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ConLawII\_LS1\_Christiansen\_SP09

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Exam Name:

Instructor:

Grade:

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## QUESTION 1:

The fourteenth amendment states that no state shall deny to any person within its jurisdiction the equal protection of the laws. This principle is applied to the Federal government through the 5th amendment's due process clause. In this case, it appears that the Alabama State College for Ladies (ASCL), which is a public state university, is implementing a diversity program that is similar to an affirmative action program. The classification the school is making is based on diversity; it is seeking out candidates that will advance the educational mission of diversity at the school. One factor the school considers in its diversity program is race. When an affirmative action program involves the issue of race, strict scrutiny is the applicable standard. The government must have a compelling interest and the law must be necessary to achieving that interest, in addition to the fact that there must not be any less restrictive alternative available. Strict scrutiny is the standard because race is a suspect classification. If a law makes a classification or distinction about race, the law must be narrowly tailored to achieving the interest so that there is no concern that the law was actually motivated by impermissible racial prejudice or stereotype.

Here, ASCL has a compelling interest in promoting a diverse student body. It has been found that many educational benefits result from having a diverse student body (exposure to different perspectives, life experiences, values, promotion of tolerance, etc.). As stated, ASCL has a long tradition of valuing diversity and has historically

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sought to pick a diverse group of students. The school's diversity program also seems necessary to achieving this goal. However, there may be a problem with the program because it seems like this program is using a quota to achieving diversity. The program makes up to 30% of its admission offers to students who advance diversity. As the Bakke case illustrated, quotas are unacceptable in the context of affirmative action programs. This is because the court has found that just looking at race (or any other single factor) does not allow for an individualized, holistic approach to analyzing a person for admission to a school. One factor cannot be the sole determining factor for admission to a school. One factor cannot be the sole trumping factor either. The types of programs the court has upheld involve programs that consider race as one factor among many in an individualized, holistic approach. Here, ASCL's program seems to meet this definition. When the school considers the issue of diversity, it is considering a host of 70 different factors that may contribute to diversity. As stated, these factors do not include gender, but do include race, home state, academic interest, etc. Here, race is but one factor among many that the school considers when trying to attain a diverse student body. Because race is not the trumping factor in the decision, this program is probably acceptable. Also, the school is doing a holistic analysis of candidates because it considers sixty nine other factors, and has access to the student's entire file.

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To make this program less subject to a constitutional challenge, ASCL should get rid of what seems to be its diversity quota of 30%. The manner in which ASCL is achieving a diverse student body is acceptable because it is conducting a holistic and individualized assessment of each candidate. The school just cannot offer 30% of its seats to 'diverse' candidates. This is too close to the racial quota that was struck down in the

Bakke case. The diversity program would be more acceptable if it conducted this analysis (objective criteria like GPA, SAT plus the 70 'diversity' criteria) for all students. Affirmative action programs are generally allowed today if they are an attempt to remedy past de jure discrimination. This might be a problem for the ASCL diversity program. The program would probably be less subject to constitutional attack if its goal was to serve as a remedy for past racial discrimination (or other discrimination) conducted by the state or school. This will be problematic given the fact that ASCL has a long history of valuing diversity and selecting a diverse student body.

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QUESTION 2:

As stated above, the equal protection clause of the 14th amendment states that no state (nor the federal government, through the 5th amendment) may deny a person the equal protection of the laws. Any time the government is making a distinction among people, an equal protection issue may be present.

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The first question to ask is, what is the classification the government is making between people? Here, the male applicant will argue that the classification is based on gender: ASCL prefers female students to male students in its admission policies. The next question to ask is whether the law is facially neutral or facially discriminatory. For a law that is facially neutral, both a discriminatory purpose and discriminatory impact must be proven. A discriminatory impact alone cannot justify a finding of discriminatory purpose. Purpose means that the government made the law 'because of' and not 'in spite of'. As the Arlington Heights case held, factors a court can consider to determine whether a

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law has a discriminatory purpose behind it include: the historical background behind the decision, the sequence of events leading up to the decision, any deviation from the normal procedure and the legislative or administrative history behind the decision.

Here, ASCL's admission policies are facially neutral because they do not make a distinction among gender on their face. Therefore, the male applicant must show that there was a discriminatory purpose and impact behind the policy. He should not have much difficulty arguing disc. impact. Men constitute only 10% of applicants each year and only 15% of male applicants are accepted as opposed to a 30% acceptance rate for women. Also, only 1% of male applicants are selected for the diversity program.

Clearly, the number of men applying to and being accepted to the school is disproportionate to the number of women. Proving discriminatory purpose may be more difficult for the male applicant however. This is because the admissions director has stated that the college does not discourage nor prohibit male students from attending. Additionally, the school has been open to men for the past decade and the school's literature is gender neutral. All of these facts indicate that the admissions policy was not designed at favoring women over men. However, the male applicant's strongest argument for a discriminatory purpose is the director's statement that "the school is very proud of our single-sex history and traditions." Considering the Arlington factors, the history of the school, its preference for women, and its earlier mission statement (to educate women in domestic arts and how to be a good wife), all seem to suggest that the school really does favor women over men. Just because the school does admit men does not mean that it is not discriminating men over women. Therefore, the male applicant should be able to establish both a discriminatory impact and purpose.

The final two questions are, what level of scrutiny is applied and does the law meet the required level of scrutiny? For issues of gender, intermediate scrutiny is the applicable standard. This means that the school must show that it has an important interest and that the law (here, the admissions policy) is substantially related to that interest. The policy must also be fairly narrowly tailored to achieving the goal and (there shouldn't be a less restrictive alternative) ASCL will probably argue that it has an important interest in promoting female scholarship and adhering to its tradition of female oriented education. The court is likely to analogize the present case to the case involving the male who applied to an all-female nursing school. In that case, the court held that the school had to admit male students in order to further the important interest of remedying gender stereotypes. This same reasoning applies here. Here, the school offers a variety of degrees and is not just focused on teaching women how to be good wives anymore. The school is likely to lose here because the interest in promoting the tradition of female scholarship is not important enough to justify favoring female students over male students. Furthermore, there are likely other less restrictive ways of achieving the school's goal that don't involve favoring women over men to such an extreme extent as is presently occurring. Therefore, ASCL's admissions policy (as applied) is not likely to pass intermediate scrutiny. Consequently, the male applicant can bring a successful constitutional challenge under the equal protection clause of the 14th amendment.

QUESTION 3:

The issue here involves freedom of association. Under the first amendment, Congress

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apply to states? (yes) <sup>14th DPC</sup>  
(Question 1 continued)

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Same? (no)  
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shall make no law abridging the right of the people to peaceably assemble. This is a fundamental right. However, this right can be infringed upon in some circumstances. There are two types of private groups under this concept. The first is an intimate association. This is a group that is small, family-like, and select. The second is an expressive association which is bigger, less select, and gathers for a common goal or for expressive purposes. Generally, the freedom of association does not give groups the right to discriminate against individuals. However, if the group is intimate, or discriminating is integral to the expressive activities of the group, the group may be allowed to discriminate. Because the government has a compelling interest in preventing discrimination, it can prevent a group from discriminating so long as an anti-discrimination law does not overly burden the purpose or nature of the group. In the Jaycees case, the court conducted this analysis of the group's purpose itself. However, in the Dale (Boy Scouts) case, the court gave deference to the group's own statement of its purpose. The rule from Dale seems to be more of the exception, and generally, the court will do its own independent analysis of the group's purpose when determining whether preventing the group from discriminating overly burdens the group or not.

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Here, the group (Ladies Who Love ASCL) is probably an expressive association, given that multiple people are part of this group. Although the name of the group (LADIES) suggests otherwise, the group defines its actual expressive purpose as being a "social and public service org promoting interaction among ASCL alums and service projects to benefit the school and its students." Although the group might argue that it's new purpose is to advocate for ASCL to become a single-sex school, this is not the group's purpose on the books, and only involves its resources. This purpose (promoting

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interaction and service projects for the school) would not be unfairly burdened by a law prohibiting gender discrimination. The presence of men in the group would not detract from fostering relations between alumni and students or completing service projects for the school. Simply put, discriminating is not integral to the group's purpose and should not be permitted. The government also has a compelling interest in preventing gender discrimination; therefore, the state's No Sex Discrimination statute will be upheld and will not be found to overly burden the nature or purpose of this group. Therefore, the court is likely to require that the Ladies Who Love ASCL admit male members.

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**END OF EXAM**