

*Essay Exam Question Grading Key*  
Prof. McDonald

**Issue**

I1 = Correct issue statement  
I2 = Incomplete issue statement  
I3 = Incorrect issue statement

**Rule**

R1 = Correct statement of governing legal principles  
R2 = Incomplete statement of same  
R3 = Incorrect statement of same

**Analysis**

A1 = Correct factual analysis  
A2 = Incomplete factual analysis  
A3 = Incorrect factual analysis

**Conclusion**

C1 = Correct conclusion  
C2 = Incomplete conclusion  
C3 = Incorrect conclusion

**Other Notations**

D = Did not follow directions or instructions provided on front of exam or as part of question.  
G = Good point or analysis.  
ORG = Need better IRAC organization and analysis (e.g., fully complete each issue before moving on to the next issue; do not “front load” rules—discuss them only where appropriate to each IRAC of a specific issue).  
Y = "Yes!" (as in "righto!").

2)

Question 2

Equal protection of the laws. Preliminary issues. EP of the laws applies to both federal and state action – state action per the 14th Amend and fed action per the incorporation of EP by the 5th Amend DP clause. It guarantees no illegitimate classifications or unfair advantages, but the ideal is only that there be similar or equal treatment for similarly situated people. There are three tiers (plus the occasional rational basis with teeth) that may be applied in the EP context. Heightened scrutiny (strict scrutiny (SS)) applies to race, national origin, or alienage classifications, and intermediate scrutiny applies to gender and illegitimacy based classifications. (Stds will be discussed below.) Rational basis is applied to all other classifications embodied in social or economic legislation. There are two main types of classifications: (1) Those that warrant heightened scrutiny -- inherently suspect classifications and those that burden the exercise of a fundamental (fund) right; (2) those that warrant rational basis (RB) review – social and economic regulatory legislation as mentioned above. Here, we have a city/ordinance issue, so the 14th Amend applies to our discussion. We will also see that SS applies in some instances and lesser, intermediate scrutiny applies in others.

Ascertaining when a law contains a racial classification. There are two things that can embody an illegitimate classification: a statute/regulation or a state action. A statute may embody a racial classification on its face or may be racially neutral. On its face it may explicitly classify based on race, or it may refer to racial characteristics in general. SS is automatically applied to these because race is an inherently suspect classification. However, for facially neutral statutes, racial classification may be found in discriminatory enforcement or discriminatory impact/purpose. The former does not seem to exist here, because the schools do not seem to be saying you can only go to these specific schools if you're Hispanic/Caucasian. In order to have a racial classification under the discriminatory impact doctrine, there must be more than discriminatory impact -- there also must be a discriminatory purpose. Discriminatory impact alone is insufficient to apply SS. I will explore this below.

Racial segregation. Regressing for a minute from the discriminatory purpose discussion, this appears to be a case of de facto segregation, because the law doesn't explicitly impose a burden or disadvantage on a target racial group, but it may have the purpose of doing so. De jure segregation can be remedied by a court order, but only if the district court finds an EP violation, i.e. that the gov't intentionally segregated on the basis of race, rather than race neutral factors such as neighborhood composition. Here, it appears the different races had already separated themselves, so we have no proven de jure segregation. However de facto segregation can be proven by intent, which may be shown by the 5 member Caucasian school board expressing concern that Hispanics were overwhelming "the way of life of our community and our kids," and expressing relief that the firm concluded there were no other feasible locations. If the ct did find intentional segregation, it would have wide latitude to order desegregation, including the use of quotas, remedial altering of attendance zones, and transportation of students to schools away from home.

Discriminatory intent. Boys would have to put forward some evidence that the gov't put the law into effect with some sort of racial intent behind it. Is there any other legit reason for the policy/recommendation adoption? The school board asserted that for the

original plan, there was no other viable option. However looking to the facts and circumstances and the board member's comments, they might be able to show at least one discriminatory purpose, i.e. to separate whites from hispanics. The burden of proof would then shift to the gov't to prove that it would have enacted this policy even in the absence of the discriminatory motive/intent. Here, the gov't will be able to prove that because placing the schools where they were was the only option according to the engineering firm. Thus, the policy will be analyzed under rational basis review, which does not question the actual purpose of the gov't. The policy must be reasonably related to the gov't's legitimate and valid interest. Here this is satisfied because putting the school where they was reasonable given the city's environmental conditions and need for more schools.

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Benign discrimination. Classifications advantaging racial minorities. Here, the gov't is voluntarily adopting a measure to remedy any possible discrimination in the form of a new student assignment policy. This is similar to Seattle School District No. 1, where the law was found not narrowly tailored enough because it was based primarily on the composition of the district as a whole, and the gov't failed to show (per its burden) that this was properly correlated. The std of review for racial preferences is SS because the court wants to smoke out illegitimate motives. The court must ask whether the asserted gov't interest is sufficiently compelling and whether the classification drawn is necessarily, or narrowly tailored toward achieving that interest. The gov't's asserted purpose must be its actual purpose. The majority of the Court recognizes two asserted interests as sufficiently compelling: (1) Remedying past discrimination (either public or private) (Scalia would say only gov't); and (2) diversity in education (both primary/secondary and higher education contexts). Here the gov't asserted that the policy was designed to promote a diverse educational environment for the benefit of all students. This is a sufficient compelling interest. In ensuring that a classification is narrowly drawn, there can be no fixed quotas and there must be a good faith consideration of race neutral alternatives. It cannot operate to cause undue harm to other racial groups and must be limited in duration. Here, it may be causing undue harm to certain Hispanic applicants, and it does not provide for sufficient individualized consideration not on the basis of race. Thus, a court would probably conclude that this policy is not narrowly tailored to serve its compelling interest. Also, there is no evidence that achieving the same racial balance as in the neighborhood fosters the asserted purpose, i.e. 25/75% is mildly arbitrary.

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Remedying private discrimination. The gov't's regulation covers private organizations that accept members from the public. Per the 13th Amend, the gov't has the authority to remedy both public and private discrimination and determine what constitute the badges and incidence of slavery. However, the 14th Amend cannot be used to prevent private discrimination (Civil Rights cases taught us this). Congress has revisited its 13th Amend holding in that case to expand it and has also relied on its commerce and spending powers to ameliorate the effects of the civil rights cases. Because state action is required under the state action doctrine, this regulation may be justified anyway if these NCPOs perform any functions traditionally and exclusively performed by the gov't (public function doctrine), or if the gov't affirmatively authorizes, facilitates, or encourages private conduct (entanglement doctrine), or otherwise looks like a gov't body).

Classifications that advantage a class based on gender. Laws granting sex prefs to females are still subject to intermediate scrutiny. Cts are more willing to uphold these if they only incidentally disadvantage men. To discern whether this is the case, one must use judgment and a fair characterization of the law, i.e. does it seem to be primarily designed to bestow a benefit and only incidentally disadvantage men? Here, the amendment requires a proportional acceptance of the gender that was insufficient the year before. This means that some of the other gender will be denied (because it's based on proportion). Thus there might be an argument that this is not an incidental disadvantage, and that the "exceedingly persuasive justification" gloss be applied. Applying the requisite intermediate

scrutiny, the City needs to demonstrate an exceedingly persuasive justification for the sex discrimination, and a close fit between the classification drawn and the purpose for it. Here, the City's justification was to promote the treatment of all people as individuals," and this is probably not sufficient (as to remedy past discrimination where proven would be). Even if it passed muster here, it would not be sufficiently closely drawn because there is no evidence that the 20% is based on anything that will help to achieve the asserted interest. It need not be the least restrictive alternative, but there must be some more solid basis than such a number.

G

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Right not to associate. The right of expressive association applies not to general rights to associate as protected by the DP clause, but rather affords protections to groups that are actually engaging in expressive activities. There is a corollary right not to associate, which cases generally involve membership policies of organizations or antidiscrimination laws. Here, in order for Boys to succeed against the City, it would have to show that the forced inclusion of women in the group would infringe the group's freedom of expressive association because the presence of that gender affects in a significant way the group's ability to advocate public or private viewpoints. There is a four step method: Does the group engage in expressive association? Here the group has an Oath and Code of conduct and fosters certain values so it is sufficiently expressive. Does Boys' 1st Amend protection actually express particular viewpoints? Here if Boys asserts that it does, the gloss is that the court will uncritically defer to this assertion. Would the presence of women significantly burden/impair the Boys' ability to advocate its message? Here, it says that being to take in females would interfere with its operating model and that it might foster certain types of conduct contrary to its values. The court will defer to this also. Does the City have a sufficiently compelling interest to justify the alleged impairment on the group's ability to express its message? Here, the fact that the purpose indicated by the council members' comment was an improper motive may affect the analysis. The gov'ts interest in "serving Boys Place right" would be insufficient, and when looking for a compelling interest, the court looks for the actual purpose. Additionally, although the court may not be able to see how the inclusion of women would burden the right to associate (Jaycees), it may say that the interest in enforcing the antidiscrimination law is not sufficiently compelling (like in Boy Scouts) to trump Boys' first amendment rights at stake. I would conclude that Boys has a protected right not to associate here.

A2  
C3

A2  
C3

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- 3)
- 4)
- 5)
- 6)
- 7)
- 8)
- 9)
- 10)

END OF EXAM