substantial hardship on a class long subject to discrimination, it "cannot be sustained unless 'carefully tuned to alternative considerations.' "[116] Marshall's requirements that statutory classifications be narrowly tailored to fit the statute's objectives and that no less discriminatory alternative be available suggest a heightened level of scrutiny.[117] The veterans' preference statute fails to meet this heightened standard of review. The means adopted by the legislature are not substantially related to the statute's stated objectives of assisting veterans in readjusting to civilian life, encouraging enlistment, and rewarding military service.[118]

Justice Marshall argued that, with respect to the first two stated objectives, the statute is overbroad. It allows veterans to exercise the preference repeatedly and without regard to their date of discharge, thus overreaching the goal of assisting veterans' readjustment.[119] The preference is also overbroad with respect to the goal of encouraging military service; it benefits draftees as well as enlistees and was generally enacted and re-enacted retroactively to benefit those who had already served. Further, the state presented no proof that the possibility of obtaining civil service jobs actually encourages enlistment.[120]

The third statutory purpose—rewarding veterans—could be accomplished by alternatives with fewer discriminatory consequences. Many of these alternatives—educational subsidies, tax abatements and special programs for needy veterans, for example—would involve costs borne by the general public rather than by one discrete group long subject to discrimination.[121] Thus, as with the first two objectives, the third state interest "does not 'adequately justify the salient features' " of the preference system.[122]

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114. *Id.* at 285-86.

115. *Id.* at 286 n. 3.

116. *Id.* at 287.

117. G. Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20-24 (1972).

118. *Feeney*, 442 U.S. at 286.

119. *Id.* at 286-87.

120. *Id.* at 287.

121. *Id.* at 287-88.

122. *Id.* at 287, citing Craig v. Boren, 429 U.S. 190, 202-03 (1976).

c. Conclusion

The Supreme Court majority in *Feeney* adopted Judge Murray's restrictive view of how discriminatory intent may be inferred from disproportionate impact. This view holds that proof that the discriminatory impact was a *desired end* which *motivated* the legislative or official action is required. The dissent adopted the views of Judges Tauro and Campbell, holding that the severity, inevitability and foreseeability of the discriminatory impact, together with the history of past official discrimination against women and the availability of less discriminatory means of achieving the statute's objectives, demonstrate discriminatory intent.

The majority and dissenting viewpoints diverge on how broadly the context of the challenged actions should be examined as evidence for discriminatory intent and the relations between "objective" factors and intent. As to the former divergence of opinion, the district court majority and the Supreme Court dissenters consider governmental restrictions on women in the military as evidence that the preference statute's impact on women was intentional. The Supreme Court majority and the district court dissent, on the other hand, maintain that the history of gender-based discrimination in the military is "not on trial" in *Feeney*.[123] Similarly, for the district court majority and Supreme Court dissenters, the availability of less burdensome alternatives is relevant to proof of intent, while for the Supreme Court majority and Judge Murray it is not. The latter scrutinize state action to determine intent without regard to less burdensome alternatives; the consequences of the action itself, no matter how severe, inevitable, foreseeable or foreseen, are not relevant to the intent determination once it is established that the legislature was aiming at something else when it enacted the statute.

The fundamental issue here is how the challenged state action is to be characterized: what is it that we say the state did? Do the means chosen by the state to achieve its goals and the inevitable consequences of those means enter into the characterization of the challenged action? Does the history of state action with respect to the affected group make a difference as to how we characterize what was done? While the Supreme Court dissenters defined the challenged state action broadly, the majority viewed it through a narrower frame, one which obliterates much of the surrounding context.

The second divergence of opinion involves the relation between "objective" factors shaping the context in which the challenged state action occurs and the "motive," "purpose," or "intent" underlying that action. The Supreme Court majority viewed intent as an event separate from, and not necessarily to be *implied* from, "objective" factors such as the statute's impact on a particular group or the history of state action with

123. *Feeney*, 442 U.S. at 278.

respect to that group. In the majority's view, such factors are at most "signs" or "symptoms" of discriminatory intent. A separate, additional inference is required to establish the existence and nature of the intent *itself.* No connection necessarily exists between the symptoms and the true subjective event—the intent: the intent might *not* be discrminatory no matter how strong the evidence of discrimination provided by the symptoms.

Justice Marshall, on the other hand, saw a necessary relation between objective factors, such as impact and historical context, and legislative intent. In Marshall's view, objective factors *constitute* intent. They are demonstrative of legislative intent such that, if enough objective evidence is available, it does not make sense to say that state action is nevertheless taken without discriminatory purpose or motivation.[124]

While the majority opinions in *Davis* and *Arlington Heights* seem to reflect Justice Marshall's approach to the relation between objective evidence and intent, *Feeney* represents a move by the Court toward viewing intent as a separate, subjective event *not* logically related to objective factors.

B. Internal Critique of Feeney

1. The Nature of "Mental" Phenomena: Regression to Cartesianism

What kind of thing are we looking for when we look for evidence of "intent," "purpose" or "motive"?[125] The Court's question in *Feeney*—namely, what kind of evidence is relevant to the truth of statements about "purpose," "intent" and "motive" and in what way is that evidence relevant?—implies an answer to the former question. In selecting "intent" as the test for an equal protection violation in cases where the alleged discrimination is not official, the Supreme Court has become mired in an ancient and extremely troublesome philosophical question: the relation between mind and body, between mental and physical phenomena.

In the fourth century B.C., Plato propounded the view of the mind or soul as an entity separate from the body which it inhabits and capable of existence independent of the body. Plato felt that the highest kind of knowledge is acquired when the mind operates independently of the body. In Plato's view, learning consists in the recollection of knowledge acquired in a previous state in which the mind existed separately from the body.[126] This doctrine formed the basis for the Christian conception of the

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124. L. Wittgenstein, The Philosophical Investigations, ## 50-51, 53-54, 66-73 (1966).

125. For a discussion of the differences in denotation of these terms see text accompanying notes 154-76.

126. Plato, Republic, Books V-VII; Phaedo 62E-84D.

immortality of the soul.[127]

While Plato's disciple, Aristotle, rejected this mind-body dualism, believing that mind or form exists only in and in relation to body or matter,[128] it was revived in the seventeenth century by Descartes, the founder of modern philosophy. Descartes embarked on a broad program of rebuilding all human knowledge on the model of modern science, starting with a foundation of absolutely certain knowledge and progressing by a series of logically necessary steps. To establish the "foundation" or indubitable first premise, Descartes invented the method of "Cartesian doubt": nothing will be accepted as known if there are any grounds on which it conceivably can be doubted.[129]

Descartes found that he could doubt the existence of the entire physical world including his own body, mathematical truths, God, and other persons. He could not doubt, however, that his mind was engaged in doubting during the inquiry. Thus, according to Descartes, the existence of his own thoughts and experiences was indubitable or absolutely certain. The "foundation stone" thus became the existence of mental phenomena meaning events such as thoughts and feelings and a mental "substance" or entity which has or is the subject of those thoughts and feelings.[130]

Our certainty that our own thoughts and feelings exist does not imply, however, that we can be certain that any *physical* event or entity exists. Since the existence of body thus is not implied by the existence of mind, mind and body are two logically separate substances having nothing in common with one another. Further, the best knowledge we can have is knowledge of our subjective, inner mental states. The knowledge which we can have of the external world is far less immediate and more tenuous than our knowledge of our own thoughts and feelings.[131]

This "mind-body dualism," which shaped philosophical and social scientific thought from the time of Descartes until the mid-twentieth century, leaves the epistemologist and the social scientist with three

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127. *See, e.g.*, Romans 8:5-13.

128. Aristotle, Metaphysics, Books IX, XII; De Anima. There is one exception to this principle: the "prime mover," or pure thought. While this object is the highest object in the universe, and moves all things by being the object of desire, without matter it can have no definite nature or content. It thus does not play an important role in Aristotle's account of individual living things such as man.

129. Descartes, Meditations (1644), and Discourse on Method (1637).

130. *Id.*

131. Indeed, Descartes was able to prove the existence of physical substance only by first using additional unproven premises to prove the existence of God as a benevolent, all powerful being, and then arguing that a benevolent God would not deceive us by giving us a strong natural inclination to believe that body exists as the cause of our sensations! Descartes, Meditations, Meditation VI (1644).

insoluble problems:

First, the problem of solipsism: how is it possible to infer the existence of objective events in the external world from the existence of the thinker's subjective mental states?[132]

Second, the problem of "other minds": an individual in principle cannot know the thoughts and feelings of another person in the way she knows her own. We have immediate, indubitable knowledge of our own inner experiences, but our knowledge of other persons' inner experiences must be inferred from their behavior and their bodies. Even assuming we can know of the existence of another person's body, however, we must make a further, highly questionable inference from such knowledge to assumptions about the subjective thoughts and feelings accompanying her physical existence. This inference necessarily must proceed by analogy from our knowledge of our own thoughts and feelings and from our observations of the events in our own bodies accompanying those thoughts and feelings.[133] But that analogy is extremely weak; I can never experience another person's mental states. The inference is thus unlike the "standard" type of empirical inference in which, for example, an electrical worker who on many occasions has opened up metal boxes of a certain size with certain exterior markings and found them to contain a certain type of fuse has good grounds for assuming that another metal box, identical to those she has opened in the past will have a fuse like those in the boxes she has previously opened.[134]

Third, the problem of mind-body interaction: since mind and body have nothing in common and since the existence of a mental event does not imply the existence of any physical events, how is it possible for them causally to interact? A related problem involves the distinction between reasons and causes: events in the physical world, including events in our bodies and some of our behavior, are caused. That is, external factors operating on the physical object *make* the event happen; its occurrence could be predicted from an accurate knowledge of these causal factors. Our reasons, purposes, and goals, however, do not seem to *cause* our behavior in the same way as do drugs, alcohol, blind emotions, hormones or enzymes. We hold individuals accountable for their actions just insofar as they act "purposively": *i.e.*, in pursuit of goals and purposes which they have adopted for "reasons." We tend to excuse behavior that is

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132. It is *not* possible. *See, e.g.*, H.H. Price, Perception (1932); A.J. Ayer, The Foundations of Empirical Knowledge (1940); C.O. Broad, The Mind and Its Place in Nature, Chapter IV (1960); B. Russell, Human Knowledge: Its Scope and Limits, Part Three (1948); C.I. Lewis, An Analysis of Knowledge and Valuation, Chapters II-IX (1946).

133. *See, e.g.*, A.J. Ayer, *One's Knowledge of Other Minds*, in Philosophical Essays (1954).

134. L. Wittgenstein, Philosophical Investigations, ## 293-304 (1953).

attributable to causes which are not the product of purposive reasoning, particularly where those causes are external to the individual. The Supreme Court's use of "motivation" to mean "cause," as well as meaning "motive" and "purpose," obscures this important distinction between "reasons" and "causes."[135]

Until recently, the only way out of these three philosophical dilemmas which result from Cartesian dualism was to *reduce* one of the two kinds of events—mental and physical—to the other. The version of reductionism most appropriate for social scientists is "physicalism" or "behaviorism" which reduces mental events to their physical concomitants.[136] When a mental event such as anger, for example, is redefined in terms of physiological reactions and observable behavior, the problem of justifying an inference from physical events to an "inner, mental" event of which the external observer can have no direct experience disappears. Similarly, there is no longer any problem explaining how mind and body can interact, since mind is now the same kind of thing as body.

Such reductionist views, however, are implausible. Our thoughts and feelings obviously are *not* identical to the behavior and physiological changes which accompany them. For example, a person may talk and act just like a Black Panther but, if he is really an FBI spy, he knows that he really abhors Black Panther political principles no matter how enthusiastically he pretends to espouse them, even if his behavior is accompanied by physiological changes exactly like those accompanying a Panther's emotions.

Recent philosophy has attempted to rethink the concept of mental phenomena as necessarily connected to or inseparable from physical phenomena without *identifying* or *reducing* the mental to the physical or vice versa. In the Anglo-American "analytic" tradition, this work derives

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135. *See, e.g., Arlington Heights*, 429 U.S. at 265-66. This confusion did not originate with the Supreme Court, however. The concept of "motivation" is a touchstone of psychological theory. "Motivation: An intervening variable which is used to account for factors within the organism which arouse, maintain, and channel behavior toward a goal." Chaplin, Dictionary of Psychology, 325-26 (1975). "Motivation" in psychology is a broad term encompassing whatever causes our actions, whether it is bodily tensions such as physical desires or our conscious reasons.

136. *See, e.g.*, D. Armstrong, A Materialist Theory of the Mind (1968); J. O'Connor, Modern Materialism (1969); R. Carnap, The Unity of Science (1934). Another version of reductionism, following Descartes' view of the primacy of our knowledge of our own sense impressions, reduces the physical to the mental. *See, e.g.*, G. Berkeley, Three Dialogues Between Hylas and Philonous (1713); A. Ayer, The Foundations of Empirical Knowledge (1940). This view, however, while popular with the "radical empiricists" of the early twentieth century such as Bertrand Russell (*see, e.g.*, B. Russell, Our Knowledge of the External World, Chapters III, IV (1915), is less attractive to social scientists as a theoretical foundation.

from the later writings of Ludwig Wittgenstein, especially the *Philosophical Investigations*.[137] Wittgenstein analyzed first person psychological statements, not as referring to isolated mental events, but rather as both manifesting and serving to establish an essential connection between the mental event and the context in which that mental event occurs. For example, Wittgenstein considered statements such as "My head hurts," and "I understand," said by a student of mathematics. He rejected the suggestion that "headache" and "understanding" refer to private mental states which exist independently of the inter-subjective social context in which the language is used. Instead, "understanding" is essentially connected with the speaker's ability to fill in the next term of mathematical series according to the correct rule or ability to prove the theorem,[138] while the "verbal expression of pain replaces crying and does not describe it."[139] Wittgenstein did not deny the existence of subjective thoughts and feelings; instead, his point was that subjective thoughts and feelings exist only in a certain inter-subjective socio-physical context which is constitutive of their identity. This context includes the experiencer's body—regarded as not just an inert physical object, but as the basis for the things we do—and other people with bodies like ours in relation to whom we do things according to social conventions or rules. Language, for Wittgenstein, involves such a set of social rules; he called the total context in which people interact through language a "form of life."[140]

A recent law review note[141] advocated a Wittgensteinian interpretation of the "segregative intent" requirement in school segregation cases. Such an interpretation would provide an intermediate standard between "subjective intent," which refers to the subjective desires of individual government officials or legislators for segregation, and "objective intent,"

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137. L. Wittgenstein, Philosophical Investigations (1953). In the Continental tradition this theme is prominent in the phenomenology of Edmund Husserl and Maurice Merleau-Ponty. *See* Husserl, Ideas: General Introduction to Pure Phenomenology, ##84-87, 90 (1931); Cartesian Meditations, ## 11, 14, 15 (1960); Merleau-Ponty, The Phenomenology of Perception, 98-345 (1962), Weinzweig, *Phenomenology and Ordinary Language Philosophy*, 8 Metaphilosophy 116, 119-21, 135-37 (1977). In Husserl's conception of consciousness as "intentional" each mental event is by its very nature directed to a transcendent object, given on the background of the spatio-temporal-social context in which we live: the world. In this way the mental and the external world are inextricably linked. For Merleau-Ponty, who adopts Husserl's theory of consciousness as intentional, consciousness itself is embodied: the body is the instrument through which consciousness directs itself to the world.

138. Wittgenstein, *supra* note 134, at ##143-54, 185-214, 578-80.

139. *Id.* at ## 244, 256, 271, 288.

140. *See, e.g., id.* at ##23-24, 572-73, 581-84.

141. Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto De Jure Distinction*, 86 Yale L.J. 317 (1976).

which defines intent as the foreseeable consequences of an action. This intermediate standard would scrutinize the motives of institutions rather than those of individual lawmakers or officials. It would include an analysis of patterns of behavior by the institution to determine whether the challenged action can be justified in terms of the institution's usual objectives and considerations. Segregative intent would mean "acting as if":

> If it can be demonstrated that the educational objectives of the school board could have been better accomplished through alternatives with less foreseeable segregative impact, the school board will be held to have acted "as if" segregation had been one of its purposes, and the consequent racial imbalance will be held to have resulted from "segregative intent."[142]

Rather than trying to ascertain the events taking place inside the minds of school administrators and school board members, courts would evaluate the "effect of and justifications for school board actions."[143] Since motivation is essentially connected to the actor's behavior in a given context, it is not necessary or relevant to attempt to proceed from evidence of behavior to proof of intent as a private inner event in the mind of the actor of which the behavior is only an external sign. This approach is consistent with the rules articulated by the Supreme Court in *Arlington Heights* and with its reasonings in cases such as *White v. Regester*[144].

In *Feeney*, however, the Court retreated to the Cartesian conception of "motive," "purpose," and "intent" with its attendant difficulties of proof and application.[145] While the rules for inferring discriminatory purpose or intent articulated in *Davis* and *Arlington Heights* seemed to suggest a Wittgensteinian approach according to which the relevant mental state is essentially connected to objective factors in the social and historical context of the action, *Feeney* holds that proof of discriminatory impact, no matter how inevitable and immediate, is at best only a first step in proving discriminatory motive. A plaintiff must also

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142. *Id.* at 338.

143. *Id.* at 342-43.

144. 412 U.S. 755 (1973) [hereinafter cited as *White*]. *See also* G. Mac Callum, *Legislative Intent*, 75 Yale L.J. 754, 784-85 (1966). Mac Callum analyzes legislative intent as a social institution in which legislators are aware that the courts will interpret their actions according to certain "canons" of legislative intent. They can thus act with reference to those canons in order to influence by their behavior "what the intentions of the legislature can reasonably be said to be." *Id.* at 785.

145. These difficulties, however, may in fact constitute the *Court's* "motive" for its choice of rule: if a rule is adopted under which it is very difficult to prove discriminatory motive and thus invoke heightened scrutiny, the equal protection clause will not often be used to invalidate state action. *See*, Trimble v. Gordon, 430 U.S. 762, 782-84 (1977) (Rehnquist, J., dissenting) [hereinafter cited as *Trimble*].

prove the existence of something else: the mental occurrence (the "desire") which *caused* the action.

A Wittgensteinian approach is not only far more satisfactory philosophically in making possible an adequate account of the nature of mental phenomena; it also provides a test which is more workable politically. Under the Wittgensteinian approach proof of objective factors can settle the issue of intent. Under the *Feeney*-Cartesian conception, on the other hand, it is apparently impossible to prove discriminatory intent since it is in principle impossible to know what is going on in another person's mind. Adoption of the *Feeney* standard as a necessary condition for finding an equal protection violation is therefore highly unlikely to result in findings of discrimination.

2. The Doctrine of the "Double Effect"

Feeney's "desired result"/"but for cause" test of intent revives the discredited "doctrine of the double effect" central to the Catholic Church's traditional abortion doctrine. According to the doctrine of the double effect, it may be morally permissible to bring about an effect which is "foreseen but in no way desired" where it would not be morally permissible to bring about the same effect as the aimed-at result of the action. The philosopher Philippa Foot explains the doctrine as follows:

> The doctrine of the double effect is based on a distinction between what a man foresees as a result of his voluntary action, and what, in the strict sense, he intends. He intends in the strictest sense both those things that he aims at as ends and those that he aims at as means to his ends. . . . By contrast a man is said not strictly, or directly, to intend the foreseen consequences of his voluntary actions where these are neither the end at which he is aiming nor the means to this end.[146]

Thus, for example, a hysterectomy which has the inevitable result of killing the fetus is permissible because the death of the fetus is neither the end at which one is aiming nor the means to that end. A craniotomy performed during childbirth is *not* permissible, however, because it aims at the death of the child in order to save the mother.

The philosopher Kant drew a similar distinction in explaining why it is wrong to lie even where telling the truth will inevitably result in one's neighbor's death at the hands of a murderer:

> 'The French philosopher' [Kant's opponent] confounds the action by which one does harm to another by telling the truth, the admission of which he cannot avoid, with the action by which he

146. P. Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, Moral Problems in Medicine, 267-68 (1976).

> does him *wrong*. It was merely an *accident* that the truth of the statement did harm to the inhabitant of the house; it was not a free deed. . . . Every man has . . . the strictest duty to truthfulness in statements which he cannot avoid, whether they do harm to himself or others. He, himself, properly speaking, does not *do* harm to him who suffers thereby, but this harm is *caused* by accident.[147]

For Kant, as for Foot, one is not to blame for the death of his neighbor under the circumstances. The death is the foreseen but not aimed-at consequence of an action done with a proper motive: telling the truth.

Our moral intuitions—against which any ethical theory must ulitmately be tested[148]—shout out that something is wrong with a theory which produces such conclusions. In the situations described by Foot and Kant, an otherwise morally worthy action has horrendous unavoidable consequences. Since these consequences are both inevitable and foreseen, to choose the action for the sake of its worthy objective is also to choose the morally undesirable consequences. One does not escape responsibility for having brought about those consequences by claiming that, while they were foreseen, they were not aimed at.[149] This standard would make the moral permissibility of an action depend on a mental sleight of hand. One must ascertain which of the consequences of the action the actor was focusing on in her mind as the "aimed-at" goal when she chose or did the action. The actor's "aim," however, is a Cartesian "inner mental event" of which we can have no evidence, since its existence is not determined by what the actor did or by the context in which she did it. Thus, while it may be true that intentionally inflicted harm is morally more culpable, and therefore more appropriate for state or court interference, than is unintentionally inflicted harm, it is

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147. Kant, *Critique of Practical Essays and Other Works on the Theory of Ethics*, in Moral Rules and Particular Circumstances 34 (1970).

148. Plato, Apology, Euthyphro. Crito (1948); Republic, Book 1 (1945).

149. What *might* excuse the action is the claim that *there was no alternative* under the circumstances: that the duty to avoid the undesirable consequences was outweighed by a *greater* moral obligation which could not have been fulfilled in any other way. This was not the situation in *Feeney*, however, where there *were* alternative ways of assisting veterans which would not have had the same consequences for women's employment opportunities as the challenged statute. For the same reason, the commentators' argument, see *supra* note 75, that there are good reasons not to apply the tort law principle that an individual is deemed to intend the natural and foreseeable consequences of her action to state legislative action concerning complex social and economic problems, because the state needs to be free to experiment with solutions to such problems, does not apply to the *Feeney* situation. *Feeney* was not the kind of circumstance in which the state needs room to experiment freely with new solutions to social problems whose consequences may not be foreseeable, for the consequences of the preference were both inevitable and in fact foreseen. Furthermore, there are widely used alternative programs which would have contributed to the same goals without the undesirable consequences.

implausible to make the criterion for intentional harm consist solely in the actor's mental state while performing the action, in abstraction from the nature of the action and the context in which it occurs.

3. An Atomistic Concept of Action

The Supreme Court's decision in *Feeney* turns on its characterization of the challenged state action. In buttressing its characterization of what the state did, the Court severely circumscribes the degree to which social and historical factors determine that characterization. However, human actions consist of more than mere physical movements made with one's body. If I raise my arm up and down while standing on the deck of a ship, what I am doing in moving my arm in this way—"signalling"—must be included in the description of my action.[150] This description will be expressed in terms of my immediate purposes, goals or intentions: I am signalling an "S.O.S." to a helicopter flying overhead in order to get help. My purposes or goals themselves presuppose the existence of a larger social context which gives meaning to my action: in order for my arm waving to constitute "signalling an S.O.S.," it is necessary both that the conventions of the semaphore code have been established and that the possibility exist that someone else whom I have reason to believe is familiar with those conventions will see me. Otherwise my arm waving will not be "signalling." Thus, to describe my action in terms of its purpose or intent necessarily implies a larger social context.[151]

The social context which must be included in the characterization of the action will necessarily include the immediate, inevitable and foreseeable consequences of the bodily movements which make up an action in that context. Choice of action in a given situation depends upon the alternatives available. Even though none of the choices presented in a given situation may be ideal, our choice involves not only the aimed-at goal, but also its attendant inevitable and foreseeable results. Thus, it is not clear why, in Professor Foot's example, performing the craniotomy is described as killing the fetus while performing the hysterectomy is not. Both operations, undertaken to save the mother, inevitably and foreseeably result in the fetus' death. At some point, of course, the effects of the action become too remote and uncertain to be properly included in the description of what one is doing; but that is also true of one's desired goals.[152] It is the issue of *proximity*, not just whether the inevitable

150. A. Melden, Free Action, Ch. III-V (1961).

151. The Massachusetts legislature's goal of "rewarding veterans," for example, implies the existence of a system of military service in which some individuals have served in the past, a social or political need to continue this system because of the possibility of future wars or other military confrontations, and some presumed facts about what motivates individuals to do such things as enlisting in the military.

152. *See* G. Anscombe, Intention, #23 (1950).

forseen effect is *desired* which determines whether that effect should be included in our characterization of the action.

To maintain that the actor intends the end without intending its necessary means is still less plausible than to omit the immediate consequences from the description of what she does.

In narrowing the range of factors it would look at to establish proof of motive, intent or purpose, the *Feeney* Court adopted an atomistic conception of an action. It considered actions as self-sufficient events, isolated or abstracted from the context in which they occur. This comports with the Court's view of *motive* or *purpose* as an isolated "inner" mental event essentially unconnected to the social content giving rise to the action.[153]

The *Feeney* Court thus adopted a philosophically outdated and inadequate view of both the nature of human action and the nature of mental phenomena. The Court characterized the challenged state action in isolation or abstraction from most of the context in which that action occurs: the relevant history, its immediate consequences, the alternatives available to the state, and, apparently, even the means chosen to achieve the end. Philosophically, however, the proper characterization of an action requires reference to precisely these kinds of factors, which the Court deemed irrelevant.

4. What Are "Purpose," "Intent," and "Motive"?

The writers of the various Supreme Court and district court opinions in *Feeney* drew a number of different distinctions between "motive," "purpose," and "intent." According to Judge Tauro, the *motive* of the veterans' preference statute is to reward military service, while its *intent* is to benefit veterans at the expense of women.[154] According to Judge Campbell, the statute's *goal* is to benefit veterans, whereas its inevitable impact and the availability of less burdensome alternatives demonstrate discriminatory intent.[155] For Judge Murray, intent and motive are the same. Motive is what prompted the legislature to pass the law. The legislature's awareness of the statute's inevitable consequences does not demonstrate intent.[156] Justice Stewart distinguished discriminatory purpose from intent as volition or awareness of consequences. His concept of purpose is like Judge Murray's: purpose is that which prompts passage of the law, the desired or aimed-at result.[157]

153. Justice Rehnquist's view of the legislative purpose of the statute in *Trimble*—to get the language onto the statute books—is only a mild parody of this conception of intention *and* action. 430 U.S. at 782.

154. *See* text acompanying notes 53-62.

155. *See* text acompanying notes 63-67.

156. *See* text acompanying notes 68-82.

157. *See* text acompanying notes 89-100.

Justice Marshall used "purpose," "intention" and "goal" interchangeably, but his concept of those terms corresponds to Judge Tauro's and Judge Campbell's concept of intent: severe foreseeable impact on a class long subject to discrimination where less drastic alternative means are available.[158]

In its brief before the Supreme Court, the federal government argued that, in past decisions, the Court has used "intent," "purpose," and "motive" interchangeably to mean factors that motivated or contributed to the challenged decision—"factors that motivated the persons who took the challenged action." Thus, the government argued, the district court's finding that the state did not act with the purpose of limiting women's employment opportunities meant that the disproportionate impact on women was not "intended" by the legislature.[159] An effect is intended only if it is a "desired consequence": only if the actor would mention the effect in answer to the question "Why did you do that?" Desired consequences include those measures chosen as means to an end, as well as those chosen as ultimate ends. On the other hand, foreseeable consequences, which are such that the actor would choose to do the same action even if those consequences did not occur, are not intended. They are mere side effects.

In his *Trimble* dissent, Justice Rehnquist criticized the entire enterprise of scrutinizing the relationship between legislative purpose and the means chosen to effect that purpose.[160] Justice Rehnquist criticizes the majority's reference to consideration of the law's "motivating purpose." "Purpose," according to Rehnquist, refers to the legislature's objective "to make the language contained in . . . [the statute] a part of the . . . law."[161] "Motive," on the other hand, means "what the legislature had in mind or was trying to accomplish" by enacting the law: *why* the legislature passed the law.[162] Motive is especially hard to ascertain; it involves trying to intuit the thoughts of individual legislators.[163]

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158. *See* text accompanying notes 103-122.

159. Brief for the United States as Amicus Curiae at 27, *Feeney*, 442 U.S. 256 (1979).

160. 430 U.S. at 781-84.

161. *Id.* at 782. This, of course, is positivistic nonsense, for it assumes that words exist in abstraction from their meanings and uses. The issue is why the legislature chose to put *that* language, with that particular meaning and intended result, into the Illinois Probate Code.

162. *Id.* at 783.

163. *Id.* at 782-83. If *overt* legislative motive is so hard to ascertain, Justice Rehnquist ought to have rejected the *Davis* rule altogether, since *hidden* discriminatory motive will be that much harder to determine. That he instead espoused the test is indicative of the prospects of the test ever being used by the court to find discrimination.

Legal commentators also disagree over whether these three terms should be distinguished. Mac Callum[164] would distinguish between intent and purpose: purpose is the general aim of the statute, while intent concerns either the details of the statute or the intended meaning of its language. Ely rejects a similar distinction between "motive" and "purpose."[165] Eisenberg thinks that no meaningful distinction can be drawn between "motive" and "purpose," either in terms of the immediacy of the purpose or in terms or whether the goal is "overt" or "hidden."[166]

How are we to determine what the differences are, if any, between purposes, motives, intentions, goals and related phenomena? As an alternative to inventing one's own definition, and as a propaedeutic to theory construction based on these terms, the late J.L. Austin proposed that philosophers and social theorists examine how these expressions are used in ordinary language.[167] If we find that they are not always used interchangeably, but that, for example, "motive" is sometimes used where "intent" or "purpose" are not, we will have discovered something useful about the "data" or "phenomena" to which these words relate. Such data should be borne in mind in the construction of philosophical and social theories. Austin advocated examining the grammatical constructions of the terms under investigation as well as the terms themselves. Like Wittgenstein,[168] Austin advocated looking at the contexts in which the words are used and at *how* they are used in those contexts, *i.e.*, examining the linguistic activity the speaker is performing in uttering the words in that particular context. Austin's method yields results relevant to the issues raised in *Feeney*.[169]

a. The Foreseeable Is Not "Unintentional"

If asked whether we intended to do some untoward act which we did—for example, stepping on a baby's hand—we cannot reply, "No, I didn't intend to," if we foresaw that our act would carry with it the untoward result. We can reply that our action was unintentional only if in some way we did not know what we were doing: "No, I didn't intend to

164. G. Mac Callum, *Legislative Intent*, 75 Yale L.J. 754, 758, 779 (1966).

165. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1217-21 (1970).

166. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. Rev. 36, 40, 106 n. 321 (1977).

167. *See, e.g.*, J. Austin, *A Plea for Excuses*, Philosophical Papers (1962). Austin's method is referred to as "ordinary language philosophy."

168. Wittgenstein speaks of "language games" which go to make up a "form of life." Wittgenstein, *supra* note 134, ##23-25, 43, 48-54. The job of the philosopher is to describe how words are used in the language games we play. *Id.* at ## 124, 126; "What *we* do is bring words back from their metaphysical to their everyday use." *Id.* at #122.

169. Weinzweig, On Saying 'What We Should Say When,' (1976) (unpublished manuscript).

step on the baby—I didn't see its hand there." If I fully realized what the consequences of my action would be, then I cannot say that I didn't intend those consequences or that I brought them about unintentionally. This is so even if what I was aiming at in putting my foot down on the floor was not to squash the baby's hand, but something else—to prevent myself from falling, for example.[170] This point, specifically recognized by Judge Campbell,[171] supports the view that, in its ordinary sense, we are presumed to "intend" the inevitable and foreseeable consequences of our actions.

b. "Motive"

One speaks of one's purposes, intentions, reasons and goals in a wide range of situations where it would be inappropriate to speak of one's "motives." For example, one might normally speak of one's "reason," but *not* of one's "motive," for coming to work early this morning. A "motive" is a special kind of reason or purpose to which we refer only when discussing actions which are in some way untoward or "fishy." A paradigm of the kind of action to which we assign a motive is a murder or assault. We presume that these actions are abnormal; thus they require special explanation before we can understand them.

Motive can also mean a covert or improper reason underlying an action which might have a legitimate surface reason. Thus we speak of the legislature's or city's discriminatory motive in cases like *Gomillion*[172] and *Palmer.*[173] Again, a motive inquiry is appropriate because there is something untoward about the action. The twenty-eight sided figure in *Gomillion* and the city's sudden closing of its swimming pools in *Palmer* were "fishy"; they do not represent the types of action we would normally expect a governmental entity to take.

Thus, in ordinary usage, "motive" is not interchangeable with "purpose" or "intent." But, if we are looking for *discriminatory* intent or purpose, then it *is* appropriate to speak of motive, since discrimination is not something which is openly approved or accepted. The paradigm case is one in which an ostensibly legitimate reason or purpose given for an action is merely a pretext cloaking a different, discriminatory purpose or motive.[174]

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170. This does not mean that I will necessarily describe my bringing about of the consequences as *intentional*, or that I will say "Yes I *did* intend to step on the baby"—I may say *neither*. *See* Austin, *supra* note 167, at 137-38.

171. *See* text accompanying notes 63-67.

172. 364 U.S. 339 (1960) (invalidating a state act which changed the boundaries of Tuskegee, Alabama from a square shape to a twenty-eight sided figure, eliminating nearly all black voters from the city).

173. 403 U.S. 217 (1971) (upholding a city council's action to close all city pools following a court order to desegregate the pools).

174. As many commentators have pointed out, a legislature's motive in enacting a

c. "Motivation"

The term "motivation," along with its derivatives "motivating" and "motivate," is not ordinarily used except as a spillover term from psychology. When so used, it occurs in the same type of situation as "motive": when something untoward has happened which needs explaining. Its connotation in this situation is different from that of "motive," however. "Motivation" refers more to irrational than to rational factors which cause actions. For example, we might say that G's "motive" in arranging for the execution of his arch-rival, D, is to gain complete control of the sanitation services in Chicago, but that depression "motivated" Professor X to kill himself, or that sensual gratification in setting fires "motivated" Y to set fire to the Las Vegas Hilton. "Depression" and "sensual gratification in setting fires" are not reasons for choosing to perform actions; rather, they are irrational forces which overcome us, causing us to do things we would not rationally choose to do.

d. Different Uses of "Intention"

"Intention" has a number of different constructions and uses, some of which overlap with "purposes" or "goals," and others which do not. These uses of "intention" and "intend" seem to fall into two main categories, centering around the questions of whether the actor knew what he was doing and at what the actor was aiming. Contrary to Judge Murray's position in *Feeney*, however, it is not necessary in any of these uses that what is intended be desired. One can know that a certain event will occur as a result of one's actions, or even aim at bringing about that action, without *desiring* that it occur. Thus, contrary to *Feeney*, the absence of desire that the challenged result occur does not mean that that result was intended.

e. "Purpose"

We can speak of either the "purpose" in doing a particular action or the overall purpose of a particular program or project. In the first use, one's purpose in performing a particular action or making a particular choice is like one's intention; it is the *reason* for the action. In the second usage, it is the *goal* of the program, activity, or statute. All statutes or state action must have a purpose in this second sense, and it is *this* "purpose" which the Court examines under the equal protection clause. Individual portions of the statute will also have purposes in relation to the overall purpose of the statute; these minor purposes may be less easy to ascertain

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measure is not the same as the motives of individual legislators in voting for it. If we are concerned with whether the statute has a discriminatory motive it is the former rather than the latter that we must ascertain. Mac Callum, *supra* note 164, at 756-57; Ely, *supra* note 165, at 1218.

than the statute's overall purpose.[175]

Unlike at least some motives, purposes do not *cause* our actions; a purpose is an explicitly aimed-at, rational goal which one consciously adopts. When we speak of actions being caused by motives such as jealousy, anger, or prejudice (or "motivated" by such factors), on the other hand, the model is that of an individual being *impelled* to act in a certain way by a psychological *force* which he has not adopted as a consciously aimed-at ideal or goal.[176]

f. Conclusion

While the meaning of "motive," "intention" and "purpose" overlap, these concepts should not be conflated. Not every purpose or intent is a motive: we look for a motive only where there is a reason to suspect a hidden, forbidden purpose or explanation. Intent is broader than "purpose." Intent relates both to whether one knew what she was doing *as well as* at what she was aiming.

Both connotations of "intent" are relevant to the issue of an entity's responsibility for its actions. Judges Tauro and Campbell correctly distinguished between the questions of the legislature's purpose in enacting the veterans' preference and whether the statute's discriminatory consequences were intentional. Rather than conflating discriminatory purpose with discriminatory intent, the Court must decide which of these concepts is determinative. If the Court determines that discriminatory "motive" is required, then the *Davis* rule, for example, becomes simply a pretext inquiry and foreseeable discriminatory impact is relevant only in extreme cases.[177] However, a more philosophically adequate conception of discriminatory intent would extend beyond cases in which discrimination is an explicitly "aimed-at" result. The Court needs to reexamine and to clarify the meaning it wishes to assign to "intent" in the light of the rationale behind its holding in *Davis*.

The next section considers whether the Court's present purposeful discrimination requirement is contrary to the rationale originally offered by commentators and jurists in support of an intent standard. It finds that the Court, in its most recent discrimination decisions, equivocates on the rationale, importance and application of its intent standard.

II. The Legal Significance of *Feeney*

Feeney represents a radical reversal of both the purpose and the scope of the "motive" test. The test's original purpose was inclusionary; it

175. Mac Callum, *supra* note 164, at 779.

176. This distinction is recognized by Professor Ely, even though he professes to see no distinction between motives and purposes. Ely, *supra* note 165, at 1221 & n. 60.

177. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (statute had no genuine purpose *except* to exclude blacks).

was sought to extend equal protection coverage to cases of discrimination not reachable by a "disparate impact" test. The rule's broad parameters, set forth in *Arlington Heights*, are consistent with this purpose. *Feeney* severely limits the reach of the *Arlington Heights* rule, converting the motive test into a method of excluding or rejecting discrimination claims.

A. Recent History of the Motive Test

The motive test originated in Justice White's dissent in *Palmer*,[178] where the majority upheld Jackson, Mississippi's decision to close its public swimming pools in order to avoid racially integrating them pursuant to court order.[179] The Supreme Court majority held that the city's decision did not violate the equal protection clause because its impact fell equally on blacks and whites.[180] The Court, citing its rejection of the motive test in *O'Brien*,[181] rejected plaintiffs' argument that the city's decision denied equal protection to blacks because it was motivated by a desire to avoid integration.[182] *O'Brien* set forth two problems the Court found with a motive test: the difficulties inherent in ascertaining legislative motive, and the futility of judicial invalidation of state action on motive grounds when the legislature could simply reenact the same law for a "purer" motive.[183] In *Palmer*, the majority also pointed to the difficulty of ascertaining which is the "sole" or "dominant" motive underlying state action, since different legislators presumably have different motives.[184]

In dissent, Justice White rejected the majority's view "that it is impermissible to impeach the otherwise valid act of closing municipal swimming pools by resort to evidence of invidious purpose or motive."[185] In support of his position, Justice White cited desegregation decisions and a 1970 article by Professor Ely[186] for the proposition that the reasons

178. *Palmer*, 403 U.S. at 240.

179. *Id.* at 219.

180. *Id.* at 225.

181. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383.

182. *Palmer*, 403 U.S. at 224.

183. *Id.* at 224-25, *O'Brien*, 391 U.S. at 383-84. Professor Ely pointed out that a third reason is implied, in both *Palmer* and in *O'Brien*: the *disutility* of invalidating a good law simply because of the process which produced it. This concern regarding the motive test was first raised in Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 356-61 (1949). Ely, *supra* note 165, at 1215.

184. *Palmer*, 403 U.S. at 225.

185. *Id.* at 241.

186. Ely, *supra* note 165. Professor Ely advocated the use of a motive test to trigger "rationally defensible difference" review in cases of random or discretionary state choice where review would not otherwise be available.

underlying certain official acts are highly relevant in assessing the constitutional validity of those acts.[187] Professor Ely rebutted *O'Brien*'s general rejection of motive, arguing that the validity of the ascertainability, futility and disutility objections in some contexts does not imply that these difficulties are always determinative.[188] Justice White would infer discriminatory motive by reference to a broad range of external, "objective" factors involving the historical and present context of the challenged actions.[189] These factors included the state and city's official hard line against integration, the public statements of city officials in connection with the desegregation litigation, and the timing of the decision to close the pools—immediately after black citizens demanded desegregation of public facilities in accordance with the district court's declaratory judgment.[190] In addition, the city's supposedly neutral reasons for its decision—concerns about economics and preserving peace and order—were inconsistent with its previous policies and with the actual state of affairs in the present context.[191] Justice White's approach comports with the test advocated by Professor Ely, that "[d]isproportionate racial impact is usually the best evidence that race has been employed as the criterion of selection."[192]

In 1973, Justice White authored the Court's opinion in *White*,[193] in which the Court held multi-member voting districts in Dallas and Bexar Counties, Texas violative of the equal protection rights of black and Mexican-American voters. Adopting the findings of the district court "representing . . . a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member districts in the light of past and present reality, political and otherwise," the Court held that the multi-member districts were used invidiously to cancel out or minimize the voting strength of racial groups.[194] While the Court's opinion did not distinguish between discriminatory intent and discriminatory impact, Justices White and Stewart later referred to *White* as

187. *Palmer*, 403 U.S. at 264.

188. Ely, *supra* note 165, at 1277-81.

189. *Palmer*, 403 U.S. at 247-55.

190. *Id.*

191. The city had traditionally operated the pools at a loss because of an expressed policy of keeping the fees " 'low in order to serve as many people as possible' " and there was little evidence to support the city's contention that the pools could not be operated safely on an integrated basis, since there had been no disorder or violence when the city desegregated its other recreational facilities. *Id.* at 251-52, 259-61.

192. Ely, *supra* note 165, at 1254.

193. 412 U.S. 755 (1973).

194. *Id.* at 769-70. The factors considered by the district court with regard to Bexar County included a long history of discrimination against Mexican-Americans in such areas as "education, employment, economics, health and politics," the low income, high unemployment rate and poor housing in the barrio in which most Mexican-Americans in the

turning on motive.[195] Here again Justice White would infer discriminatory intent from "objective" factors making up the context of the challenged action, including its history and other present indicia of discrimination.

In *Keyes v. School District No. 1*,[196] the Court officially reinstated discriminatory "purpose" as a necessary condition of an equal protection violation in school systems with no history of official state-imposed segregation. Justice Brennan's opinion for the majority, however, articulated broad rules regarding the finding of de jure segregation.[197]

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county lived, the existence of cultural and language barriers which made participation in community and political processes extremely difficult, and the past use of the poll tax and extremely restrictive voter registration procedures denying Mexican-Americans access to Texas political processes even longer than blacks. *Id.* at 768. This history resulted in a low voter turnout rate and an extreme paucity of Mexican-Americans elected to the state legislature. *Id.* at 768-69. In addition, the Bexar County legislative delegation had been insufficiently responsive to the needs of the Mexican-American community. Assessing the multi-member district "overlaid . . . on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county," the district court concluded that Mexican-Americans were effectively removed from the county's political processes. *Id.* at 769. Similar factors were considered by the district court with regard to the situation of blacks in Dallas County: a history of official discrimination which adversely affected the right of blacks to register, other features of the Texas electoral system which enhanced the opportunity for racial discrimination in a multi-member district, the extreme underrepresentation of blacks in the state legislature, and racism by the Democratic party committee in charge of slating candidates. *Id.* at 766-67.

195. Mobile v. Bolden, 446 U.S. 55, 69, 94-95 (1980).

196. 413 U.S. 189 (1973) [hereinafter cited as *Keyes*].

197. (1) The segregation need not be *statutory*, but can consist of such actions and policies of the school authorities as the structuring of attendance zones, the making of decisions as to the location and size of new schools, the use of mobile classrooms, and the adoption of transfer policies so as to concentrate minority students in one specific area. Assignment of faculty and staff on a racially segregated basis so that certain schools are identifiable as "black" or "Mexican-American" schools is further evidence of de jure segregation. *Id.* at 201-05.

(2) Where a present condition of segregation exists which is traceable to intentional segregation at the time of the court's decision in Brown v. Board of Education, 347 U.S. 483 (1954), that condition can be treated as *present* intentional segregation warranting judicial intervention. An independent finding of present segregative intent is not required. Thus where school officials had previously performed such actions as gerrymandering the school attendance boundaries in order to create all black schools, the mere assertion of adherence to a neighborhood school policy is not sufficient to rebut an inference of de jure segregation; such intentionally segregative actions affect the composition of the neighborhoods themselves. *Id.* at 205-13.

(3) Proof of de jure segregation in a substantial portion of the school system creates a rebuttable presumption that the entire school system is a dual system: that the existence of de facto segregation in other portions of the system "is not adventitious." *Id.* at 203, 208. Here again, intent is to be inferred from a broad range of factors in the historical and present context of the challenged institution. *Id.* at 211.

In *Davis*,[198] the Court overturned its logic in *O'Brien* and *Palmer sub silentio*, explicitly adopting a "motive" test as a necessary condition for *all* equal protection violations.[199] Justice White, writing for the majority, distinguished between the test for a violation of Title VII of the Civil Rights Act as articulated in *Griggs v. Duke Power Co.*,[200] and the test for a finding of invidious discrimination under the equal protection clause of the Constitution.[201] Whereas under the Civil Rights Act a finding of discriminatory *impact* is sufficient to shift the burden of proof to the employer to show that the challenged job selection procedure is substantially related to job performance, *Davis* held that proof of discriminatory impact alone is not even sufficient to require heightened scrutiny, much less to establish an equal protection violation. Proof of discriminatory *purpose* is required.[202]

Justice White's opinion attempted to explain away "indications to the contrary" in previous decisions, arguing that since *Palmer* turned on the absence of discriminatory motive for the pool closings, its warnings against relying on motivation were mere dicta.[203] Justice White raised two policy arguments in support of adopting motive over impact. The first argument is that an impact approach would "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black man than to the more affluent white."[204] Secondly, Justice White argued that an "impact" approach grants rights to individuals as members of groups which they do not have as individuals, since no *individual* who failed a racially neutral employment test could claim a denial of his equal protection rights, whatever his race.[205] As noted above, however, discriminatory impact *can* be an

198. *Washington v. Davis*, 426 U.S. 229 (1976).

199. *Id.* at 242.

200. 401 U.S. 424 (1971). The *Griggs* rule had been relied on by the First Circuit in *Castro*, 459 F.2d at 731 (1972).

201. *Davis*, 426 U.S. at 238-39.

202. *Id.* at 239. The majority opinion specifically disapproved a number of circuit court cases holding that substantially disproportionate racial impact is sufficient to prove racial discrimination violative of the equal protection clause, "absent some justification going substantially beyond what would be necessary to validate most other legislative classifications." *Id.* at 244-45 n. 12. Among the cases so disapproved was Metropolitan Housing Dev. Corp. v. Arlington Heights, 517 F.2d 409 (7th Cir. 1975), *cert. granted*, 423 U.S. 1030 (1975).

203. Justice White's argument rested on the fact that the *Palmer* Court accepted the city's explanation in terms of economic and police power considerations. *Id.* at 242-43.

204. *Davis*, 426 U.S. at 248. This argument is taken seriously by the commentators: Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 25 (1976); Eisenberg, *supra* note 166, at 46, 54-55.

205. *Davis*, 426 U.S. at 245-46.

important element in the proof of discriminatory intent.[206]

In his concurring opinion, Justice Stevens expressed reservations about the "motivation" requirement, noting that there is no "bright line" between impact and intent: impact—what happened—often provides the best evidence of intent.[207] Stevens' concerns echo *O'Brien* and *Palmer*: "It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the 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."[208] On the other hand, in cases of egregious disproportionate impact, such as *Gomillion* or *Yick Wo*, it does not matter whether the standard is phrased in terms of motive or effect.[209]

Arlington Heights provided the Court an opportunity to further articulate and elaborate its standards for applying the *Davis* rule and to reconsider *Davis*' less than satisfactory justification for that rule. Justice Powell, writing for the majority, justified *Davis*' motive test by the argument that the judicial deference normally accorded legislative and administrative decisions is no longer warranted once it is established that a discriminatory purpose is a motivating factor in that decision.[210]

In applying the *Davis* rule to Arlington Heights' refusal to rezone a parcel of land for a low and moderate income housing project which would be racially integrated, Justice Powell set forth broad rules for the inference from discriminatory impact to discriminatory intent. He first made clear that it is not necessary to establish that discriminatory purpose was the *sole* or *dominant* concern animating the challenged state action so long as it was "a motivating factor."[211] Justice Powell then set forth six forms of inference to discriminatory intent from the context of the challenged action, elaborating the "totality of circumstances" approach mentioned in *Davis*. In all of these "forms of inference," the impact of the official action

206. *See* text accompanying note 6.

207. *Davis*, 426 U.S. at 253-55.

208. *Id.* at 253.

209. *Id.* at 254. Justices Brennan and Marshall did not dissent from the Court's adoption of the "motive" rule nor from its finding of no discriminatory motive on the facts of the case, except to criticize the propriety of the court's disapproval of the cases cited in its note 12, *id.* at 244 n. 12, especially the disapproval of the *Arlington Heights* case, in which certiorari had already been granted, *id.* at 257 n. 1.

210. *Arlington Heights*, 429 U.S. at 265-66. In this connection, Justice Powell cited a 1971 article by Professor Brest suggesting reasons for examining motive. Brest, *supra* note 75. According to Professor Brest, the Court should inquire into the decisionmaker's motivation if a rule is neutral on its face but there is reason to believe that the decisionmaker may have given weight to an impermissible factor in promulgating it. This is because the government is constitutionally prohibited from pursuing certain objectives, and consideration of an illicit objective may determine the outcome of a legislative decision by giving improper weight to the impermissible factor. *Id.* at 114, 118-20.

211. *Arlington Heights*, 429 U.S. at 265-66.

"may provide an important starting point" for inferences of intent:[212]

(1) The effects of the governmental action may exhibit "a clear pattern, unexplainable on grounds other than race," as in *Yick Wo*[213] or *Gomillion*.[214] In these cases, impact alone is determinative.

(2) The historical background may reveal a series of official actions taken for invidious purposes.[215]

Further evidence of motive may be provided by:

(3) the specific sequence of events leading to the action;[216]

(4) departures from normal procedural sequences for making that type of decision;[217]

(5) substantial departures from the factors usually considered important for that type of decision, so that the decision appears arbitrary and unreasonable;[218] and

(6) an examination of the legislative or administrative history, which may produce statements by the decisionmakers as to their true purpose.[219]

While these six types of inquiry are proper subjects for an investigation into intent, the list is not intended to be exhaustive.[220] If

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212. *Id.* at 265-66.

213. Yick Wo v. Hopkins, 118 U.S. 256 (1886).

214. Gomillion v. Lightfoot, 365 U.S. 339 (1960).

215. *Arlington Heights*, 429 U.S. at 267. *See* Griffin v. School Board, 377 U.S. 218 (1964); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

216. *Arlington Heights*, 429 U.S. at 267. *See* Reitman v. Mulkey, 357 U.S. 369 (1967); Progress Dev. Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961); and Kennedy Park Homes Assoc. v. Lackawanna, 436 F.2d 108 (2nd Cir. 1970), in which the property sought for an integrated housing project had always been zoned for multi-family units *until* the town learned of the project, whereupon the land was rezoned for park land.

217. *Arlington Heights*, 429 U.S. at 267.

218. *Id.*

219. *Id.* at 268.

220. *Id.* The six factors are similar to those set forth by Professor Brest in his 1971 article. Brest, *supra* note 75, at 120-24. Brest listed the following factors as indicative of discriminatory intent: the preceding and concurrent events and situations; the content of the "operative rule" itself (the prescription made by the law or decision as to how people shall be treated); whether the decisionmaker considered the costs of the decision and the availability of less costly alternatives; whether the regulation is poorly or dubiously suited to its stated objective; the timing of the decision; any past history of overt discrimination along the lines of the suspected illicit motivation; whether other decisions of the same decisionmaker seem designed to reach the same illicit result; and whether the decision is a radical departure from the decisionmaker's past practice. Brest's tests of failure to consider costs and less costly alternatives and of whether the decision is ill-suited to its stated objectives are presumably what Justice Powell meant by substantial departures from the usually determinative factors for that type of decision. Brest's test of whether *other* decisions of the decisionmaker reach the same result is an addition to the *Arlington Heights* tests, however. According to Brest, even when there is reliable direct evidence of legislative intent in the form of statements of individual legislators, there is the difficulty of attributing the motives of those individual

discriminatory purpose *is* proven, the burden then shifts to defendant to establish that the same decision would have resulted even *without* the impermissible purpose.[221]

Arlington Heights set the stage for determining the *Feeney* issue of whether foreseeable discriminatory impact is sufficient to prove discriminatory intent. As explicated by the Court in *Arlington Heights*, the *Davis* rule is Wittgensteinian:[222] motive is to be inferred from an examination of a wide range of factors making up the context of the challenged action, including its impact, its history, and the agency's usual practices and criteria. The Court's statement that the six patterns of inference are not intended to be exhaustive is also Wittgensteinian, for Wittgenstein stressed that the concepts we use in our "language games" are open-ended. Significantly, the Court's "liberal" members—those justices who have been most concerned with the vindication of the rights of oppressed minorities—had up to this point raised no objection to the majority's intent standard.[223]

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legislators to the legislative body itself. Such "direct evidence" will therefore always have to be used in conjunction with the above "circumstantial" factors. *Id.* at 124.

221. Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977). Applying these criteria to the village's denial of plaintiffs' rezoning application, the Court found no discriminatory motivation. *Arlington Heights*, 429 U.S. at 270. Approval of the rezoning would have been inconsistent with the village's "buffer zone policy," since multi-family units were to serve as a buffer between single-family developments and commercial or manufacturing uses. *Id.* at 270. The Court found that the "buffer zone policy" had not been administered in a discriminatorily selective manner, and that there was nothing suspicious, either procedurally or substantively, about the sequence of events leading to the decision. *Id.* at 269. Although there had been heated discussion of the proposal at three public meetings focusing on the "social issue"—the desirability of introducing housing that would probably be racially integrated—the Court found that the statements by the plan commission and by the village board members at the meetings focused almost exclusively on the zoning issues and that the village had been consistent in its concerns for the maintenance of single-family zoning. *Id.* at 269-70.

Justices Marshall and Brennan, concurring and dissenting, did not object to the Court's adopted rules for inferring discriminatory intent. They dissented only in regard to the Court's holding, on the grounds that the case should have been remanded to the district court for a reassessment of the evidence in light of the *Davis* rule. *Id.* at 271-72. Justice White, dissenting, agreed that remand would have been appropriate rather than the Court's re-examining the evidence itself. *Id.* at 272. He also objected to the Court's "lengthy discussion of the standard for proving the racially discriminatory purpose required by *Davis*," and to its listing "various 'evidentiary sources' or 'subjects of proper inquiry' in determining whether a racially discriminatory purpose existed," as unnecessary. He would have simply accepted the district court's finding, held not clearly erroneous by the court of appeals, that the village's decision was motivated by a legitimate desire to protect property values and the integrity of its zoning plan. *Id.* at 273.

222. *See* text accompanying notes 137-43.

223. It is not clear, however, whether the *Arlington Heights* Court followed its own standard; it did not discuss the issue, apparently of concern to the Seventh Circuit, of why no blacks lived in Arlington Heights. The court of appeals had held that it was necessary to

Shortly after *Arlington Heights* was decided, the Court applied the *Davis-Arlington Heights* rule in *Castaneda v. Partida*[224] to a claim of discrimination in grand jury selection procedures in Hidalgo County, Texas. The Court majority found that a forty percent underrepresentation of Mexican-Americans on the grand jury panel, despite the fact that a "governing majority" of Mexican-Americans lived in the county, constituted an example of a "clear pattern [of discrimination], unexplainable on grounds other than race."[225] Adopting the *Davis* "totality of circumstances" rule, the Court held that disproportionate impact, *plus* the use of non-neutral selection procedures, shifted the burden of proof to defendant, which had failed to rebut plaintiff's prima facie case.[226] Justices Powell and Rehnquist and Chief Justice Burger dissented, however, on the grounds that the majority relied on disproportionate impact as proof of intent.[227] Very rarely, the dissenters argued, will proof of disproportionate impact be sufficient to prove intent: *Yick Wo* and *Gomillion* are exceptions. Instead, one must look for *other* circumstantial and direct evidence of intent, examining carefully the factors explaining the statistical disparity, to determine whether the selection procedures used are racially neutral.[228]

In an opinion which clearly articulated the issue ultimately decided in *Feeney*, the Fifth Circuit in *United States v. Texas Education Agency (Austin III)*[229] adopted Justice Stevens' "intend the natural and foreseeable consequences" standard of intent when faced with a Supreme

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examine the rezoning denial "in light of its 'historical context and ultimate effect.' " Metropolitan Housing Dev. Corp. v. Arlington Heights, 517 F.2d 409, 413 (7th Cir. 1975). This included the fact that while Northwest Cook County was expanding rapidly in employment opportunities and housing, a high degree of residential segregation remained. The village had been "exploiting the problem by allowing itself to become an almost one hundred percent white community," and it had no other plans for building low-cost housing. There were no parcels of land in the village already zoned for multiple family units which could have been used by the developer as alternative sites. *Id.* at 414.

224. 430 U.S. 482 (1977) [hereinafter cited as *Partida*].

225. *Id.* at 493.

226. *Id.* at 494-95.

227. *Id.* at 510-11.

228. *Id.* at 512. The evidence of non-neutral selection procedures relied on by the majority in *Partida* was insufficient, the dissent argued, since the judge who appointed the jury commissioners, three out of five commissioners, ten out of twenty members of the grand jury array, and five out of twelve grand jurors were Mexican-Americans. *Id.* at 514. Since Mexican-Americans also controlled the political processes in Hidalgo County, constituting a majority of elected officials and judges in the county, Chief Justice Burger and Justices Powell and Rehnquist felt it was unlikely that they would discriminate against "those who share their own identifiable attributes." *Id.* at 514-16. The case was therefore different from Alexander v. Louisiana, 405 U.S. 625 (1972), where the jury commission and the judge who appointed it were all white. *Partida*, 430 U.S. at 512.

229. 564 F.2d 162 (5th Cir. 1977).

Court remand order for reconsideration of its earlier decision in light of *Davis*.[230] In *United States v. Texas Education Agency (Austin II)*,[231] the Fifth Circuit had already reviewed, in light of *Keyes*,[232] its earlier finding[233] of an equal protection violation in a tri-race school system, affirming its original holding on the basis of its *Austin I* finding that the segregative effects of the school district's assignment policies were foreseeable.[234] In adopting this rule, Judge Wisdom, in *Austin II*, had pointed to the difficulty of obtaining "direct evidence" of school officials' intentions and the consequent need to use circumstantial evidence.[235] However, the Supreme Court vacated and remanded *Austin II* for reconsideration in light of *Davis*.[236]

On remand in *Austin III*, the Fifth Circuit reaffirmed its findings of intentional segregation of Mexican-American students in the light of *Davis* and *Arlington Heights*.[237] Judge Wisdom reaffirmed the "objective intent" standard adopted in *Austin II*.[238] Noting that *Keyes*, *Davis*, and *Arlington Heights* did not specify whether establishing an equal protection violation required proof of an "objective" or a "subjective" standard of discriminatory intent, Judge Wisdom's opinion reiterated the difficulties inherent in the use of the subjective standard as pointed out in *Austin II* and pointed to Justice Stevens' *Davis* concurrence as supporting an objective standard.[239]

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230. *Id.* at 168.

231. 532 F.2d 380 (5th Cir. 1976).

232. 413 U.S. 189 (1973).

233. United States v. Texas Educ. Agency, 467 F.2d 848 (5th Cir. 1972) [hereinafter cited as *Austin I*].

234. *Austin II*, 532 F.2d at 388-89. The *Austin II* court pointed to actions of the school board which inevitably produced or maintained segregation of Mexican-American students when alternative actions would have produced integration. Such actions included adoption of a neighborhood school policy where residential segregation existed, choice of school sites, construction and renovation of schools, drawing of attendance zones, student assignment and transfer policies, and faculty and staff assignments. *Id.* at 390-92.

235. *Id.* at 388. In this connection, Judge Wisdom cited Professor Brest's guidelines for inferring intent from circumstantial evidence. *See* discussion, *supra* note 220.

236. Austin Independent School District v. U.S., 429 U.S. 990 (1976).

237. *Austin III*, 564 F.2d at 174.

238. *Id.* at 166-70.

239. *Id.* at 167-68. Judge Wisdom's opinion retreats from the *Austin II* rule only so far as to recognize that, where there is no *other* evidence of discriminatory intent, *Davis* and *Arlington Heights* provide that a neighborhood school policy *by itself*, when motivated by racially and ethnically neutral bona fide concerns such as the desire to have the children attend the school closest to home, is not unconstitutional even though the natural and foreseeable result of the policy is de facto segregation. *Id.* at 169-70. However, Judge Wisdom would withhold the application of the "foreseeable consequences" standard only from those official acts and decisions which have a firm basis in well accepted and historically sound non-discriminatory social policy. He indicates that "as a practical matter, in school desegregation cases we can envision few official actions, other than the decision to

The Supreme Court denied certiorari to *Austin III*.[240]

B. The Significance of Feeney

The foregoing discussion enables us to appreciate *Feeney*'s significance with respect to the interpretation of the "motive" test for an equal protection violation. It is clear that in *Feeney*, the Court felt called upon to decide the issue raised in *Austin III* of whether "objective" or "subjective" intent is the appropriate standard for the *Davis-Arlington Heights* rule. As noted above,[241] the Court adopted the "subjective" model, whereby the trier of fact is required to probe the minds of the decisionmakers to ascertain what "desires," or "aims" led to the decision. External events may be evidence or signs of events in the decisionmaker's mind, but are not identified with the latter.

The Court's choice of this Cartesian "subjective" model greatly aggravates the "ascertainability" and "futility" objections to the use of "motivation" as a test of an equal protection violation.[242] According to the Wittgensteinian "objective" model, motives and intentions are essentially connected to events in the historical and present context of the action. Consequently, they are ascertainable in the same way as any other events or states of affairs. According to the subjective standard, however, motives and intentions are *unascertainable*, in principle, by anyone other than the agent.[243]

We can observe this dichotomy by applying the "subjective" test for ourselves to the *Feeney* situation. How are we to establish that the clearly foreseen and inevitable adverse impact of the veterans' preference on women was *not* a desired result of the state legislature's action, but merely something "in spite of which" that action was undertaken? How would the legislature itself know this? According to the subjective model of intention as an inner event in the mind of the actor, it is impossible for an external observer to ascertain another's intent, even if the actor knows which consequences are focused on in choosing a course of action. Further, it is not even clear, under this standard, that one can speak of the

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use a neighborhood school policy for student assignment, that would not be subject to the 'natural foreseeable consequences' rule." *Id.* at 168. Decisions as to school locations, the construction and renovation of schools, school closing, the drawing of student attendance zones, and faculty and staff assignment, on the other hand, are *particularly subject* to the rule because there "the presumption is especially probative." *Id.* at 169. In addition, discriminatory intent can be inferred from the school board's refusal to take action to ameliorate segregation. *Id.* at 170.

240. 443 U.S. 915 (1979).

241. *See* text accompanying notes 89-95.

242. *See* text accompanying note 183, Brest *supra* note 75, at 119-30; Ely, *supra* note 165, at 1212-23; Eisenberg, *supra* note 166, at 114-17.

243. *See* text accompanying notes 132-37.

intent of the legislature *as distinguished from* the intentions of its members, since the legislature has no separate mind which experiences inner events such as desires, goals, aims, etc. Thus, since the motive test is impossible to satisfy, it will be seldom that facially neutral state action is invalidated on equal protection grounds.[244]

The "futility" problem is also exacerabated under the subjective conception of intent. To reenact the same law for a different motive, all the legislator or administrator need do is focus on something else "in his mind's eye" the second time around: to take "mental aim" at a different aspect of the situation. Under the objective, Wittgensteinian conception, on the other hand, it is not as easy to reenact the same law for a different motive. The law must actually function differently in the external world.

A third difficulty with the use of a "motive" test is also exacerbated by a subjective conception of motive. As pointed out by Professors Brest and Karst[245] and by Justice Powell,[246] to impugn the decisionmaker's motives is a personal affront which is not to be indulged unless the accuser is absolutely certain of the truth of her accusation. The chances of obtaining certainty are less, and the affront greater, under the subjective conception of "motive" than if "motive" is related to the action's *impact*. Under the subjective conception we are impugning the actor's character, or "soul"; under the objective conception we are merely talking about what was *done*. Thus, for this reason also, official action seldom will be invalidated.

It is enlightening to note, in this context, that, from the time *Davis* was decided until the 1982 term,[247] no Supreme Court cases with the exception of *Partida* and two school desegregation cases[248] decided immediately after *Feeney* found discriminatory purpose. These cases, however, involving jury selection and school desegregation where official

244. Thus Professor Ely has recently expressed concern that the effect of the Supreme Court's use of the motive test, which he was the first to advocate, "has been in each case to deny the constitutional claim." Ely, *The Centrality and Limits of Motivation Analysis*, 15 San Diego L. Rev. 1155, 1161 (1978).

245. Brest, *supra* note 75, at 128-30 (Brest calls this the "impropriety" argument); Karst, *The Costs of Motive-Centered Inquiry*, 15 San Diego L. Rev. 1163, 1164-65 (1978).

246. *Partida*, 430 U.S. at 516 (Powell, J., dissenting).

247. In 1982, in Pullman-Standard, Inc. v. Swint, 456 U.S. 273 (1982), the Court held that the question of intentional discrimination is a pure question of fact, subject to reversal only on the "clearly erroneous" standard of Fed. R. Civ. P. 52. *Id.* at 290-93. This made the determination of intent subject to the vagaries of lower court findings of fact, and has led to *inconsistent* holdings. *See* Mobile v. Bolden, 446 U.S. 55 (1980) and Rogers v. Lodge, 102 S.Ct. 3272 (1982); Washington v. Seattle School Dist. No. 1, 102 S.Ct. 3187 (1982), Crawford v. Bd. of Educ., 102 S. Ct. 3211 (1982).

248. Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979).

segregation existed at the time of *Brown v. Board of Education*,[249] are special kinds of cases in which discriminatory intent is less difficult to prove under the *Davis* standard than is normally true. In jury cases the absence of discrimination should lead to a result reflecting the proportion of the minority group members in the general population. Similarly, school districts officially segregated at the time of *Brown* have an affirmative duty to desegregate: failure to take action to undo the dual school system constitutes a further equal protection violation without need of further proof of intent.[250] Thus, in these two types of cases, discriminatory impact *is* sufficient to prove intent.[251]

The Court has thus come full circle from the time of *Palmer*,[252] when commentators and Supreme Court justices were impelled, in response to Supreme Court statements that motivation was irrelevant, to argue *in favor of* the consideration of motivation. Consideration of motivation is necessary, the argument went, to encompass obvious equal protection violations, such as the closing of the swimming pools in *Palmer*, which could not be handled by an "impact only" test. Such arguments proposed "motive" as an *inclusionary* test enabling courts to find violations in cases which had intuitive merit, not as an *exclusionary* test requiring courts to exclude cases having intuitive merit. The view advocated in the early articles referred to by the Court as support for the motive test was not that motivation is a *necessary* condition, but that it is *sometimes* a *sufficient* condition for heightened scrutiny or invalidation.[253]

While supposedly merely clarifying the *Davis-Arlington Heights* standard with respect to the role of impact in proving intent, *Feeney* in fact changes that standard in a manner not consistent with the Court's earlier articulations. Rather than simply elaborating the implications of the *Davis* and *Arlington Heights* rules, *Feeney* retreats from those rules. Hence, Justices Marshall and Brennan, neither of whom had objected to the motivation requirement in *Davis* or *Arlington Heights*, dissented vigorously in *Feeney*, stressing the necessity of objective criteria in matters of intent.[254]

The extent of the change is seen when one considers that application of the six *Arlington Heights* patterns of inference would have allowed Feeney to establish an equal protection violation. She had clearly

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249. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

250. *Keyes*, 413 U.S. at 200.

251. *Davis*, 426 U.S. at 241; *Partida*, 430 U.S. at 493-94 (discriminatory impact shifts burden to defendant to *disprove* discriminatory intent).

252. 403 U.S. 217 (1971).

253. Ely, *supra* note 165, at 1207; Brest, *supra* note 75. *See also* Eisenberg, *supra* note 166, at 47-49, 149.

254. *Feeney*, 442 U.S. at 282-86.

demonstrated a history of discrimination against women in the military on the basis of "archaic and overbroad generalizations" regarding the proper role of women,[255] citing specific regulations and policies which had drastically restricted the opportunities of women for military service.[256] The Court itself, as Justice Stewart admitted, has taken notice of women's inferior opportunities in military service. Events leading to the challenged action also arouse suspicion regarding motivation. The statute provided for a special exemption from the preference for jobs "calling for women." Also, the legislature amended the statute to exclude *attorney* positions *after* the *Anthony* suit was filed, thereby eliminating all the plaintiffs save Feeney. In addition, the legislature failed to consider less costly methods of achieving its aim, despite the fact that such alternatives not only were available and known to it, but were practically the universal norm (since the federal government and all other states but three utilized a point preference rather than an absolute preference). According to Justice Marshall, the fact that the statute is ill-suited to meet its stated objectives[257] also raised the issue of legislative departures from appropriate substantive considerations.

The *Feeney* Court, however, refused to consider four of the six factors mentioned in *Arlington Heights*. It refused to consider the history of discrimination against women in the military on which the veterans' preference is "overlaid," it declined to address the issue of past exemptions for "women's jobs" as indicative of discriminatory purpose, and it did not view the usual state practice of adopting a less restrictive form of preference as indicating a departure from the appropriate substantive considerations in relation to the legislature's specified goal. The Court was content to consider only the question of whether the challenged legislative action had some other explanations besides sex discrimination (*Arlington Heights*' first test) and selected aspects of the legislative history. Those criteria, however, cannot constitute the sole test for discriminatory motive, since *Arlington Heights* specifically rejected the requirement that discriminatory motive be the sole or dominant purpose.[258] The fact that some other explanation besides discriminatory motive exists does not demonstrate that discriminatory motive is not *also* operative.

The *Feeney* Court's retreat from *Arlington Heights*' codification of

255. This is a test for invidious sex discrimination under the equal protection clause, established in cases where the discrimination was overtly based on gender.

256. *See* text accompanying notes 19-25. Eisenberg, *supra* note 166, at 54, 68, 73-79, would require evidence of *specific* past discriminatory acts in order to invoke heightened scrutiny. Otherwise *Davis*' concern about placing in jeopardy a broad range of tax, welfare and regulatory programs is invoked.

257. *See* text accompanying notes 117-22.

258. *See* text accompanying note 211.

factors relevant to the proof of intent corresponds to its regression to an "atomistic" conception of challenged action. In the Court's view, the challenged action is to be examined narrowly, in isolation from the action's past, its future, and the rest of the context in which it occurs.[259] Justice Marshall hinted at this "atomistic" feature of the Court's conceptual framework in referring to the Court's "singularly myopic view of the facts established below."[260]

C. Feeney*'s Monstrous Progeny*

The implications of *Feeney*'s regression to a subjective conception of intent and an atomistic conception of an action are evident in two 1980 decisions, *Mobile v. Bolden* and *Harris v. McRae.*[261] In *Bolden*, black plaintiffs claimed that the at-large election of the city's governing commission operated to dilute their voting strength, in violation of the fourteenth and fifteenth amendments.[262] The Supreme Court reversed the Fifth Circuit's affirmance of the district court's finding of a constitutional violation, applying the *Feeney* version of the invidious purpose requirement to alleged violations of the fifteenth as well as to violations of the fourteenth amendment.[263] Multi-member districts thus are unconstitutional only if their *purpose* is invidiously to cancel out or minimize minority voting strength. It is not enough that the system adopted have the *foreseeable effect* of preventing the election of blacks; the system must have been adopted for the *purpose* of preventing their election.[264] According to Justice Stewart, plaintiffs' allegations of discriminatory intent in *Bolden* were negated by the fact that blacks could vote and run for office in Mobile without hindrance and by the fact that blacks formed the only active slating organization in the city.[265] Despite the fact that no black had ever been elected to the commission even though blacks comprised approximately 34.5% of the city's population, and despite the fact that, because of bloc voting, it was highly unlikely that any black could be elected under the at-large system, the Court found no discriminatory purpose.[266] Justice Stewart's opinion rejected as simply irrelevant to plaintiffs' claim the history of official discrimination against blacks in Alabama,[267] discrimination against blacks in municipal jobs

259. *See* text accompanying notes 98-100.

260. 442 U.S. at 286.

261. Mobile v. Bolden, 446 U.S. 55 (1980) [hereinafter cited as *Bolden*]; Harris v. McRae, 448 U.S. 297 (1980) [hereinafter cited as *McRae*].

262. *Bolden*, 446 U.S. at 58.

263. *Id.* at 61-63.

264. *Id.* at 71 n. 17.

265. *Id.* at 73.

266. *Id.* at 74.

267. *Id.*

and services by the non-black elected officials,[268] and the mechanics of an electoral scheme (specifically, the size of the district and the requirement of a majority vote) which tended to intensify its discriminatory effect on the black voter.[269]

Bolden, even more blatantly than *Feeney*, demonstrates the Court's complete abandonment of both the *Davis-Arlington Heights* totality of the circumstances approach and the *Arlington Heights*-Brest formulae for inferring intent from objective, contextual factors. Instead, *Bolden* established even more explicitly an approach whereby the challenged state action is considered as an isolated event apart from both its historical and its present social and political context.[270] Thus, Justice White, the originator of the intent standard, pointed out in his *Bolden* dissent that the Court had forsaken the *Davis* rule.[271] *Davis*, Justice White argued, requires that discriminatory motive be proved from the totality of objective factors making up the context of the challenged action or institution.[272] Examples of these factors were those considered by the district court in *White* pertaining to the cultural and economic realities of the Mexican-American community on which the multi-member voting

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268. *Id.* at 73-74.

269. *Id.*

270. Only four justices joined in this opinion. *Id.* at 58. Justice Blackmun concurred in the result. *Id.* at 80. He felt that there *was* a showing of discrimination, but that the district court went too far in the remedy, in substituting its idea of the proper form of government for the form chosen by the citizens. *Id.* at 82-83. Justice Stevens concurred in the result, but would reject the plurality's "intent" test in favor of a standard focusing on the system's *objective effect*. *Id.* at 90-92. Under such a test, an official decision regarding voting districts violates the fourteenth and fifteenth amendments if (1) it was manifestly not the product of a routine or traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) if no neutral justification could be given for the decision, so that it was either totally irrational or entirely motivated by a desire to curtail the political strength of the affected minority group. *Id* at 90. The application of this test, however, does not indicate unconstitutional discrimination in the instant case. The type of election system challenged is widely used, so that the decision to adopt it was routine and capable of neutral justification. The impact of the system was not to interfere with the voting rights of individuals, but only with their political strength as a group. Justice Stevens would not have used too strict a standard of invidious discrimination in relation to the effects of gerrymandering on groups, since there is no constitutional right to proportional representation for particular groups. Thus even though there *was* evidence that making it harder for blacks to be elected to city offices was the motivation behind the decision to retain the Commission system, Justice Stevens would have upheld that system. *Id.* at 86-87, 91-92.

The Commission system was thus upheld, even though only four Court members agreed both that the subjective "discriminatory intent" test was appropriate *and* that no discriminatory intent was shown. Two Court members felt that discriminatory motive *was* shown, but concurred in the result: Justice Blackmun, because he felt that remand was appropriate, and Justice Stevens, because he rejected the "motivation" test.

271. *Id.* at 102-03.

272. *Id.* at 103.

districts were "overlaid."[273] These same factors or types of factors were considered by the district court in the instant case, and the facts it found were "even *more* compelling" than those in *White*:[274]

> By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting makes it impossible to elect a black commission under the at-large system, the plurality rejects the 'totality of the circumstances' approach . . . and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.[275]

Justice Marshall, who did not dissent from the *Davis-Arlington Heights* "discriminatory purpose" rule and who argued in *Feeney* only as to the need for *objective* indicia of intent, would have *limited* the use of the discriminatory purpose rule. In his dissent, Justice Marshall argued that "discriminatory purpose" should not be a necessary condition for a fifteenth amendment violation or for a violation of the "fundamental rights" strand of fourteenth amendment cases.[276]

If the discriminatory purpose rule *is* to apply to fifteenth amendment cases, Justice Marshall would not have adopted the *Feeney* standard, which is too "rigid" to be "appropriate," creating "a burden of proof far too extreme to apply in vote-dilution cases."[277] Instead, he would have used the foreseeability-burden-shifting rule suggested by Justice Stevens in *Davis* and rejected by the *Feeney* Court.[278] Justice Marshall ended his opinion with a strong condemnation of the Court's equal protection doctrine as "bespeak[ing] an indifference to the plight of minorities who, through no fault of their own, have suffered diminution of

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273. *Id.*

274. *Id.* at 103.

275. *Id.*

276. *Id.* at 113-14. Since the right to vote is a substantive right which is explicitly recognized by the Constitution under both the fourteenth and fifteenth amendments, the reasons for the *Davis* rule do not apply to cases dealing with the infringement of this right. On the one hand, to utilize an impact test in *these* cases would not raise the spectre of court interference with a wide range of governmental decisions in local welfare and regulatory programs, as it would in cases dealing with the right to be free from discrimination in the distribution of goods or services to which citizens are not constitutionally entitled. On the other hand, the difficulties in proving motivation would allow infringement of the protected right to vote. *Id.* at 113-15, 121, 134-35. Professor Ely feels that it is inappropriate to resort to motive in such cases. Ely, *supra* note 165, at 1281-84; Ely, *supra* note 244 at 1160-61.

277. *Bolden*, 446 U.S. at 136.

278. *Id.* at 137. This rule comports with Justice Marshall's own "sliding scale" approach to the issue of the appropriate level of judicial scrutiny, according to which "the degree to which the government must justify a decision depends upon the importance of the interests infringed by it." *Id.* at 138, citing San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 109-10 (1973) (Marshall, J. dissenting).

the right preservative of all other rights:"[279]

> It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments . . . make this Court an accessory to the perpetuation of racial discrimination. The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious.[280]

In *McRae*,[281] a decision which seems to represent a gender-based version of the *Dred Scott* case[282] or of *Korematsu v. United States*,[283] the Court applied the *Feeney* rule to reject an equal protection challenge to the constitutionality of the Hyde amendment.[284] The Hyde amendment prohibits the use of federal Medicaid funds to pay for abortions except where the life of the mother would be endangered if the pregnancy were carried to full term.[285] Pregnancies which merely jeopardize the mother's health, even to the point of reducing her ultimate life expectancy, are included in the prohibition.[286] The district court found that the Hyde amendment violates the equal protection rights of teenage women, especially those aged seventeen and under, who are disproportionately represented in the group of women for whom abortion is medically necessary.[287]

The Supreme Court, in a majority opinion authored by Justice Stewart, chose to treat the district court's findings as involving an age discrimination issue and applied the *Feeney* test to conclude that there was no evidence that the statute was enacted because of its impact on

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279. *Id.* at 135. Racially selective sympathy and indifference is conduct manifesting the belief that the concerns of blacks are not worthy of the same degree of attention as those of whites. Brest, *supra* note 204, at 7-8. According to Justice Marshall, "the decisions to maintain multimember districting having obvious discriminatory effects represents, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, and the perpetuation of inhumanity." *Bolden*, 446 U.S. at 139.

280. *Id.* at 141.

281. 448 U.S. 297 (1980).

282. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

283. 323 U.S. 214 (1944).

284. *McRae*, 448 U.S. at 326.

285. The 1980 version of the amendment also excluded pregnancy due to rape or incest, if reported promptly to law enforcement or public health service agencies. *Id.* at 302.

286. Examples of medical conditions which could result in such damage if aggravated by pregnancy include phlebitis, diabetes, kidney disorders, cancer, sickle cell anemia, rheumatic fever and heart disease. *Id.* at 339 (Marshall, J., dissenting), 353 n. 5 (Stevens, J., dissenting).

287. *Id.* at 323 n. 26.

teenage women.[288] Since poverty is not a suspect classification, Justice Stewart argued that the challenged legislation need meet only the "rational basis" level of scrutiny.[289] Because the statute is rationally related to the legitimate governmental objective of protecting potential life by encouraging childbirth, as opposed to abortion, through the use of financial incentives except in the most extreme circumstances, it withstood the "rational basis" level of scrutiny.[290] Thus, it was not irrational for the federal government to pay for other medically necessary services and for childbirth but not for abortion, because only abortion is the purposeful termination of a potential human life.[291] The Court did not discuss the issue of gender-based discrimination, although only women have the need for abortion.[292]

The *McRae* Court applied the same "atomistic" thinking criticized with respect to *Feeney* and *Bolden* to the claim that the Hyde amendment infringed plaintiffs' due process right to freedom of personal choice with regard to pregnancy recognized in *Roe v. Wade*.[293] The *McRae* majority concluded that the amendment did not block women from seeking abortions.[294] Indigency may prevent women from receiving abortions, the majority noted, but indigency is not an obstacle of the government's making.[295] The mother's freedom to choose abortion for personal reasons, including preservation of her health, without criminal sanctions does not imply the right to government funds for abortion.[296]

Four justices registered separate dissents to the majority opinion.[297] Justice Blackmun wrote a separate dissent solely for the purpose of pointing out that "[t]here is 'condescension' in the Court's holding that 'she may go elsewhere for her abortion'; this is 'disingenuous and alarming' . . . 'the Court either chooses to ignore or fears to recognize' . . .

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288. *Id.* at 323.

289. *Id.* at 323-24.

290. *Id.* at 324-25.

291. *Id.* at 325.

292. It can be expected, however, that if the issue had been raised it would have been treated in the same way as Geduldig v. Aiello, 417 U.S. 484 (1974). *See supra* note 1. In addition, the application of *Feeney*'s "because of, not just in spite of" test presumably would have produced the same results in a claim of gender-based discrimination. The idea was not to disadvantage *women* by refusing to fund a medically necessary procedure, but just to encourage *childbirth*. If men could get pregnant, they would be encouraged to bear children instead of having abortions as well, and it is simply a contingent fact unrelated to the issue of gender-based discrimination that only *women* can get pregnant!

293. 410 U.S. 113 (1973).

294. *McRae*, 448 U.S. at 316-17.

295. *Id.*

296. *Id.* at 315-18.

297. Justice Brennan's dissent was joined by Justices Marshall and Blackmun, each of whom also wrote a separate dissenting opinion. Justice Stevens also dissented. *Id.* at 329, 337, 348, 349.

the lot of the poorest among us.' . . . "[298] Justice Stevens called the Court's equal protection analysis "sterile" in its exclusive focus on the legitimate interest in protecting the potential life of the fetus "without reference to the context in which that interest was held to be legitimate" in *Roe v. Wade*.[299] Thus, the Court majority missed the point that a woman cannot be denied a benefit to which she would otherwise be entitled solely because of her exercise of a right declared to be constitutionally protected.[300] Justice Marshall pointed out what should have been obvious to the Court majority: for the indigent woman attempting to exercise her right to freedom of choice in procreative matters, there is no perceptible difference between outright governmental prohibition of abortion and failure to fund abortion while funding childbirth.[301] Justice Marshall would have looked at the immediate consequences of the governmental action in the context as part of what the government *did*. Here the immediate consequences are "a significant increase in the number of poor women who will die or suffer significant health damage because of an inability to procure necessary medical services."[302]

The dissenters also expressed dissatisfaction with the Court's equal protection analysis, focusing on the appropriate level of review. Justice Marshall criticized the Court's rigid "two-tiered" approach.[303] Instead, Justice Marshall would impose a higher level of scrutiny on legislation impacting politically powerless "discrete and insular minorities" such as poor women.[304] Justices Brennan and Blackmun agreed that the statute calls for heightened scrutiny because it affects only a politically powerless segment of society: that group of women least able to defend their *Roe v. Wade* privacy rights against the "political majority's judgment of the morally acceptable and socially desirable preference on a sensitive and intimate decision that the Constitution entrusts to the individual."[305] For

298. *Id.* at 348-49.

299. *Id.* at 350-52.

300. *Id.* at 352.

301. *Id.* at 347.

302. *Id.* at 338. The dissenters also argued that the statute does not survive even the "rational basis" test. It does not serve a legitimate state interest because its purpose is to discourage the exercise of a constitutionally protected choice. *Id.* at 330-36, 354-56. It is not rationally related to preserving fetal life, since it prohibits abortion even in cases in which the mother's medical condition will lead to the death, deformity, or shortened life expectation of the fetus. *Id.* at 339-40. And it is not rationally related to the purposes of the Medicaid program as a health scheme for the poor, since childbirth (especially with complications) is more expensive than abortion, and since the result of the amendment will be not to treat medical conditions where the treatment would result in terminating the pregnancy. *Id.* at 330-32, 355-56.

303. *Id.* at 342.

304. *Id.*

305. *Id.* at 332.

Justice Marshall, heightened scrutiny is also appropriate if the group affected has experienced a history of discrimination. Here, minority women are disproportionately represented in the affected group: non-white women obtain abortions at nearly double the rate of whites.[306] Justice Marshall's "sliding scale" model of appropriate scrutiny also considers the importance of the governmental benefits denied. Here the benefits at issue " 'are of absolutely vital importance in the lives of the recipients.' "[307]

Justice Stevens wrote that "[this case] . . . illustrates the flaw in the method of equal protection analysis by which one chooses among alternative 'levels of scrutiny' " *first*, and only *then* judges the appropriate means-end relationship.[308] "That method may simply bypass the real issue"—that of determining the weight to be attached to the competing claims for class inclusion or exclusion.[309] Here the plaintiffs' claim to inclusion in the class of Medicaid recipients more than outweighs the government's interest in excluding plaintiffs, because *Roe v. Wade* gave greater priority to protecting the mother's health and the individual's freedom of choice than to protecting fetal life.[310]

The dissenting justices' vitriolic attack in these two cases clearly indicates the bankruptcy of the Court's motive test for determining whether government action which disadvantages women and minorities will invoke heightened scrutiny. Justice White, the originator of the motive test, rejected it in its *McRae* form because it is virtually impossible to prove motivation under the "subjective," "Cartesian" conception of intent.[311] As Justice Marshall's dissent pointed out, when this conception is combined with the narrow, atomistic conception of an action, the test becomes a cynical device used to deny recognition of injustices to traditionally oppressed groups in the name of federalism and other principles of limited government.[312]

D. Later Developments

The discriminatory intent cases of the 1981 and 1982 terms display contradictory and confusing statements concerning the definition of the motive standard and procedures for its application. They reveal as well the inconsistency of the standard's results and a willingness on the part of

306. *Id.* at 343.
307. *Id.* at 341-43.
308. *Id.* at 352 n. 4.
309. *Id.*
310. *Id.*
311. *Id.* at 327-29.
312. "Ultimately the result reached today may be traced to the Court's unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds." *Id.* at 347.

the conservative justices to change the standard in order to achieve a politically desired result. In addition, the cases seem to indicate a decline in the *significance* of the standard as a test for deciding equal protection cases. Cases are now being decided primarily on other grounds.

1. Does Intent Matter?

In *Michael M. v. Sonoma County Superior Court*[313] the Court, in a 5-4 decision, upheld California's "statutory rape" law making it a crime for a male to have sexual intercourse with a female under 18 unless she is his wife.[314] Defendant had challenged the statute on equal protection grounds, since no comparable statute makes it illegal for a female to "accomplish" an act of sexual intercourse with a male under 18. Since the case involved an overt gender-based classification, it did not turn primarily on the issue of discriminatory purpose, but rather on the issue of whether the challenged classification withstood the intermediate level of review.[315]

However, Justice Rehnquist, writing for the Court, rejected the dissent's claim that the statute's purpose when passed in 1859—to protect the virtue and chastity of young women—is unjustifiable because it rests on archaic stereotypes.[316] He cited the rule of *O'Brien*,[317] stating that, even if this were one of the statute's motives, the Court will not strike down an otherwise constitutional statute on the basis of an allegedly illicit legislative motive.[318] Given the history of the "motive" requirement in the Court's equal protection cases since *O'Brien*, this argument betrays a cynical willingness on the Court's part to manipulate doctrine in order to achieve a desired result.[319]

2. Who Decides Whether There Was Discriminatory Intent?

In *City of Memphis v. Green*,[320] black citizens had challenged the city's closing of a street through an affluent white neighborhood. The closing had caused traffic to the city center from black neighborhoods to

313. 450 U.S. 464 (1981).

314. *Id.* at 466.

315. *Id.* at 468-69.

316. *Id.* at 472 n.7.

317. 391 U.S. 367 (1948).

318. 450 U.S. at 472 n.7.

319. Furthermore, the outmoded stereotype suggested by defendant and the dissenters as the statute's true purpose is just what the Court's "protection of young women from the consequences of sexual intercourse" rationale boils down to. This becomes more apparent when the Court rejected as "ludicrous" defendant's argument that if the purpose of the statute is really to prevent pregnancy, it is impermissably overbroad in its inclusion of intercourse with prepubescent females. *Id.* at 475.

320. 451 U.S. 100 (1982) [hereinafter cited as *Memphis*].

the north to be diverted.[321] Plaintiffs claimed that the city's action violated 42 U.S.C. § 1982 and the thirteenth amendment.[322] The closing was effected by the erection of a barrier at the point of separation between the black and white neighborhoods. It was a unique step, not part of a uniform city planning effort, taken at the request of white property owners who expressed concern about excess traffic and danger to children.[323] One person soliciting signatures for a petition in favor of the street closing had referred to the traffic as "undesirable traffic."[324]

The Supreme Court reversed the Sixth Circuit's finding of a violation.[325] Justice Stevens' opinion "inexplicably"[326] re-examined the facts which formed the basis for the holding in light of the record, even to the extent of making factual findings not made by either the district court or the court of appeals[327] concerning the significance of the inconvenience to black citizens. The district court's finding of no discriminatory intent was upheld against suggestions to the contrary by the court of appeals, on the basis of the concerns expressed by residents and city council members about traffic.[328] The Court refused to probe beneath the surface of the residents' *expressed purposes*, asserting that because the plaintiffs had sued the mayor and city council, it is the latter's motivation that must be ascertained.[329] The Court similarly refused to hold that the history of resistance to desegregation in Memphis, the fact that the white neighborhood in question developed as a result of pre-World War II segregation, and evidence of present racial animus required the district court to find that the city council's action was racially motivated, since there was no showing that "the residents of Hein Park would have welcomed the heavy flow of transient traffic through their neighborhood if the drivers had been predominantly white."[330] Thus, the *Feeney* test is alive and well with the assistance of some independent fact finding by the Supreme Court: the Court defers to the district court's factual determination of no discriminatory intent, but only *after* it has assisted the district court in finding those facts.

Justice Marshall, dissenting, argued that the evidence produced at trial met the *Arlington Heights* requirement for proof of discriminatory

321. *Id.* at 103.
322. *Id.* at 102.
323. *Id.* at 104.
324. *Id.* at 115.
325. *Id.* at 129.
326. *Id.* at 130 (White, J., concurring).
327. *Id.* at 110.
328. *Id.* at 113-16.
329. *Id.* at 114-15.
330. *Id.* at 116 n. 27.

intent.[331] It was clear that the "undesirability" of the traffic referred to the fact that it was predominantly black; the city had deviated from its usual procedures in processing applications for street closings in not requiring that the application be signed by all homeowners of abutting property; there was no notice to black homeowners and only minimal opportunity for them to speak at the council meetings; the action was unique in the history of the city, and all parties were aware of the symbolic significance of the action's disparate racial impact, given the city's history of racial segregation.[332] These were precisely the types of factors which *Arlington Heights* had indicated were relevant to the proof of discriminatory intent.[333] That they were not determinative here indicates that the *Arlington Heights* totality of circumstances approach is moribund.

In 1982, however, there was a strange new development. In *Pullman-Standard v. Swint*,[334] the Court held that the question of whether the differential impact of a seniority system reflected intentional discrimination under section 703(h) of Title VII of the Civil Rights Act is a pure question of fact, subject to review only according to the "clearly erroneous" standard.[335]

Shortly thereafter, the Court decided *Rogers v. Lodge*,[336] a case very similar to *Bolden*. This time the Court *upheld* the court of appeals' affirmance of the district court's findings of discriminatory intent in the maintenance of an at-large multi-member electoral system in Burke County, Georgia[337] because *Swint* required that the clearly erroneous standard be applied to the trial court's finding.[338] In addition, as Justice White's opinion pointed out, the factors considered by the district court[339]

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331. *Id.* at 141.

332. *Id.* at 141-44.

333. *Id.* at 141.

334. 456 U.S. 273 (1982) [hereinafter cited as *Swint*].

335. Rule 52 of the Federal Rule of Civil Procedures. *Id.* at 1788-89. In so holding, the Court rejected the Fifth Circuit's rule that a finding of discrimination is a question of "ultimate fact," subject to independent determination by the reviewing court. *Id.* at 1788.

336. 102 S.Ct. 3272 (1982) [hereinafter cited as *Lodge*].

337. *Id.* at 3278-79.

338. *Swint*, 456 U.S. at 287.

339. These factors included the fact that no black had even been elected to county offices and a series of indicia that blacks had less opportunity to participate in the political processes than whites: the history of previous discrimination against blacks and its adverse effect on voter registration; discrimination against blacks in education; exclusion of blacks from participation in Democratic Party processes; past and present discrimination in the selection of grand jurors, the hiring of county employees, and appointments to the county governing boards and committees; the unresponsiveness of county officials to black interests and the need for services in the black community; the county's reluctance to enforce desegregation; county assistance to an all-white private school; and the depressed socio-economic status of county blacks as a result of past discrimination. In addition, the

were the same as those considered in *White v. Regester*, where the Court also had found it appropriate to defer to the district court's " 'local appraisal of the design and impact of the . . . multimember district in the light of past and present reality, political and otherwise.' "[340] Thus, the totality of circumstances approach was resuscitated under the guise of deference to district court fact finding.

As the dissent in *Lodge* pointed out, however, the factors considered by the district court were the very same factors considered by the district court in *Bolden* and rejected by the Supreme Court.[341] Justice White was unable to explain satisfactorily the difference in result between the two cases.[342]

The conservative dissenters all criticized the decision for inappropriately delving into the subjective motivations of local officials,[343] although this is precisely what the *Feeney* test requires. Justice Stevens, noting the reservations expressed in his *Davis* concurrence, argued that the intent standard is ephemeral and judicially unmanageable, making the constitutionality of the institution depend not on its structure, but on such changing and extraneous factors as the motivations of politicians operating with regard to population shifts and voting patterns.[344] Stevens would now have adopted Justice Marshall's position in *Bolden*, that it is inappropriate to apply an intent standard to the distribution of constitutionally protected interests.[345] He cited Professor Karst's argument that the motive standard is inadequate to protect black citizens from unconstitutional conduct[346] and stressed the ascertainability and disutility objections[347] to the motive test. He would, however, have looked at

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district court considered features of the at-large system which enhanced the tendency of multi-member districts to minimize the voting strength of racial minorities: the size of the county, the majority vote requirement and the requirement that candidates run for specific seats combined with the absence of a residency requirement. *Lodge*, 102 S.Ct. at 3279-81.

340. *Id.* at 3278.

341. *Id.* at 3281-82 (Powell, J., dissenting).

342. *Id.* The plurality in *Mobile* had rejected the district court's finding because it had relied on the factors specified in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) [hereinafter cited as *Zimmer*], decided before the discriminatory intent standard was articulated by the Court. *Bolden*, 446 U.S. at 71. The district court in *Lodge* relied on these same factors. However, Justice White rejected the argument that it therefore used the wrong legal standard for the reasons set forth in *Bolden*. This was because the district court referred to the discriminatory intent standard for vote dilution cases set forth in Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), and because it recognized that it was not limited to a consideration of the *Zimmer* factors but was to consider the totality of the circumstances. *Lodge*, 102 S.Ct. at 3277-78. The argument is strained: Justice White had felt that in *Bolden* the district court had relied appropriately on the *Zimmer* factors. *Bolden*, 446 U.S. at 101.

343. *Lodge*, 102 S.Ct. at 3282.

344. *Id.* at 3283.

345. *Id.* at 3290.

346. Karst, *supra* note 245; *Lodge*, 102 S.Ct. at 3290 n. 28.

347. *Lodge*, 102 S.Ct. at 3290-92. *See* text accompanying notes 141-43 & note 183.

the *reasons* or *purposes* for legislative action, as judged by the "customary indicia of legislative intent . . . . [t]he formal proceedings of the legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents."[348] Here the record was inadequate to permit determination of the validity of the county governmental structure on the basis of traditional subjective standards.[349]

Justices Powell and Rehnquist would not have abandoned the subjective intent standard in determining a vote-dilution case under the fourteenth amendment.[350] They agreed, however, with Justice Stevens that the inquiry into intent should be focused on "objective" factors which are judicially manageable and should avoid "deeply subjective inquiries into the motivations of local officials in structuring local governments."[351] In this connection, they too cited Professor Karst's 1978 rejection of the motive test.[352] They would have reversed in *Lodge* because "the factors cited by the court of appeals are too attenuated as a matter of law to support an inference of discriminatory intent."[353]

This shift by the conservative justices is a remarkable development. In *Feeney*, the conservative justices explicitly *adopted* a "deeply subjective" standard of discriminatory intent, a narrow standard under which intent is very difficult to ascertain. Yet when the district court in *Lodge* found intent on the basis of *objective* indicia, the conservative justices labeled this finding "subjective," and would have opted for something "objective." Moreover, in criticizing the district court's finding in *Lodge*, the conservative justices cited Professor Karst, who *rejected* the motive test altogether. But the "objective" indicia which the conservative justices had in mind, unlike the indicia in *White*, are such as will not lead to invalidation of challenged governmental action. Instead, as *Memphis* indicates, the conservative justices would now look no further than legislators' statements.[354] This inquiry yields no test of intent at all and is diametrically opposed to Professor Karst's position, which criticized the motive test as inadequate to protect the rights of minorities.

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348. *Lodge*, 102 S.Ct. at 3290 n. 28.

349. *Id.* at 3290-91.

350. *Id.* at 3282.

351. *Id.*

352. *Id.*; *see* Karst, *supra* note 245.

353. *Lodge*, 102 S.Ct. at 3383.

354. *Memphis*, 451 U.S. at 114-15. Other indications of *this* approach are to be found in Justice Rehnquist's dissents in *Trimble*, 430 U.S. at 776; Columbus Bd. of Educ. v. Penick, 443 U.S. at 509-10, and in his majority opinion in Crawford v. Los Angeles Bd. of Educ., 102 S.Ct. 3211 (1982).

Finally, in two school desegregation cases decided shortly after *Swint* and *Lodge*, the Court's principle of deference to the fact finder on the issue of discriminatory intent led to inexplicably opposite conclusions[355] in markedly similar factual situations. *Washington v. Seattle School District No. 1*[356] and *Crawford v. Board of Education*[357] both involved equal protection challenges to state initiatives outlawing busing for desegregation. Both cases turned primarily not on the issue of whether the propositions were enacted with a discriminatory motive, but on the issue of whether the initiatives involved explicit racial classifications.[358]

Justice Powell's majority opinion in *Crawford*, citing *Reitman v. Mulkey*[359] for the proposition that deference is owed to a lower court's finding concerning the circumstances surrounding the passage and impact of state legislation,[360] all but disavowed the motive test. The California Court of Appeals found that claims alleging voters were motivated by a discriminatory purpose were based on "pure speculation,"[361] a finding based on nothing more than the stated purposes of the amendment itself.[362] Implicitly recognizing that such a lower court finding does not warrant deference, the Supreme Court instead went on to speculate itself as to what could have motivated the voters. According to Justice Powell, voters were presumably motivated by concern over the adverse effects on a school system of " 'the pursuit of racial balance at any cost.' "[363] Adopting this speculation, the Court then argued that the benefits of neighborhood schooling are racially neutral and that minority voters supported Proposition I.[364] Paradoxically, in this context, the Court cited Justice Stevens' *Davis* criticism of the motive test as a

355. On both the issue of discriminatory intent and on the underlying equal protection claim.

356. 102 S.Ct. 3187 (1982) [hereinafter cited as *Seattle*].

357. 102 S.Ct. 3211 (1982) [hereinafter cited as *Crawford*].

358. *Seattle*, 102 S.Ct. at 3193-95; *Crawford*, 102 S.Ct. at 3217-18.

359. 387 U.S. 369 (1967).

360. *Crawford*, 102 S.Ct. at 3221. In *Reitman*, the Supreme Court deferred to the California Supreme Court. 387 U.S. at 376. In *Crawford*, the Court deferred to the most conservative panel of the California Court of Appeals which, as Justice Marshall pointed out, "affirms a factual determination that was never made" on the issue of discriminatory intent. 102 S.Ct. at 3231.

361. *Crawford*, 102 S.Ct. at 3221.

362. The stated purposes were to conserve funds, protect student health and safety, maximize educational opportunities, enhance parental participation in the eduational process, conserve fuel, protect the environment, and preserve harmony and tranquility in the state and its public schools. Crawford v. Bd. of Educ., 113 Cal. App. 3d 633, 654-55, 170 Cal. Rptr. 495, 509 (1980).

363. *Crawford*, 102 S.Ct. at 3221.

364. *Id.*

sufficient condition for invalidation of challenged state action.[365] Thus, in *Crawford* the principle of deference to the lower court produces a result in which no serious consideration was given to the issue of whether the challenged action derives from discriminatory motive.

In *Seattle*, on the other hand, the Court concluded that "it is beyond reasonable doubt . . . that the [challenged state action] . . . was enacted 'because of,' not merely 'in spite of' its adverse effects upon" busing for integration, and thus was effectively drawn for racial purposes,[366] because the district court and court of appeals had found that the initiative was addressed to a racial issue.[367] In support of this conclusion, the Court pointed to sponsors' statements emphasizing the fact that the challenged initiative prohibited busing only for purposes of desegregation[368] and concluded that neither the courts nor the initiative's sponsors "had any difficulty perceiving the racial nature of the issue settled by [the] Initiative . . . ."[369]

Since these two cases are distinguishable only by the fact that there was a lower court finding of discriminatory motive in *Seattle*, but not in *Crawford*, the *standards* applied by the lower courts now appear to be irrelevant. The state action challenged in *Crawford*, like the initiative challenged in *Seattle*, explicitly addressed only busing for integration. In addition, voters in each case had no difficulty recognizing the racial nature of the proposed state action. We are thus left without guidance as to the proper test for discriminatory intent.

Accordingly, the current status of the motive test is ambiguous. If the Court now intends simply to defer to the lower courts without any examination of the lower court's rationale, it is likely that the motive test will diminish in importance. Recent statements by some of the conservative justices casting doubt on the wisdom of having a motive test at all support this prognostication.[370] When it applies the test at all, the Court now vacillates widely in its definition of the standard. For the conservative justices, the test has gone from an objective, totality of circumstances test to a subjective, inner event of "mental aiming" test, and finally, back to an objective but positivistic refusal to look beyond the *legislators' statements themselves*, in *Memphis* and *Crawford*. One is left with the strong suspicion that the *Court's* motive is simply to avoid finding equal protection violations against women and minorities.

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365. *Id.* at 3221 n. 30.

366. *Seattle*, 102 S.Ct. at 3195-96.

367. *Id.* at 3192-93.

368. *Id.* at 3195. This fact also triggered the application of the rule of Hunter v. Erickson, 393 U.S. 385 (1968) and Lee v. Nyquist, 318 F.Supp. 710 (W.D.N.Y. 1970), *summarily aff'd*, 402 U.S. 395 (1971), on the basis of which the Court upheld the district court finding that the initiative restructured the political processes along racial lines.

369. *Seattle*, 102 S.Ct. at 3195.

370. *See* text accompanying notes 343-44.

Conclusion: What Should Be the Test of an Equal Protection Violation?

What Kind of Motive Test: Subjective or Objective?

For the reasons argued extensively throughout this article, if a motive or intent test is to be adopted, it should be an objective test, which permits examination of the entire historical and social context of the action. To eliminate the role of impact in the proof of intent is to render the concept of intent useless as a test of discrimination.

Should Discriminatory Purpose Be a Necessary Condition for an Equal Protection Violation?

Proof of discriminatory purpose should not be a necessary condition of an equal protection violation. *Impact*, not intent, is the crucial factor. The primary concern of the equal protection clause must be with what is in fact *done* to protected groups by state agencies. While the reasons *why* it was done may be a factor entering into the description of what was done, such reasons are not the only factors to be considered in determining how the action is to be described. In many circumstances, the harm is just as great if done for "benign" reasons as for malevolent ones, and in any case this harm requires remedy regardless of the reasons that it occurred. Thus, in *Feeney*, the state's motivation of rewarding veterans is irrelevant to the question of whether the near total exclusion of women from important state civil service jobs is constitutionally justified or requires a remedy. Similarly, cases in which invidious motivation is impossible to prove militate against relying exclusively on motivation as the criterion for remedying race and gender-based harms. This is not to say that the equal protection clause is violated whenever a state action adversely affects minorities or women. *Significant* adverse impact on disenfranchised groups should shift the burden of justification to the defendant in the same way that *overt* racial or gender-based classifications do.

Should Motivation Be Irrelevant?

The argument that motive should not be a *necessary* condition of unconstitutionality leaves open the question of whether motivation should be a *sufficient* condition of unconstitutionality, or *one factor* to be considered. As a first approach, recall *Palmer*. Assuming that the adverse effects were equal for blacks and whites, should the city's decision be unconstitutional because the motive was to avoid integration? It seems intuitively clear that the decision should be invalidated: motive *does* matter. But *why* does it matter?

Professor Brest suggests two reasons.[371] The first reason recalls the "ordinary language" analysis of motive in Section I of this article.[372] A motive is a hidden, forbidden purpose. Overt discrimination on the basis of race violates the fourteenth amendment, unless the requirements of "strict scrutiny" are met. Thus, in *Palmer*, the city is prohibited from operating overtly segregated swimming pools. It would also be prohibited from operating swimming pools which were segregated *in fact*, but where some other ostensible basis is advanced as a pretext. *If*, then, the city is prohibited from closing the swimming pools because of opposition to integration, it is also prohibited from closing them for pretextual reasons—such as economy and safety—which simply disguise opposition to integration. Disadvantaging a racial group is a constitutionally prohibited objective; therefore, it cannot be pursued *covertly*, under cover of a permissable pretext, any more than it can be pursued *overtly*.

If discriminatory motive violates the equal protection clause in cases such as this, then we would have an "either/or" test: either discriminatory impact *or* discriminatory motive may be the basis for finding an equal protection violation in appropriate circumstances. Of course, in some cases both motive and impact can be established.

Professor Brest's second argument suggests a different approach. Pointing out that consideration of illicit motives may determine the outcome of an official decision, Brest argues that an individual has the right not to be disadvantaged by a decision which would not have been adopted but for the consideration of illicit objectives.[373] Brest's is essentially a *causation* argument. Causation is a relationship between two events or factors: the cause and its *effect*, whereby the former ostensibly *brings about* the latter. In our case, the *effect* is harm to minority group members; the cause, the illicit motivation. Thus, Brest's main argument against a discriminatory motivation test is that it produces harmful *results*, one of which is stigmatization of minority group members. This causal test thus *combines* motive *and* impact.[374]

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371. Brest, *supra* note 75, at 115-16.

372. *See* text accompanying notes 171-72.

373. In a 1976 article Professor Brest articulates his "anti-discrimination principle" prohibiting race-dependent decisions and conduct. Brest, *supra* note 204. This principle prevents unfair infliction of injury based on irrational assumptions with respect to the comparative worth of racial groups through two basic objectives: preventing harmful results which depend upon consideration of race, and guarding against "defects in process." *Id.* at 6-7.

374. This is seen by analyzing Brest's concept of a "race dependent decision": the idea is that consideration of race *produced* the decision. This suggests that the "motive or impact" dilemma might be solved by adapting a test of invidious discrimination which combines the two. To do this is to abolish the de facto-de jure distinction, as suggested by Justice Douglas in *Keyes*, 413 U.S. at 215-16 (Douglas, J., concurring), Justice Powell, also in *Keyes*, 413

Professor Brest also suggests a third argument, distinguishing a law's "operative rule" from its *objectives* and *effects*.[375] The "operative rule" is what the law or governmental decision prescribes; Brest points out that a covert operative rule which classifies by race is just as illicit or suspect as an overt operative rule based on race.[376] A law whose overt operative rule is neutral, but which covertly classifies on the basis of race, however, is a law which is racially *motivated*: racial classifications are the true, though hidden, explanation of what the law is doing. Brest's main argument for the unconstitutionality of racially motivated government action is based on its unjust or harmful effects. But laws whose operative principles are covertly based on race are unconstitutional *regardless* of their effects. Here we are embroiled in the confusion about "motive" noted in Section I:[377] "motivation" can refer to the *aimed at purposes* of the decisionmaker, the *reasons* why the decisionmaker acted as it did, what *caused* the decisionmaker to act as it did, or any hidden, nefarious, factor which explains an untoward action. Sometimes many of these factors are *the same* in explaining a given action; sometimes they are different. Where the covert operative rule of a decision is race, we have a case of illicit motivation in which the "motive" is different from the law's purpose and effects. Thus, it is not simply that the aimed at goal is covertly race or gender-based: as in *Seattle*, the law *itself* actually classifies covertly on the basis of race or gender. As such, the law violates the equal protection rights of those subject to it *regardless* of its purpose *and regardless* of its effects.[378]

Should the De Facto-De Jure Distinction Be Abolished?

Professor Eisenberg also advocates a form of "causation" test to handle cases where it is not possible to establish intentional discrimination. Under Eisenberg's principle, governmental action resulting in disproportionate impact on a protected group would invoke heightened scrutiny whenever such impact is "reasonably attributable to race."[379] "Reasonably attributable to" is a causal principle which he would define

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U.S. at 224 (Powell, J., concurring in part and dissenting in part), and by Justice Stevens, *see* discussion *supra* note 288.

375. Brest, *supra* note 75, at 103-05.

376. *Id.* at 116-18.

377. *See* text accompanying notes 172-74.

378. This is analogous to "deontological" arguments for the morality or immorality of actions or rules. According to deontological theories, the moral rightness or wrongness of an action does not depend on its consequence but is a function of the nature of the action itself. *See, e.g.*, Kant, Fundamental Principles of the Metaphysic of Morals 21, 44 (1969); W.D. Ross, The Right and the Good (1922).

379. *See* Eisenberg, *supra* note 166, at 40, 62.

in terms of the tort law tests of "cause in fact" and "proximate cause."[380] Thus, Eisenberg advocates an "intermediate" principle in between *pure* impact and the "motive only" rule of *Davis* and *Feeney*. If the disproportionate impact can be causally traced to prior race-dependent decisions of the state agency, and if the causal link is a "proximate" one in terms of contiguity in time, place, and subject matter, then a form of heightened (but not necessarily strict) scrutiny is invoked. On this level of scrutiny, *noncompelling* governmental interests can be considered as well. The causal principle thus permits a "balancing" approach where the governmental interests are balanced against the concerns of the impacted minority. This approach provides more flexibility than under traditional "strict scrutiny" or under Justice Marshall's "sliding scale" approach: not all racial classifications need be treated in the same manner because the Court can consider the *degree* of disproportionate impact and the *area* of plaintiffs' injury.[381]

Professor Eisenberg's approach is a good one. The causal principle allows the consideration of the same contextual factors advocated above as essential ingredients for proof of motivation. This article has stressed that if a motive test is adopted, the context of the challenged action and its foreseeable impact must be considered essential ingredients in any determination of motivation.[382] Eisenberg's test considers these factors. Thus, it does not matter if the factors are labeled "motive" or "impact"; what matters is that they are the factors that *should* be considered in assessing equal protection claims. Eisenberg would also utilize consideration of motive where disproportionate impact could not be clearly established.[383] Finally, this approach rejects the Court's "either/or" gyrations in favor of permitting consideration of *both* motive *and* impact factors in assessing equal protection claims.

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380. *Id.* at 57-59.

381. *Id.* at 58-73.

382. The purely "subjective" standard of *Feeney* and *Bolden* is almost useless as a test of discriminatory intent, for it allows the state agency to *do* anything and *say* that it had a good motive so long as there is *some* evidence supporting its claim of licit motivation. That is, the subjective conception of intent is not consistent with *Arlington Heights*' rejection of the "dominant purpose" rule. As seen in the results of *Memphis* and *Crawford*, it thus provides virtually no protection against discrimination which does not declare itself on the face of the statute or policy.

383. *Id.* at 102-105.