

**PART II: Essay Question**  
**Recommended Time: 75 minutes**

The Alabama State College for Ladies was founded in 1870 to educate young women "in domestic arts and how to be a good wife." Naturally, it has shed its limited, original mission and since the 1970s has been a full-service state university offering a variety of degrees typical of other small colleges. Their admissions process has been open to men for nearly a decade now, promotional materials are mostly gender neutral in their language and the College admissions director has publicly stated that the College "does not discourage or prohibit male students from attending—although we are immensely proud of our single-sex history and traditions." Nevertheless, men constitute only 10% of applicants each year and only 15% of male applicants are accepted (as opposed to a 30% acceptance rate for female applicants).

The College has a long tradition of valuing diversity and has historically sought to pick a diverse group of women from its applicant pool. In fact, up to (approximately) 30% of the offers of admission are chosen from candidates who "advance the educational mission of diversity"; the remaining students are selected based exclusively on objective criteria (SATs, GPA, etc.). Diversity candidates are evaluated by a Diversity Program Committee that is instructed to consider a host of 70 different factors that may contribute to a diverse pool of students. These factors do not include the sex of the applicant but include many other considerations (race, home state, academic interest, socio-economic status, etc.). The Committee has access to the applicant's entire admissions file. Approximately 1% of all students recommended for admission under the Diversity Program are male.

The College has recently been sued by a rejected mail applicant, who claims the admissions policies as applied to men constitute gender discrimination.

On a related note, the College has long received donations from "Ladies who Love ASCL," a century-old private non-profit organization with a mission that states it is a "social and public service organization promoting interaction among ASCL alums and service projects to benefit ASCL and its students." The leadership of the group has recently voted to use its resources to advocate for ASCL to become a single-sex college again. They are being sued because a male alumnus of ASCL has been denied admission to their group because of his sex and claims that is a violation of the state's No Sex Discrimination statute.

1. Do you believe that the Diversity Program is permitted under the Equal Protection clause? Identify any additional characteristics that would increase the likelihood it would survive constitutional scrutiny.
2. Can the male plaintiff bring a successful equality claim under the federal constitution even though the College's written admissions policies allow men to apply and attend?
3. Is a court likely to require the Ladies Who Love ASCL to admit male members?

**END OF EXAM**

**CONSTITUTIONAL LAW II – Spring 2009**  
Prof. Eric C. Christiansen  
*Final Exam Comments*

*In the past I have found it helpful to give you some information about your final exam—particularly an idea of what I was looking for in your essay. Feel free to contact me if you have specific questions. And feel free to come by my office hours during the first three weeks of the Fall semester if you want to discuss your essay individually. You must re-read your essay, read the posted sample answer(s), and read through this document as well. Mark them all up and compare them and then come see me (bringing the mark-ups with you). Our meeting will be much more productive if you do that, so I require it.*

*On your essay exams, numbers ["1"] are points earned; numbers in parentheses ["(1)"] are weak points—too many points in parentheses and I roll the score down one or more points; check marks, plusses and minuses are extra good or bad elements that can raise or lower points if numerous. Other marks (other than the comments themselves) are just to help me find my way around the essay. I do not do extensive on-paper comments because of this memo and because you can come meet with me.*

*I tried to give a fairly straightforward exam. This could easily have been a bar exam type essay problem—it is just a little bit longer perhaps. Many of you acquitted yourselves admirably and had interesting things to say. The total essay scores ranges from 4-35 out of 36 possible. For each of the three questions there are a set number of points I am willing to give but because there are multiple ways for you to answer the question, there are more possible points than the maximum I will give, e.g., there were 12 points possible on Q3 but no one was permitted more than the 10 point max for that question. As a consequence, even 10/10 was not necessarily a perfect answer. Additionally, when I finish reading all three answers there are up to two additional points for Argument, Organization, Vocabulary or "Mastery" (clear and exceptional grasp of one or more of the issues).*

*MCQ range (out of 15 questions) was 2-15.*

*Your success is important to me—now, next year and in your future careers. Please let me know if I can help in any way.*

*--Prof. Christiansen*

**Q1) 1. Do you believe that the Diversity Program is permitted under the Equal Protection clause? Identify any additional characteristics that would increase the likelihood it would survive constitutional scrutiny.**

*This was a fairly straightforward question about affirmative action programs for higher education. Some of you were overly focused on the gender issues in the overall question and hence neglected to see this was a typical diversity program that preferenced race and other factors. Gender was not an explicit issue.*

*Total points possible: 14 (Range:2-14)*

**EPC (Fourteenth Amendment):** applies directly to the states (no incorporation needed)  
**"No State shall... deny to any person within its jurisdiction the equal protection of the laws."**

**State action requirement--state college program**

**1) What is the classification? (Basis for differentiation?)**

Is it Suspect? (immutable / history of discrim / limited political power to remedy)

Here: Race and other characteristics

**2) What is the level of scrutiny?**

Rational basis review: rationally related to legitimate govt purpose

--for characteristics like home state and socio-economics

Strict scrutiny: necessary to achieve compelling govt purpose

--for race

**3) Is the classification justified by a sufficient purpose?**

Does it survive the appropriate level of scrutiny? [analysis]

**A) Non-race elements:**

Legitimate purpose? VERY deferential --anything govt lawyer claims

burdens plaintiff: must disprove every conceivable legit purpose

Rationally related to?

Not arbitrary

**B: For the race-based element**

**Affirmative Action programs can violate EP**

Richmond v Croson Co. (1989) / Adarand Constructors v Pena

Strict scrutiny applies to federal law benefiting racial minorities

--needed to "smoke out" the appropriate use of race (Survives Str Scrut)

--searching inquiry into whether this is benign/remedial

**Compelling Government Interest:** educational benefits that flow from diversity

**Narrowly Tailored:** factors to be weighed to determine constitutionality

*Grutter*

Not a quota [seeking a Critical mass is okay (if "no specified percentage")]

Only a "plus": not insulating some applicants from competition based on classification

Uses race in a flexible, non-mechanical way

Many kinds of diversity are considered

Non-racial alternatives were considered

[limited duration?]

*Gratz*

No meaningful individualized review of applicants (Fails Str Scrut)

Automatic distribution of points based on race.

**Q2) Can the male plaintiff bring a successful equality claim under the federal constitution even though the College's written admissions policies allow men to apply and attend?**

*This question addressed facially neutral gender discrimination against men. It required you to identify the requirements and apply the many relevant facts to your analysis.*

*Total points possible: 12 (Range:2-12)*

**EPC (Fourteenth Amendment)**

**"No State shall... deny to any person within its jurisdiction the equal protection of the laws."**

State action requirement --state college

**1) What is the classification?**

Basis for differentiation? Gender (if proven by plaintiff)

Is it **Suspect?** (immutable / history of discrim / limited political power to remedy)

Yes: heightened scrutiny but not strict scrutiny = intermediate

**If facially neutral (*Washington v. Davis*)...must demonstrate:**

**A) Discriminatory Impact**

Multiple factors: legislative / policy history, statistics, etc.

**B) Discriminatory Purpose.**

*Feeney*: selected "because of" adverse effects ("aware of" not enough)

*Arlington Heights*: show 'substantial' or 'motivating' discriminatory factor

--burden shifts to D to show the same result would have occurred anyway

**2) What is the level of scrutiny?**

(NOT PROVEN) If not demonstrated to be discriminatory based on gender...

**Rational basis review:** rationally related to legitimate govt purpose

Legitimate purpose? VERY deferential --anything govt lawyer claims

**\*\*BURDENS plaintiff:** must disprove every conceivable legit purpose\*\*

Rationally related to?

(PROVEN) If demonstrated to be discriminatory based on gender... intermediate scrutiny

Burden shifts to government to justify discrimination

Important governmental interest and substantially related to it

**3) Is the classification justified by a sufficient purpose?**

**Analysis**

Rational basis review: **rationally** related to **legitimate** govt purpose

Intermediate scrutiny: substantially related to an important governmental interest

**Q3) Is a court likely to require the Ladies Who Love ASCL to admit male members?**

*This question requires you to consider a potential violation of the Right of Association by a state non-discrimination statute. If the statute is valid, the Ladies must admit the male plaintiff, if the statute is invalid for violating the Right of Association, the Ladies may exclude as they wish.*

*Total points possible: 10 (Range:2-10)*

**Right of Association**

**Define**

**Source: unenumerated fundamental right derived from the First Amend**

--integral to freedom of speech and assembly

Applies to state action through Fourteenth Amendment

--**incorporation** of BoR through due process clause of the Fourteenth Amendment

**State action?** Yes, state No Sex Discrimination law may violate 1<sup>st</sup> (14<sup>th</sup>) Amend

**State anti-discrimination laws applied to private social groups' right of association**

**First Question: Is it Association?**

**Intimate Association:** Highly personal (very small group) relationships

**Expressive Association:** Association for collective effort based on shared goals

Which here? Expressive (or both?)

Intimate or purely political associations cannot be interfered with in this manner.

**Does state law interfere?**

Yes (expressive only), but permissibly

**Jaycees**

Applies to expressive associations: limits are justified if:

A) Speech neutral law / policy (anti-discrimination is neutral)

B) CGI (non-discrimination on the basis of gender)

C) No serious burdens on association

**Jaycees answer:** discrimination only permitted if obvious and substantial interference with core expression of association (determined by court)

**Dale answer:** discriminate if group asserts it would substantially change speech (defer to group's self definition)

**Valid?** The Ladies must admit the male plaintiff or violate the No Sex Discrimination law

**Invalid?** No Sex Discrim Law violates the Right of Association; the Ladies may exclude as they wish.