

# TITLES OF NOBILITY, HEREDITARY PRIVILEGE, AND THE UNCONSTITUTIONALITY OF LEGACY PREFERENCES IN PUBLIC SCHOOL ADMISSIONS

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## ABSTRACT

*This Article argues that legacy preferences in public university admissions violate the Constitution's prohibition on titles of nobility. Examining considerable evidence from the late eighteenth century, the Article argues that the Nobility Clauses were not limited to the prohibition of certain distinctive titles, such as "duke" or "earl," but had a substantive content that included a prohibition on all hereditary privileges with respect to state institutions. The Article places special emphasis on the dispute surrounding the formation of the Society of the Cincinnati, a hereditary organization formed by officers of the Continental Army. This Society was repeatedly denounced by prominent Americans as a violation of the Articles of Confederation's prohibition on titles of nobility. This interpretation of the Nobility Clauses as a prohibition on hereditary privilege was echoed during the ratification of the Constitution and the post-ratification period.*

*This Article also sets forth a framework for building a modern jurisprudence under the Nobility Clauses and concludes that legacy preferences are blatantly inconsistent with the Constitution's prohibition on hereditary privilege. Indeed, the closest analogues to such preferences in American law are the notorious "grandfather clauses" of the Jim Crow South, under which access to the ballot was predicated upon the status of one's ancestors. The Article considers a variety of counterarguments supporting the practice of legacy preferences and concludes that none of them are sufficient to surmount the Nobility Clauses' prohibition of hereditary privilege.*

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For many applicants to America's finest public universities this year, their admission prospects will turn heavily on one factor—do they have a parent who attended that university? If so, that applicant will likely be selected over another applicant with similar qualifications. Such applicants, known as “legacies,” receive special consideration in the admissions calculus, and are admitted at significantly higher rates than their non-legacy counterparts.<sup>1</sup>

Not surprisingly, these policies strike many people, of all political persuasions, as inherently unfair. A recent poll found that three-quarters of Americans disapprove of legacy preferences.<sup>2</sup> In 1990, Senator Bob Dole referred to legacy preferences as an “unfair advantage” and asked the Office for Civil Rights to investigate whether they violated the 1964 Civil Rights Act.<sup>3</sup> In 2002, Senator Trent Lott, in an effort at damage control following his remarks at Senator Strom Thurmond's hundredth birthday party, attacked legacy preferences for their disparate impact on minorities.<sup>4</sup> In January 2004, on the eve of the New Hampshire primary, Senator and presidential candidate John Edwards published an editorial titled “End Special Privilege” in which he argued, “legacy preferences reward students who already had the most advantages to begin with;” they are “something out of an aristocracy, not our democracy.”<sup>5</sup> In August 2004, George W. Bush, perhaps the world's ultimate legacy preference,<sup>6</sup> stated that he thought such preferences should be abolished.<sup>7</sup> And earlier that year, Texas A&M University, under intense criticism from civil rights groups and state legislators, abolished legacy preferences entirely.<sup>8</sup>

Despite these political pressures, however, legacy preferences remain firmly entrenched at America's most selective universities<sup>9</sup> and appear to

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1. ROBERT K. FULLINWIDER & JUDITH LICHTENBERG, *LEVELING THE PLAYING FIELD: JUSTICE, POLITICS, AND COLLEGE ADMISSIONS* 82 (2004).

2. See WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 1 (2005).

3. See Daniel Golden, *Family Ties: Preference for Alumni Children in College Admission Draws Fire*, WALL ST. J., Jan. 15, 2003, at A1 [hereinafter *Family Ties*].

4. See DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 247 (2006).

5. John Edwards, Op-Ed, *End Special Privilege*, USA TODAY, Jan. 26, 2004, at 12A.

6. See JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 344–45 (2005) (discussing the circumstances of Bush's admission to Yale).

7. Elisabeth Bumiller, *Bush, a Yale Legacy, Says Colleges Should Not Give Preference to Children of Alumni*, N.Y. TIMES, Aug. 7, 2004, at A12.

8. Daniel Golden, *No More Boost for 'Legacies' at Texas A&M*, WALL ST. J., Jan. 13, 2004, at B1.

9. GOLDEN, *supra* note 4, at 125 (“not a single U.S. private college or university has dropped legacy preference”). Indeed, some public institutions that do not currently employ legacy preferences

be impervious to legal challenge. Consider, for example, the recent affirmative action cases involving the University of Michigan.<sup>10</sup> Under the university's 150-point scale for undergraduate admission, one hundred points guaranteed admission and four points were awarded for being the child of an alumnus or an alumna.<sup>11</sup> The plaintiffs did not challenge this provision. Indeed, their lawyers conceded at oral argument that this "legacy preference" was constitutional because the Equal Protection Clause did not bar "alumni preferences."<sup>12</sup>

Justice Thomas's dissent in *Grutter v. Bollinger*<sup>13</sup> argued that legacy preferences were perfectly constitutional:

The Equal Protection Clause does not, however, prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures. . . . So while legacy preferences can stand under the Constitution, racial discrimination cannot. I will not twist the Constitution to invalidate legacy preferences or otherwise impose my vision of higher education admissions on the Nation.<sup>14</sup>

As a matter of current equal protection doctrine, Justice Thomas is likely correct. Absent the finding of a suspect class or an infringement of a fundamental right, legacy preferences are subject to ordinary rational basis review. Universities can plausibly argue that legacy preferences increase alumni involvement in the university, increase alumni donations to the university, and bring to the campus students who will be especially likely to become involved alumni leaders themselves.<sup>15</sup> As the Dean of Admissions at the University of Virginia has explained, "The legacy preference helps ensure [alumni] support by recognizing their financial contributions and their service on university committees and task forces."<sup>16</sup> The only published decision concerning a challenge to legacy preferences upheld them on precisely these grounds.<sup>17</sup>

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are considering adopting them. *See, e.g.*, Rick Jurgens, *Dean Seeks to Privatize Boalt Hall*, *CONTRA COSTA TIMES*, Oct. 3, 2004.

10. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 255 (2003). *See generally* GREG STOHR, *A BLACK AND WHITE CASE: HOW AFFIRMATIVE ACTION SURVIVED ITS GREATEST LEGAL CHALLENGE* (2004).

11. *Gratz*, 539 U.S. at 277–78 (O'Connor, J., concurring).

12. Transcript of Oral Argument at 13, *Grutter*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 1728613.

13. 539 U.S. 306 (2003).

14. *Id.* at 368 (Thomas, J., dissenting).

15. *See, e.g.*, BOWEN ET AL., *supra* note 2, at 167 (quoting Harvard University's justifications for legacy preferences).

16. *Family Ties*, *supra* note 3, at A1.

17. *Rosenstock v. Bd. of Governors of the Univ. of N.C.*, 423 F. Supp. 1321, 1324, 1327

Nor does it matter that legacy preferences greatly advantage affluent whites at the expense of recent immigrants and those who are the first in their families to attend college. At Texas A&M in 2002, for example, legacy preferences brought 321 whites to college who otherwise would not have been admitted, but only three African-Americans and twenty-five Hispanics.<sup>18</sup> Although numerous scholars have lamented the severe and disparate impact of these preferences on underrepresented minorities,<sup>19</sup> disparate impact alone is insufficient to sustain an equal protection challenge. Under *Washington v. Davis*,<sup>20</sup> a plaintiff must show that legacy preferences were created or are being maintained with the purposeful intent of discriminating against a suspect class. In almost all cases, this will be impossible to establish. Universities would have little difficulty in demonstrating that the legacy preferences are created primarily to advantage a particular group of alumni children, and that any racial disparities that result are purely incidental.<sup>21</sup> Absent the application of a higher standard of review, equal protection analysis is not a particularly useful route for challenging legacy preferences.<sup>22</sup> Indeed, one scholar goes so far as to say, “[the University of Michigan] may even transform itself into the Michigan University for Alumni Children Only, without running afoul of the law in any way.”<sup>23</sup>

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(M.D.N.C. 1976); see also Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 536–37 (2002) (citing reduction in alumni support to Columbia University after elimination of legacy preferences in the 1960s); cf. *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1995) (stating in dicta that universities may consider “relationship to school alumni” in making admissions decisions).

18. Todd Ackerman, *Legislators Slam A&M over Legacy Admissions*, HOUSTON CHRON., Jan. 4, 2004, at A1; see also BOWEN ET AL., *supra* note 2, at 167–68 (discussing the high socioeconomic status of legacy applicants at eighteen selective colleges and universities); *Family Ties*, *supra* note 3, at A1 (noting that at the University of Virginia 91% of legacy applicants accepted on an early-decision basis are white, but only 1.6% are black).

19. See GOLDEN, *supra* note 4, at 6; Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1197–98 (1997); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2386 (2000); Greenberg, *supra* note 17, at 536–37; Judith Greenberg & Robert Ward, *Review of Privilege Revealed*, by Stephanie M. Wildman with Contributions by Margalynne Armstrong, Adrienne D. Davis and Trina Grillo, 45 CLEV. ST. L. REV. 251, 258 (1997) (book review); Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065, 1112–13 (1997); *Naked Hypocrisy: The Nationwide System of Affirmative Action for Whites*, 18 J. BLACKS IN HIGHER ED. (Winter 1997–98, at 40, 40).

20. 426 U.S. 229 (1976).

21. See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274–81 (1979) (upholding a preference for veterans in state jobs despite the significant incidental impact on women).

22. For an argument that university admissions practices should be subject to disparate impact analysis under Title VII, see Michael G. Perez, Note, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 MICH. J. RACE & L. 467 (2004).

23. Charles W. Collier, *Affirmative Action and the Decline of Intellectual Culture*, 55 J. LEGAL

This Article argues that the conventional wisdom supporting the constitutionality of legacy preferences by public universities is incorrect. Such preferences, far from being constitutionally benign, are in fact an egregious violation of the constitutional prohibition of titles of nobility. The Constitution contains two Nobility Clauses. The “federal” clause provides that “No Title of Nobility shall be granted by the United States.”<sup>24</sup> Similarly, the “state” clause provides that “No State shall . . . grant any Title of Nobility.”<sup>25</sup>

Titles of nobility? Surely only cranks and misfits invoke the Nobility Clauses in constitutional argument.<sup>26</sup> How could legacy preferences possibly constitute a title of nobility? Although this conclusion may seem startling at first glance, it follows inevitably from a serious analysis of the Nobility Clauses. For too long, it has been easy simply to assume that the Nobility Clauses raise no significant issues of interpretation and prohibit only a very specific evil. For example, Judge Diane Wood of the Seventh Circuit recently wrote, “Debate over [the Constitution’s] meaning is inevitable whenever something as specific as the . . . Titles of Nobility Clause is not at issue.”<sup>27</sup> Yet few courts or scholars have directly asked, much less answered, the fundamental question of what specifically constitutes a prohibited title of nobility. This question is much more difficult than it first appears.

Let’s consider some possible answers. First, we might conclude that “title of nobility” is a term of art from English law, with a widely understood meaning at the time of the framing and ratification of the Constitution. Such an answer, however, is far from satisfactory. Under English law, the “nobility” consisted of a narrowly defined and readily ascertainable class. As Blackstone explained in the 1760s, the titles of nobility then in use were limited to “dukes, marquesses, earls, viscounts

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EDUC. 3, 5 (2005). Legacy preferences may withstand scrutiny under even the Civil Rights Act of 1964, which imposes lower standards of proof. See *Washington v. Davis*, 426 U.S. at 246–48 (noting differing standards between the Equal Protection Clause and the Civil Rights Act). In the late 1980s, the U.S. Department of Education’s Office for Civil Rights (OCR) investigated Harvard University’s treatment of Asian-American applicants, and found that the use of legacy preferences had a highly negative affect on that group. KARABEL, *supra* note 6, at 503–05. OCR concluded that preferences for alumni served “legitimate institutional goals.” *Id.* at 504. For an argument attacking OCR’s position, see John D. Lamb, *The Real Affirmative Action Babies: Legacy Preferences at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491 (1993).

24. U.S. CONST. art. 1, § 9, cl. 8.

25. U.S. CONST. art. 1, § 10, cl. 1.

26. See cases cited *infra* note 219 (citing pro se cases).

27. Diane P. Wood, *Our 18th Century Constitution in the 21st Century World*, 80 N.Y.U. L. REV. 1079, 1105 (2005).

and barons.”<sup>28</sup> Significantly, the definition excludes such royal titles as king or prince, as well as lesser figures such as knights, whose titles were not hereditary.<sup>29</sup> Historian John Cannon points out that only 1003 persons held these particular titles of nobility during the eighteenth century.<sup>30</sup> Because the children of the nobility were deemed commoners, and eldest sons received noble status only upon inheritance of the title, the English nobility was significantly smaller than the nobility in most other European countries.<sup>31</sup>

There is no evidence whatsoever indicating that anyone in late eighteenth-century America viewed the Nobility Clauses as reflecting only this English term of art. Indeed, if we were to accept that interpretation, states could endow citizens with titles such as king, prince, or knight, as well as other titles unknown to England, such as czar, emperor, or sultan. Yet knighthoods, for example, have long been considered inconsistent with the prohibition on titles of nobility. In 1784, in referring to the prohibition of titles of nobility in the Articles of Confederation, George Washington wrote that “it appears to be incompatible with the principles of our national Constitution to admit the introduction of any kind of nobility, knighthood, or distinctions of a similar nature, amongst the citizens of our republic.”<sup>32</sup> Obviously, the Nobility Clauses must extend beyond the narrow meaning of nobility under English law.

So let’s try a broader answer: The Nobility Clauses may simply mean that a state may not bestow a title that has been used to denote some form of royalty or nobility in any country in the world. Yet a basic hypothetical should put that notion to rest. Suppose a state decided to create a title called “distinguished citizen.” There would be one distinguished citizen in each county. The state would build each such person a large country estate and grant that person a distinctive coat of arms. Moreover, the state senate

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28. WILLIAM BLACKSTONE, 1 COMMENTARIES \*396.

29. *See id.* at \*403–06 (discussing the titles of knight, baronet, esquire, and gentleman as titles of commoners).

30. JOHN CANNON, *ARISTOCRATIC CENTURY: THE PEERAGE OF EIGHTEENTH-CENTURY ENGLAND* 10 (1984).

31. *Id.*; *see also* J.V. BECKETT, *THE ARISTOCRACY IN ENGLAND: 1660–1914*, 23, 40 (1986). It is possible that the term “nobility” had broader scope prior to the eighteenth century. *See, e.g., id.* at 18–19 (citing seventeenth-century sources). Non-hereditary “life peerages” were not introduced in England until 1958. ANN LYON, *CONSTITUTIONAL HISTORY OF THE UK* 392 (2003).

32. Letter from George Washington to Jean de Heintz, Jan. 21, 1784, *in* 1 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 67* (W.W. Abbot ed., 1992). Washington was referring to a resolution of the Continental Congress declining to nominate Americans for membership in the Polish Knights of the Order of Divine Providence. 26 *JOURNALS OF THE CONTINENTAL CONGRESS* 7 (1784) (stating that Congress could not do so “consistently with the principles of the Confederation”).

would be replaced with a Chamber of Citizens, composed solely of the distinguished citizens. Finally, the title and privileges of a distinguished citizen would be hereditary and would descend to the eldest child or other heir at law.

If the Nobility Clauses are simply about words, about the prohibition of certain distinctive terms from European aristocracy, this scheme would be unobjectionable. No formal title of nobility has actually been used.<sup>33</sup> Yet such a scheme would replicate the English House of Lords in all but name, and could only be unconstitutional if the Nobility Clauses have some substantive content and are not simply about semantics and wordplay. It is the *substance* of nobility that the Clauses primarily forbid, not just the forms in which nobility appears. Indeed, the fulsome praise of these prohibitions in the revolutionary generation is inexplicable if they were meant to destroy only the outer trappings of nobility, but to leave its substance firmly in place. As Senator John Taylor put it in 1794, “Whilst the constitution inhibits a nobility even *nominally*, are its principles permissive of its erection *in reality*? Does it reject the *term* ‘murder,’ and yet allow the crime to be perpetrated?”<sup>34</sup>

If the Nobility Clauses prohibit the substance of nobility, of what does that substance consist? Two fundamental principles lie at the core of the Nobility Clauses: (1) a prohibition of hereditary privileges with respect to the institutions of the state; and (2) a prohibition on special privileges with respect to the institutions of the state. The scope of the latter prohibition presents significant interpretive difficulties and may prove to be nonjusticiable.<sup>35</sup> But the first is straightforward. The Nobility Clauses

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33. Such a scheme would also pose significant problems under the Guarantee Clause of Article IV. U.S. CONST. art IV, § 4.

34. JOHN TAYLOR, AN ENQUIRY INTO THE PRINCIPLES AND TENDENCY OF CERTAIN PUBLIC MEASURES 29 (Philadelphia, Thomas Dobson 1794).

35. In an important 1984 article, Richard Delgado argued that the Nobility Clauses prohibited the government from providing benefits to certain favored people while withholding them from others. Richard Delgado, *Inequality “From the Top”: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984). As such, the Clauses prohibit the government from “concentrating power and resources in an elite class.” *Id.* at 122. Delgado identified several categories of conduct that would be prohibited: conferring “(a) significant and enduring advantages of wealth and political influence; (b) significant and enduring advantages with respect to the exercise of basic human faculties, especially those concerned with speech and thought; (c) perception by others as special or superior; (d) membership in a closed class, i.e., one that will resist entry by outsiders regardless of merit.” *Id.* at 115. This is a very useful start at fleshing out this principle, although, as Delgado notes, its enforcement may ultimately rest with the political branches, rather than with the judiciary. *Id.* at 122–23. For an argument that the Nobility Clauses prohibit veterans’ preferences in federal civil service employment, see Jeffrey A. Heldt, Comment, *Titles of Nobility and the Preferential Treatment of Federally Employed Military Veterans*, 19 WAYNE L. REV. 1169 (1973).

squarely prohibit hereditary privileges with respect to state institutions, whether by the federal government or by the states.

This Article argues that the prohibition on hereditary privilege under the Nobility Clauses should form an essential component of constitutional analysis. Such a view is anchored in the bedrock principle for which eighteenth-century Americans fought and died—the equality of all citizens before the law. As this Article will explain, revolutionary Americans repeatedly and consistently denounced hereditary privileges of all forms, and they viewed the Nobility Clauses as performing a vital role in their elimination.

In light of this revolutionary heritage and the Constitution's square prohibition of hereditary privileges through the Nobility Clauses, legacy preferences in public university admissions fail miserably. Indeed, so unusual are these preferences that it is hard to think of analogous situations in which access to state institutions is conditioned in part on the status of one's ancestors. The closest analogues, in fact, are the notorious grandfather clauses created in the American South to evade the Fifteenth Amendment. Like grandfather clauses, legacy preferences entrench privilege based upon a time in which a particular group's ancestors held almost all the power.<sup>36</sup> What should be surprising is not that legacy admissions are unconstitutional, but that they have remained in place for so long without challenge.

Even for those readers who disagree with my ultimate conclusion about the constitutionality of legacy preferences, I hope that this Article will at least persuade them that the Nobility Clauses are worthy of more serious discussion and analysis than they have received so far. Constitutional law would benefit from a vigorous debate on the purposes and applications of the Nobility Clauses. The issues they raise are not simple, and they merit our careful attention.

The first Part of this Article examines the revolutionary era's rejection of nobility and hereditary privilege as inconsistent with republican ideals of equality and liberty. It focuses particular attention on the controversy surrounding the formation of the Society of the Cincinnati, a hereditary organization limited to Continental Army officers and their heirs. The legitimacy of this institution, in light of the ban on titles of nobility in the Articles of Confederation, became the subject of widespread popular debate. A close examination of this debate provides substantial evidence that contemporaries viewed prohibitions on titles of nobility as substantive

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36. See *infra* notes 260–64 and accompanying text.

bans on hereditary privileges. This understanding is reiterated in numerous speeches and writings surrounding the ratification of the United States Constitution.

Part II turns to the practical problems of building a workable jurisprudence of nobility. Not every hereditary distinction that governments employ is constitutionally suspect. Thus, it is necessary to translate the constitutional prohibition on hereditary privilege into a test readily applicable by courts.<sup>37</sup> After addressing the limited Supreme Court precedent touching on hereditary privilege in the equal protection context, this Part argues that the Nobility Clauses prohibit the government from providing benefits, not available to or shared with others in the relevant jurisdiction, to individuals based solely on their ancestry. This limitation is subject to two important exceptions. Such benefits may be provided when they are either (1) an incident of a parent's government employment in circumstances in which the benefit is not part of a zero-sum game, or (2) an exemption designed to limit the burdens of mandatory government service on one particular family. This Part offers a variety of examples illustrating how this test plays out in practice.

Part III applies the insights of Parts I and II to the specific problem of legacy preferences and concludes that these preferences are an unconstitutional grant of hereditary privilege. It considers and rejects arguments that the Nobility Clauses apply only to absolute privileges or to positions of power over others. It also considers and rejects a variety of objections specific to the legacy context. First, it rejects the argument that legacy preferences are long-standing. Such preferences in public universities are a product of the latter half of the twentieth century and have their origins in Ivy League policies of the 1920s designed to limit the number of Jewish students. It also examines the experience of West Point, America's first truly selective institution of higher education. Finally, Part III rejects the arguments that the elimination of legacy preferences would harm public universities or limit their ability to employ other forms of admission preferences.

## I. TITLES OF NOBILITY AND HEREDITARY PRIVILEGE

When the leaders of the American Revolution banned titles of nobility in the Articles of Confederation, in the earliest state constitutions, and in the United States Constitution, they sought to ensure one of the

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37. See generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001) (discussing the role of doctrinal tests to implement underlying constitutional values).

Revolution's deepest principles—that hereditary privilege would have absolutely no place in the new American republic. Such distinctions were unthinkable in a nation founded upon principles of equality. The American Revolution, as Gordon Wood reminds us, was not simply about American independence, but about the replacement of the social order of monarchy with an order appropriate for a republic.<sup>38</sup> As Wood notes, “Because the revolutionaries are so different from us, so seemingly aristocratic themselves, it is hard for us today to appreciate the anger and resentment they felt toward hereditary aristocracy.”<sup>39</sup> Indeed, it has become easy to dismiss the Nobility Clauses, because we now take it for granted that a hereditary police chief or university president or general would be ridiculous. But the world of eighteenth-century Britain was a world in which positions of power and access to education were deeply tied to one's ancestry.<sup>40</sup> It is that British world of inherited privilege that the leaders of the American Revolution sought to overthrow forever. So far as I can determine, no single person of any consequence in the forming of the American Constitution, the Articles of Confederation, or the state constitutions ever argued affirmatively in favor of hereditary privileges of any form.

As the crisis with Great Britain deepened in early 1776, Thomas Paine published his famous *Common Sense*, the most influential political pamphlet in the history of the world. Paine crystallized the exasperation so many Americans felt in the presence of a hereditary monarchy and a hereditary House of Lords. Although the supporters of monarchy invoked biblical authority, Paine argued that monarchy was “the most preposterous invention the Devil ever set on foot for the promotion of idolatry.”<sup>41</sup> Hereditary succession was “an insult and an imposition on posterity.”<sup>42</sup> “One of the strongest *natural* proofs of the folly of hereditary right in kings,” Paine argued, “is that nature disapproves it, otherwise she would not so frequently turn it into ridicule, by giving mankind an *ass for a lion*.”<sup>43</sup> It opens the door to “the *foolish*, the *wicked*, and the *improper*.”<sup>44</sup>

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38. See generally GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991).

39. *Id.* at 181.

40. Beckett, *supra* note 31, at 40–42.

41. THOMAS PAINE, *COMMON SENSE* 72 (Isaac Kramnick ed., Penguin Books 1986) (1776).

42. *Id.* at 76.

43. *Id.*

44. *Id.* at 79; cf. <http://www.nationmaster.com/encyclopedia/Princess-St%C3%A9phanie-of-Monaco> (biographical sketch of Princess Stephanie of Monaco).

Indeed,

[m]ost wise men, in their private sentiments, have ever treated hereditary right with contempt; yet it is one of those evils, which when once established is not easily removed; many submit from fear, others from superstition, and the more powerful part shares with the king the plunder of the rest.<sup>45</sup>

When Americans turned to drafting their own constitutions, they quickly banished titles of nobility and any hint of hereditary privilege with respect to state institutions. The Virginia Declaration of Rights, for example, adopted on June 12, 1776, declared, “[N]o man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services; which, not being descendible, neither ought the offices of magistrate, legislator, or judge, to be hereditary.”<sup>46</sup> Similarly, the Maryland Declaration of Rights stated, “[N]o title of nobility, or hereditary honours, ought to be granted in this State.”<sup>47</sup> The New Hampshire Constitution declared that “[n]o office or place, whatsoever, in government, shall be hereditary—the abilities and integrity requisite in all, not being transmissible to posterity or relations.”<sup>48</sup> The North Carolina Declaration of Rights stated “[t]hat no hereditary emoluments, privileges or honors ought to be granted or conferred in this State.”<sup>49</sup> Other states prohibited any person holding a title of nobility from voting or holding office in the state.<sup>50</sup>

The Massachusetts Constitution of 1780, largely drafted by John Adams, stated,

No man, nor corporation, or association of men have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public; and this title being in nature neither hereditary, nor transmissible to children, or descendants, or relations by blood, the idea of a man born a magistrate, lawgiver, or judge, is absurd and unnatural.<sup>51</sup>

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45. PAINE, *supra* note 41, at 76–77.

46. VA. DECLARATION OF RIGHTS of 1776, art. IV.

47. MD. DECLARATION OF RIGHTS of 1776, art. XL.

48. N.H. CONST. of 1784, art. I, § IX.

49. N.C. DECLARATION OF RIGHTS of 1776, art. XXII.

50. *See, e.g.*, GA. CONST. of 1777, art. XI.

51. MASS. CONST. art. VI.

Similarly, in a 1777 pamphlet, Benjamin Rush, a signer of the Declaration of Independence, denounced “hereditary titles, honour and power” and sought “to exclude them for ever [sic] from Pennsylvania.”<sup>52</sup>

The Articles of Confederation, sent to the states for ratification in 1777, provided “nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.”<sup>53</sup> As Akhil Reed Amar points out, “Nowhere else had the Confederation so directly regulated states’ internal governance.”<sup>54</sup> This provision made a deep impression on observant Europeans. In 1785, Englishman Richard Price noted, “with peculiar satisfaction” that under the Articles of Confederation, “no titles of nobility shall be ever granted by the United States.”<sup>55</sup> As he explained, “Let there be honour to encourage merit; but let them die with the men who have earned them.”<sup>56</sup>

The prohibition on titles of nobility in the Articles of Confederation was the direct predecessor of the Nobility Clauses of the U.S. Constitution. Understanding how revolutionary Americans interpreted the Articles provides a unique window into their understanding of the Nobility Clauses. Section A of this Part therefore addresses the most extensive national debate over the Articles’ prohibition of titles of nobility—the intense, blistering dispute surrounding the formation of the Society of the Cincinnati. Section B examines evidence from the late 1780s and 1790s concerning the Nobility Clauses themselves. As we shall see, revolutionary Americans and their successors repeatedly linked their prohibitions on titles of nobility to prohibitions on hereditary privilege.

#### *A. The First Interpretive Dispute: The Fracas over the Society of the Cincinnati*

Americans’ agreement on the odiousness of titles of nobility does not necessarily connote agreement on the substance of what precisely was banned. Did the prohibitions on titles of nobility in the Articles of Confederation and the state constitutions simply prohibit particular titles, formal words such as “duke” or “earl,” or did they carry a more substantive meaning? In the mid-1780s, Americans fiercely debated the

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52. BENJAMIN RUSH, OBSERVATIONS UPON THE PRESENT GOVERNMENT OF PENNSYLVANIA 8 (Philadelphia, Styner & Cist 1777).

53. ARTICLES OF CONFEDERATION, art. VI, cl. 1.

54. AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 125 (2005).

55. RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION 60 (Trenton, Isaac Collins reprint 1785).

56. *Id.*

legitimacy of the institution of the Society of the Cincinnati.<sup>57</sup> This debate, which has scarcely been noticed by constitutional scholars, provides deeply probative evidence of the original meaning of the Titles of Nobility Clause in the Articles of Confederation. The thrusts and parries in this debate provide compelling evidence that the subsequent Nobility Clauses of the U.S. Constitution were not intended solely as a limitation of certain distinctive titles, such as “duke” or “earl.” Rather, these prohibitions carry an important substantive component—a prohibition on hereditary privileges with respect to state institutions.

### 1. *Formation and Controversy*

In 1783, two years after the conclusion of open hostilities, a group of former officers in the Continental Army formed a private organization entitled the Society of the Cincinnati. The Society was named after the famous Roman general Cincinnatus, who had returned to his farm after his military campaigns were concluded. Membership in the Society was limited to men who had been officers of the Continental Army for a specified period of time, although the Society had the power to elect certain honorary members as well.<sup>58</sup> The Society was divided into separate state societies, loosely overseen by an overarching national organization.<sup>59</sup> There was also a French chapter for French officers who had served during the Revolution.<sup>60</sup> The purpose of the Society was to promote fellowship amongst former officers and, quite possibly, to ensure that promised salaries and benefits were paid by the often recalcitrant Continental Congress. All of this in itself would probably not have been particularly alarming, and would have provoked as little objection as an alumni society for Harvard or Yale College.

There were two additional features of the Society, however, that immediately provoked a torrent of criticism from outraged Americans; these features could not have been better calculated to raise the specter of a nascent nobility. First, members wore a ribbon and a medal indicating their membership in the Society; such ribbons and medals were a common feature of British nobility.<sup>61</sup> Second, and most troubling, membership in

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57. For overviews of the controversy, see MINOR MYERS, JR., *LIBERTY WITHOUT ANARCHY: A HISTORY OF THE SOCIETY OF THE CINCINNATI* 48–69 (1983); Edgar Erskine Hume, *Early Opposition to the Cincinnati*, 30 *AMERICANA* 597 (1936).

58. Myers, *supra* note 57, at 261–62.

59. *Id.* at 260–61.

60. *Id.* at 32.

61. See AEDANUS BURKE, *CONSIDERATIONS ON THE SOCIETY OR ORDER OF THE CINCINNATI* 4

the Society was made hereditary, passing to each member's eldest son or other heir at law. In short, membership, with the exception of the honorary memberships, was forever limited to the descendants of Continental Army officers. As word of these features spread, Americans responded with outright horror. Here was nothing less than the beginnings of a hereditary nobility.

The first sustained attack came from the Chief Justice of South Carolina, Aedanus Burke. An immigrant from Ireland, Burke was a well-read lawyer who had risen rapidly in the South Carolina legal establishment.<sup>62</sup> Under the pseudonym "Cassius," he published a blistering pamphlet on the Cincinnati, arguing that it "creates a race of hereditary patricians, or nobility."<sup>63</sup> As he explained,

[I]t is in reality, and will turn out to be, an hereditary peerage; a nobility to them and their male issue, and in default thereof, the collateral branches: what the lawyers would call a title of peerage of Cincinnati to them and their heirs male, remainder to their heirs general.<sup>64</sup>

Such an institution, Burke contended, was a direct violation of the prohibition on titles of nobility in the Articles of Confederation.<sup>65</sup> On this point, Burke's argument had to confront an obvious objection. The Articles prohibited the United States and the states from granting titles of nobility; the Cincinnati was simply a private organization, acting without sanction from any government. Burke argued that any state sanction of the Society would be an obvious violation of the Articles, noting that "the order cannot, at present, be sanctified by legal authority,"<sup>66</sup> and that creation of the Society "by Congress or our own Legislature" would be a "violation of the confederation and of our laws."<sup>67</sup>

Even as a private organization, however, the Society still violated the Articles. As Burke put it, "[T]he order of Cincinnati usurp a nobility without gift or grant, in defiance of Congress and the States."<sup>68</sup> It was an

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(Charleston, A. Timothy, 1783) (writing under the pseudonym Cassius) (noting that the medal was "to be worn by each member, as the French and British Nobility wear their Stars and Ribbons, the insignia of their peerage").

62. JOHN C. MELENEY, *THE PUBLIC LIFE OF AEDANUS BURKE: REVOLUTIONARY REPUBLICAN IN POST-REVOLUTIONARY SOUTH CAROLINA* 17–24 (1989).

63. BURKE, *supra* note 61, at 1.

64. *Id.* at 7.

65. *Id.*

66. *Id.*

67. *Id.* at 8.

68. *Id.* at 7.

“infringement of a general law of the Union”<sup>69</sup> and would reduce the country in less than a century to “two ranks of men: the patricians or nobles and the rabble.”<sup>70</sup> The Cincinnati would “soon have and hold an exclusive right to offices, honors and authorities, civil and military.”<sup>71</sup> The Cincinnati were therefore “breaking through our constitution” and “turning the blessings of Providence into a curse upon us.”<sup>72</sup>

Burke urged the legislature “to immediately enter into spirited Resolutions” against the Society. “Instituting exclusive honors and privileges of an hereditary Order, [was] a daring usurpation on the sovereignty of the republic.”<sup>73</sup> It was also a “dangerous insult to the rights and liberties of the people, and a fatal stab to that principle of equality which forms the basis of our government, to establish which the people fought and bled as well as the Cincinnati.”<sup>74</sup>

It is important to note Burke’s argument that legislative creation of the Society would have violated the prohibition on titles of nobility, even though no formal “titles” were used. The Society’s medal, ribbon, and hereditary descent were sufficient to bring it within the prohibited category of nobility. If this argument were truly “off-the-wall,” to use Jack Balkin’s term for arguments outside the acceptable professional mainstream,<sup>75</sup> one would expect it to fall on deaf ears and be dismissed as the ravings of a paranoid lunatic. Yet nothing of the sort occurred.

Burke’s arguments against the Cincinnati were instead enthusiastically embraced across the nation, and his pamphlet was published widely.<sup>76</sup> A popular convention in the state of Connecticut warmly recommended Burke’s pamphlet “to the notice and perusal of the people at large.”<sup>77</sup> It later issued a statement warning that “a new and strange order of men had

69. *Id.*

70. *Id.* at 8.

71. *Id.* at 13.

72. *Id.* at 8. Burke found the invocation of Cincinnatus “extraordinary.” Did Cincinnatus, Burke asked,

having subdued the enemies of his country, and returned home to tend his vineyard and plant his cabbages . . . confer an hereditary order of peerage on himself and his fellow-soldiers? I answer, No; it was more than he dared to do. For a less crime, that republic, in the days of its liberty, put to death, banished or disgraced some of her citizens, as illustrious and renowned as any we have, without exception.

*Id.* at 15–16.

73. *Id.* at 30.

74. *Id.*

75. Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 *YALE L.J.* 1407, 1444–45 (2001).

76. See MYERS, *supra* note 57, at 49.

77. *CONN. COURANT*, Dec. 23, 1783, at 2.

arisen under the eye of Congress, by the name of the Society of the Cincinnati . . . to be distinguished from the rest of the citizens, wearing the badges of peerage.”<sup>78</sup> A committee of the Massachusetts legislature was appointed to inquire into any associations “which may have a tendency to create a race of hereditary nobility, contrary to the confederation of the United States and the spirit of the constitution of this commonwealth.”<sup>79</sup> The committee issued a scathing report on the Cincinnati in March 1784. The report, adopted in full by both houses of the legislature, stated, “hereditary distinctions and ostentatious orders, strike the minds of unthinking multitudes, and favour the views and designs of ambitious men, often issuing in hereditary nobility, which is contrary to the spirit of free governments, and expressly inhibited by an article in the confederation of the United States.”<sup>80</sup> Although the men who fought in the revolution were worthy of honor, there was a constant danger of “rewarding the families” of such men.<sup>81</sup> In short, the Society of the Cincinnati was “unjustifiable, and if not properly discountenanced, may be dangerous to the peace, liberty, and safety of the United States in general, and this commonwealth in particular.”<sup>82</sup> Even Henry Knox, a founder of the Society, was forced to concede that in Boston, “the cool, dispassionate men seem to approve of the institution generally, but dislike the hereditary descent.”<sup>83</sup>

On February 19, 1784, the governor of South Carolina addressed the state legislature and roundly denounced the Cincinnati as “dangerous” and as “generative of suspicion, jealousy, division and domestic discord.”<sup>84</sup> The Society’s assumption of the “power of creating orders descendable to the oldest male posterity” was “incontestably big with alarm.”<sup>85</sup> A Boston newspaper reported on April 19, 1784, that the state of Rhode Island was determined “to disenfranchise any and every person who is a member [of the Society of the Cincinnati] and render them incapable of holding any

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78. *To the Good People of the State of Connecticut*, CONN. JNL., Apr. 7, 1784, at 1.

79. Letter from Henry Knox to George Washington (Feb. 21, 1784), in 1 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, *supra* note 32, at 143.

80. INDEP. GAZETTEER, Apr. 17, 1784, at 2.

81. *Id.*

82. *Id.* A newspaper subsequently quoted a Massachusetts legislator as stating, “I tell you it won’t do; my constituents don’t like it; so, look ye, it shan’t do; we’ll have none of your Chinatis [sic] here—none—It won’t do, I tell you again, it won’t do.” WKLY. MONITOR & AM. ADVERTISER, Jan. 4, 1785, at 2.

83. Letter from Henry Knox to George Washington (Feb. 21, 1784), in 1 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, *supra* note 32, at 143.

84. *Extracts from the Speech of the Governor of South Carolina to the General Assembly*, SALEM GAZETTE, Apr. 8, 1784, at 3.

85. *Id.*

post of honor and trust in that government.”<sup>86</sup> Other writers argued that members of the Society should be barred from all civil and military offices in the United States.<sup>87</sup> Samuel Adams contended that the Society represented as “rapid a stride towards an hereditary military nobility as was ever made in so short a time”<sup>88</sup> and wondered how the Cincinnati could “imagine that a people who had freely spent their blood and treasure in support of their equal rights and liberties could be so soon reconciled to the odious hereditary distinctions of families.”<sup>89</sup> The French minister to the United States reported in April 1784, “The institution of the Society of the Cincinnati gives every day more ombrage to the inhabitants of the North. They do not wish to suffer any distinctions to exist.”<sup>90</sup> He continued, “They find them incompatible with republican government, dangerous to liberty, and I think their fears are not chimerical. . . . It is in effect an institution diametrically opposed to the principles of equality . . . .”<sup>91</sup>

Later that decade, historian William Gordon would describe the events of late 1783 and early 1784:

The alarm is become so universal, that the general society, at their meeting to be held in Philadelphia in May, must agree upon alterations, and remove the most obnoxious parts of the plan, or the states will be likely to set their faces against the Cincinnati as a dangerous order.<sup>92</sup>

As he explained, “It is to be hoped that the several states will be united in determining that the society shall dissolve with the deaths of the present officers and honorary members, and that it shall not be perpetuated by an accession of new and younger ones.”<sup>93</sup>

86. BOSTON GAZETTE, Apr. 19, 1784, at 3. No such legislation appears to have been enacted.

87. NEWPORT MERCURY, May 22, 1784, at 2.

88. Letter from Samuel Adams to Elbridge Gerry (Apr. 23, 1784), in 1 JAMES T. AUSTIN, THE LIFE OF ELBRIDGE GERRY 424, 425 (Boston, Wells & Lilly 1828).

89. Letter from Samuel Adams to Elbridge Gerry (Apr. 19, 1784), in 1 AUSTIN, *supra* note 88, at 422.

90. *Quoted in Hume, supra* note 57, at 615.

91. *Id.*

92. WILLIAM GORDON, THE HISTORY OF THE RISE, PROGRESS, AND ESTABLISHMENT, OF THE INDEPENDENCE OF THE UNITED STATES OF AMERICA 386 (New York, Hodge, Allen & Campbell 1789).

93. *Id.*; *see also* W. WINTERBOTHAM, AN HISTORICAL, GEOGRAPHICAL, COMMERCIAL, AND PHILOSOPHICAL VIEW OF THE UNITED STATES OF AMERICA 263 (New York, Tiebout & O'Brien, 1796) (“The alarm became general, . . . especially from a part of the institution which held out to their posterity the honor of being admitted members of the same society.”).

Other writers emphasized the inconsistency between the Society and the principles of the Revolution. As a New England historian wrote in 1784,

And though the war was levied against hereditary claims of power over others, and to secure equity among all the inhabitants, and the articles of union and confederation between these States expressly forbid their granting any titles of nobility, yet in May following those officers presumed to incorporate a society among themselves, to have an hereditary succession, and each a golden medal and blue ribbon, with a large fund of money at command, and power to elect our chief rulers into their society . . . . The above proceedings have caused unspeakable difficulties through these States, which have been loudly complained of by multitudes . . . .<sup>94</sup>

The hereditary aspect was easily the most grating. One opponent of the Cincinnati pointed out the significant differences between the Cincinnati and other fraternal organizations. The honors and privileges of Freemasons would “with their respective natural bodies, be laid in the dust,”<sup>95</sup> but the “honors and privileges of the *military* majority of the Cincinnati . . . are entended [sic] to descend, and like the nobility in monarchical and aristocratical governments, entailed to their male heirs forever.”<sup>96</sup>

One of the more unusual sources of attack against the Cincinnati came from a French count. Drawing heavily on Burke’s pamphlet and on assistance from Benjamin Franklin,<sup>97</sup> the Count de Mirabeau published a lengthy polemic that was widely reprinted in America.<sup>98</sup> Mirabeau, writing in the voice of an American, reiterated many of Burke’s arguments and contended that the formation of the Society was the “creation of an actual patriciate, and of a military nobility.”<sup>99</sup> Continuation of the Society risked “the total subversion of our constitution.”<sup>100</sup> The Society violated prohibitions in various state constitutions as well as the prohibition on titles of nobility in the Articles of Confederation, which Mirabeau described as “the fundamental law of the political existence of the

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94. ISAAC BACKUS, 2 A CHURCH HISTORY OF NEW ENGLAND 366 (Providence, John Carter 1784).

95. NORWICH PACKET, April 1, 1784, at 2.

96. *Id.*

97. See MYERS, *supra* note 57, at 154.

98. THE COUNT DE MIRABEAU, CONSIDERATIONS ON THE ORDER OF CININNATUS (1786).

99. *Id.* at 5.

100. *Id.* at 15.

American states.”<sup>101</sup> He asked, “[C]an it be doubted whether [the Society] violates the spirit of our laws? Whether it subverts the principles of that equality, of which we are so jealous? Whether it establishes, and eternally fixes in the state, an order of citizens distinct from their fellow-citizens?”<sup>102</sup> The Cincinnati had “lain in ruins that beautiful, plain, and natural equality, which God created for our use and happiness, which philosophy contemplated with heart-felt pleasure, which our laws and government promised and ought to have secured to us.”<sup>103</sup> In America, “where every citizen is the equal of his fellow-citizen, there can be no honour but virtue, but the love of our rights, the detestation and contempt of inequality.”<sup>104</sup>

American ministers serving in France heartily agreed with Mirabeau. John Adams wrote to LaFayette in 1784, denouncing the Cincinnati as an “order of chivalry” and stating that it was “against our confederation, and against the constitutions of several States.”<sup>105</sup> It was “against the spirits of our governments and the genius of our people.”<sup>106</sup> Adams would later describe the Cincinnati as the “deepest piece of cunning yet attempted” and an “inroad upon our first principle, equality.”<sup>107</sup> His fellow minister John Jay declared that if the Cincinnati “took well in the States he would not care if the Revolutionary War had succeeded or not.”<sup>108</sup> Benjamin Franklin stated,

I only wonder that, when the united Wisdom of our Nation had, in the Articles of Confederation, manifested their Dislike of establishing Ranks of Nobility, by Authority either of the Congress or of any particular state, a Number of private persons should think

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101. *Id.* at 19; *see also id.* at 50 (“neither do the laws of any of the states, nor of the articles of the confederation, authorize individuals to create titles, and confer them upon themselves, by their own private authority”).

102. *Id.* at 25.

103. *Id.* at 30.

104. *Id.* at 32. Mirabeau was later a prominent leader in the French Revolution. *See generally* BARBARA LUTTRELL, *MIRABEAU* (1990).

105. Letter from John Adams to the Marquis de LaFayette (Mar. 28, 1784), in 8 *THE WORKS OF JOHN ADAMS* 192 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1853).

106. *Id.*; *see also* Letter from John Adams to Elbridge Gerry (Apr. 25, 1785), in 1 *AUSTIN, supra* note 88, at 427, 429 (“Is not this institution against our confederation? Is it not against the declarations of rights in several of the states?”).

107. Letter from John Adams to Elbridge Gerry, *supra* note 106, at 427.

108. *Quoted in* Hume, *supra* note 57, at 608; *see also* Letter from John Jay to Gouverneur Morris (Feb. 10, 1784), in 3 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 109, 111–12 (photo. reprint 1970) (Henry P. Johnston ed., 1890) (“The institution of the Order of Cincinnatus does not, in the opinion of the wisest men whom I have heard speak on the subject, either do credit to those who formed and patronized or to those who suffered it.”).

proper to distinguish themselves and their Posterity, from their fellow Citizens, and form an order of *hereditary Knights*, in direct Opposition to the solemnly declared Sense of their Country.”<sup>109</sup>

Franklin hoped that “the Order will drop this part of their project, and content themselves . . . with a Life Enjoyment of their little Badge and Ribband, and let the Distinction die with those who have merited it. This I imagine will give no offence.”<sup>110</sup>

LaFayette reported to Washington from Paris that “[m]ost of the Americans Here are indecently Violent Against our Association.”<sup>111</sup> He expressed strong reservations about the hereditary component, suggesting that it “endanger[ed] the Free Principles of democracy.”<sup>112</sup> LaFayette would later admit that he wished the Cincinnati “had not been thought of,” and that his “principles ever have been against heredity.”<sup>113</sup>

Thomas Jefferson was equally hostile to the Cincinnati. In a letter to George Washington, Jefferson advised Washington to distance himself from the Society and pointedly summarized the major objections:

[T]hat it is against the Confederation; against the letter of some of our constitutions; against the spirit of them all—that the foundation, on which all these are built, is the natural equality of man, the denial of every preeminence but that annexed to legal office, and particularly the denial of a preeminence by birth.<sup>114</sup>

Jefferson reported that the Continental Congress would be “unfriendly to the institution” and that his private conversations with the delegates revealed almost unanimous opposition to the Society.<sup>115</sup> General Nathanael Greene echoed Jefferson on this point, observing “Congress has said nothing on the subject, but they are not less displeased with the order than other citizens.”<sup>116</sup> Jefferson further reported that he had “hear[d] from

109. Letter from Benjamin Franklin to Sarah Bache (Jan. 26, 1784), in 3 *THE FOUNDERS’ CONSTITUTION* 381 (Philip B. Kurland & Ralph Lerner eds., 1987).

110. *Id.*

111. Letter from the Marquis de LaFayette to George Washington (Mar. 9, 1784), in 1 *THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES*, *supra* note 32, at 190.

112. *Id.*

113. MYERS, *supra* note 57, at 157.

114. Letter from Thomas Jefferson to George Washington (April 16, 1784), in 7 *THE PAPERS OF THOMAS JEFFERSON* 106, 106 (Julian P. Boyd ed., 1953).

115. *Id.* at 107.

116. Letter from Nathanael Greene to Joseph Reed (May 14, 1784), in 13 *THE PAPERS OF GENERAL NATHANAEL GREENE* 311, 312 (Roger N. Parks ed., 2005); *see also* Letter from Elbridge Gerry to Samuel Adams (Sept. 5, 1785), in 22 *LETTERS OF DELEGATES TO CONGRESS* 618 (Paul H.

other quarters that [the Society] is disagreeable generally to such citizens as have attended to it, and therefore will probably be so to all when any circumstance shall present it to the notice of all.”<sup>117</sup> In Jefferson’s view, making the Society “unobjectionable” would require abolition of hereditary membership.<sup>118</sup> Jefferson would later note that he was an “enemy of the institution from the first moment of it’s [sic] conception.”<sup>119</sup>

## 2. *Defense and Reform of the Society*

Placed in a deeply defensive posture by this barrage of criticism, supporters of the Cincinnati produced several supportive pamphlets that stressed the virtuous and pure motives behind the Society’s founding. When they engaged the arguments about prohibited titles of nobility, they primarily emphasized the Society’s lack of connection with any institutions of the state. One supporter noted, “[T]he Cincinnati have nothing but an empty title, exhibited, like the honors of masonry, on a parchment, a medal, and a riband.”<sup>120</sup> They were entitled neither to estates nor offices. “From such a society of men as little is to be feared as from the order of masons, a convention of physicians, or a company of merchants and mechanics.”<sup>121</sup> It was “ridiculous” to suggest that a “number of individuals combined merely for social purposes and those of the most benevolent kind, without any power annexed to the honours of the society, should be dangerous to a republican form of government.”<sup>122</sup> One anonymous pamphleteer pointed to the failure of the Continental Congress to prohibit the organization, and emphasized that any

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Smith ed., 1995) (stating that Congress expected that the Cincinnati would voluntarily abolish the Society because of the “sense of their fellow citizens”).

117. Letter from Thomas Jefferson to George Washington (April 16, 1784), *supra* note 114, at 107.

118. *Id.* at 108.

119. 10 THE PAPERS OF THOMAS JEFFERSON 6 (Julian P. Boyd ed., 1954).

120. CONN. COURANT, Jan. 13, 1784, at 2.

121. *Id.*

122. *Id.* The lack of connection to state institutions was undoubtedly the strongest argument against the applicability of the Articles’ Nobility Clause. Did opponents of the Cincinnati truly believe that any private organization with a hereditary component was prohibited? It is possible that some did, but more likely the Cincinnati represented a unique category. As retired military officers, they clearly had a greater connection to the state than would, say, an organization of tailors. Membership in the Cincinnati was conditional upon the member having been previously selected and employed by the United States for high military office. A hereditary organization of former delegates to the Confederation Congress would likely have raised similar concerns. The history of nobility in Europe would also have suggested reasons to be particularly concerned about hereditary orders of military heroes.

distinctions created by the Society were “distinction[s] without power.”<sup>123</sup> Simply put, “The institution of the order of the Cincinnati is back’d by no power, and consequently attended with no danger.”<sup>124</sup> For another supporter, the Society was primarily a “charitable institution” with limited funds, making fears of nobility “extravagant.”<sup>125</sup>

One member of the Society, in a reply to Burke, tartly stated,

I believe the military gentlemen approve, as much as you can do, of the article of our confederation, prohibiting the grant of titles of nobility; and probably may have as much interest in the preservation of a republic which they have sought to establish, as those who enjoy its blessings at a cheaper rate.<sup>126</sup>

But the Society simply was not a title of nobility, “its objects being of a private nature, and not interfering with the rights and privileges of any set of men.”<sup>127</sup> As he explained, “It certainly bears no resemblance to a city corporation of shop-keepers or tailors, or to any corporate body whatever. It has no charter; it has no privileges or immunities, but what arise from its own funds.”<sup>128</sup> As such it was no different than the Freemasons, and its members were “no longer military commanders, but private citizens, combined as friends, without any political weight or authority.”<sup>129</sup>

These defenses are important both for what they say and what they do not say. If the prohibition on titles of nobility were simply a prohibition on words such as “duke” or “earl,” there would have been no violation even if the Society had been created by the Continental Congress or by an individual state. Burke’s argument could have been quickly dismissed in a single paragraph, or indeed, a single sentence. But no defender appears to have made that argument. Rather, they focused their energy on repeatedly emphasizing the private nature of the society and its lack of any connection to the state. Thus, at no point did they squarely rebut Burke’s and other critics’ contention that the Society, if created by Congress or an

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123. [STEPHEN MOYLAN?], OBSERVATIONS ON A LATE PAMPHLET ENTITLED CONSIDERATIONS ON THE SOCIETY OR ORDER OF THE CINCINNATI 18, 21 (Philadelphia, Robert Bell, 1783).

124. *Id.* at 20. Even Edgar Erskine Hume, a Society member writing in the 1930s, conceded that the arguments in this pamphlet were “somewhat less convincing” than Burke’s. Hume, *supra* note 57, at 599.

125. To Cassius, CONN. COURANT, Jan. 20, 1784, at 1.

126. A REPLY TO A PAMPHLET, ENTITLED CONSIDERATIONS ON THE SOCIETY OR ORDER OF CINCINNATI 7 (Annapolis, Frederick Green, 1783).

127. *Id.* at 8.

128. *Id.* at 18.

129. *Id.* at 19.

individual state, would constitute an impermissible title of nobility. The silence on this critical point is telling.

As criticisms mounted, the Society held its first general meeting in May 1784.<sup>130</sup> George Washington noted that the opposition of Virginia and other states to the Cincinnati had become “violent and formidable.”<sup>131</sup> Delegates from Connecticut, Massachusetts, and New Hampshire reported opposition in their states.<sup>132</sup> The South Carolina delegate reported that “almost all the various classes” in his state “were opposed to the institution in its present form.”<sup>133</sup> The Pennsylvania delegate specifically noted the objection of the people to “the hereditary part.”<sup>134</sup>

George Washington then delivered one of the most forceful speeches of his life. He insisted that the Society “discontinue the hereditary part in all its connections *absolutely*, without any substitution which can be construed into concealment.”<sup>135</sup> Indeed, had he not feared alienating the French members of the Society, Washington stated he “would propose to the Society to make one great sacrifice more to the world [and] abolish the Order altogether.”<sup>136</sup> Washington then introduced a report of a committee of Congress providing that “no persons holding an hereditary title or order of nobility should be eligible to citizenship in the new state they were about to establish.”<sup>137</sup> Washington stated that he “knew this to be leveled at our Institution.”<sup>138</sup> If the Society did not abolish hereditary succession, “we might expect every discouragement and even *persecution* from them and the states severally— . . . 99 in a hundred would become our violent enemies.”<sup>139</sup> Washington concluded by referring to a letter from LaFayette, “objecting to the hereditary part of the Institution, as repugnant to a republican system, and very exceptionable.”<sup>140</sup> The next day, Washington put his personal reputation directly on the line. He spoke against the hereditary provisions with “much warmth and agitation,”

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130. See Myers, *supra* note 57, at 58.

131. Winthrop Sargent’s Journal (May 5, 1784), in 1 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, *supra* note 32, at 333.

132. *Id.*

133. *Id.*

134. *Id.*

135. George Washington, Observations on the Institution of the Society (May 4, 1784), in 1 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, *supra* note 32, at 330.

136. Winthrop Sargent’s Journal, *supra* note 131, at 334.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

noting that they were “peculiarly obnoxious to the people” and stating that unless they were abolished, he would resign from the Society.<sup>141</sup>

Yielding to Washington, and to overwhelming public pressure, the general meeting accordingly revised the founding document of the Society to eliminate all traces of hereditary succession. Shortly thereafter, the Society issued a circular letter under Washington’s signature to the various state societies. Widely reprinted in American newspapers,<sup>142</sup> the letter explained that the Society had initially been created “in a hasty manner.”<sup>143</sup> Because the “original institution appeared in the opinion of many respectable characters to have comprehended objects which are deemed incompatible with the genius and spirit of the confederation,” the Society had abolished “the hereditary succession.”<sup>144</sup> This succession would have drawn an “unjustifiable line of discrimination between our descendants and the rest of the community.”<sup>145</sup> As one defender of the Society explained, “the exceptionable part was the hereditary descent; that was, to conform to the sentiments of the people, abolished.”<sup>146</sup> Washington later contended, “[I]f the first institution of this Society had not been parted with, ere this we should have had the country in an uproar, and a line of separation drawn between the Society and their fellow-citizens.”<sup>147</sup> Even Nathanael Greene, who had initially supported the hereditary provisions, conceded his error. In a letter to Washington, he admitted, “The clamour raised against the Cincinnati was far more extensive than I had expected. I had no conception that it was so universal. . . . [B]ut I found afterwards our ministers abroad and all the inhabitants in general were opposed to the order.”<sup>148</sup> He commended

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141. *Id.* at 335; *see also* Letter from George Washington to James Madison (Dec. 16, 1786), in 1 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES, *supra* note 32, at 457 (describing Washington’s role in the reform of the Society).

142. *See, e.g.*, NEWPORT MERCURY, May 29, 1784, at 2.

143. A CIRCULAR LETTER, ADDRESSED TO THE STATE SOCIETIES OF THE CINCINNATI 2 (Philadelphia, E. Oswald & D. Humphreys, 1784).

144. *Id.* at 2–3.

145. *Id.* at 3.

146. *From the Independent Gazetteer*, NEW-HAVEN GAZETTE, July 29, 1784, at 1. Later that year, at the Yale College commencement ceremonies, there was a “forensic disputation” on the question: “Is the Society of the Cincinnati dangerous to the liberties of the United States?” SALEM GAZETTE, Sept. 21, 1784, at 3.

147. Letter from George Washington to Arthur St. Clair (Aug. 31, 1785), in 3 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 212–13 (W.W. Abbot ed., 1994).

148. Letter from Nathanael Greene to George Washington (Aug. 29, 1784), in 13 THE PAPERS OF GENERAL NATHANAEL GREENE, *supra* note 116, at 383.

Washington for the measures he took, which “seemed to silence all jealousies on the subject.”<sup>149</sup>

With this important modification, opposition to the Cincinnati largely faded away.<sup>150</sup> Surprisingly, however, the abolition of hereditary succession never became formally effective, because it failed the necessary ratification by the state chapters of the Society.<sup>151</sup> In 1786, for example, Alexander Hamilton, who knew something about low birth,<sup>152</sup> served on a committee of the New York Society of the Cincinnati. Although the committee rejected the proposed changes on the grounds that they provided no alternative mechanism for the Society to continue, it did note serious concerns with the hereditary succession, since it “refers to birth what ought to belong to merit only, a principle inconsistent with the genius of a Society founded on friendship and patriotism.”<sup>153</sup> Most Americans were likely unaware that hereditary succession had not been formally abolished. In the mid-1790s, Edmund Randolph approvingly noted that the Cincinnati had abolished “hereditary succession” at the “first general meeting.”<sup>154</sup> In 1797, another historian noted, “[t]he Cincinnati afterwards expunged the exceptionable part of their constitution.”<sup>155</sup> A modern historian points out that it “was not clear . . . how many state societies had to accept the amended institution before it became effective” and that “the question remained undecided for the next sixteen years.”<sup>156</sup>

### 3. Implications

Reflecting on the dispute several years later, John Adams emphasized that “in America . . . legal distinctions, titles, powers, and privileges, are

149. *Id.*

150. One newspaper noted, however, that “the determination of the Society that succession shall not be hereditary is of little or no moment, as the son of a member, upon his father’s decease, will possess himself of, and exult in the insignia which his ancestor bore, and that by this means an *hereditary peerage* will be as effectually established in this country, to the danger and perhaps subversion of its liberties . . .” NEWPORT MERCURY, July 3, 1784, at 1.

151. Hume, *supra* note 57, at 618–22. The Society continues in existence today and has a large headquarters on Massachusetts Avenue in Washington, D.C.

152. See RON CHERNOW, ALEXANDER HAMILTON 8 (2004).

153. Report of a Committee of the New York State Society of the Society of the Cincinnati (July 6, 1786), in 3 THE PAPERS OF ALEXANDER HAMILTON, 675, 676 (Harold C. Syrett ed., 1962).

154. [EDMUND RANDOLPH], GERMANICUS 53 (Philadelphia, 1794).

155. A CONCISE HISTORY OF THE UNITED STATES 168 (2d ed., Philadelphia, John McCulloch 1797).

156. MYERS, *supra* note 57, at 63.

not hereditary.”<sup>157</sup> For Adams, there was no more “remarkable phenomenon in human history, nor in universal human nature, than this order.”<sup>158</sup> How could the army officers “voluntarily engaged in a service under the authority of the people” institute “titles and ribbons, and hereditary descents, by their own authority only?”<sup>159</sup> Quite simply, the Society of the Cincinnati was “founded on no principle of morals, true policy, or our own constitution.”<sup>160</sup> Similarly, in an article for a French encyclopedia on the controversy, Jefferson wrote, “[O]f distinctions by birth or badge, [Americans] had no more idea than they had of the mode of existence in the moon or planets. They had heard only that there were such, and knew they must be wrong.”<sup>161</sup>

Throughout the controversy, prominent Americans, including well-trained lawyers, repeatedly referred to the prohibition on titles of nobility in the Articles of Confederation. This widespread popular deliberation over the meaning of this provision represents the best and most concrete evidence of how late-eighteenth-century Americans viewed constitutional prohibitions on titles of nobility. The Society was little more than a private fraternity of retired public officials with a hereditary right to wear a ribbon.<sup>162</sup> Yet it was denounced as illegitimate and inconsistent with the Articles of Confederation by people who disagreed about almost everything else. On what other subject did John Adams, John Jay, Thomas Jefferson, Samuel Adams, Benjamin Franklin, and, I think we can safely say, George Washington, all agree? How would these Americans have reacted if the federal government or a state had opened and funded an exclusive university to which admission was linked, even in part, to hereditary privilege? I think the answer is obvious—they would have resisted it with every fiber of their being.<sup>163</sup>

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157. JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 207 (Da Capo Press, 1971) (1788).

158. *Id.* at 208.

159. *Id.*

160. *Id.* at 209.

161. Jefferson's Observations on Demeunier's Manuscript, in 10 THE PAPERS OF THOMAS JEFFERSON 30, 51 (Julian P. Boyd ed., 1954). In 1786, Jefferson would report to Washington from Paris that he had “never heard a person in Europe, learned or unlearned, express his thoughts on this institution, who did not consider it dishonourable and destructive to our governments,” and he concluded that the Society should be eradicated completely. Letter from Thomas Jefferson to George Washington, Nov. 14, 1786, in *id.* at 531, 532–33.

162. *But see Remarks on a Piece in the Connecticut Courant, Signed A.Z.*, CONN. COURANT, Feb. 10, 1784, at 2 (“[N]obility is a word of sparse signification and may arise from various sources. . . . The medal and the ribbon . . . will inspire a kind of enthusiastic possession of authenticated nobility to many of those who are distinguished by them, and provoke envy and emulation in many observers.”).

163. It is perhaps worth noting that “[o]f the ninety-nine men who signed the Declaration of

### *B. The Constitution and the Post-Ratification Period*

This Section provides still further evidence suggesting that the Nobility Clauses prohibit not only the use of particular titles, but also the granting of hereditary privileges with respect to state institutions. The tight linkage between the Nobility Clauses and hereditary privilege permeates the discussions of the Nobility Clauses in the late 1780s and 1790s.

#### *1. The Nobility Clauses in the Constitution*

In 1787, there could be little doubt that the prohibition on titles of nobility would survive whatever revisions were made to the Articles of Confederation. A year earlier, Noah Webster praised the fact that “[n]ot a single office or emolument in America is held by prescription or hereditary right; but all at the disposal of the people.”<sup>164</sup> Such principles, Webster explained, “form the basis of our American governments; the first and only governments on earth that are founded on the true principles of equal liberty, and properly guarded from corruption.”<sup>165</sup> In an earlier work, Webster had emphasized that the “annihilation of all hereditary distinctions of rank” was necessary for the preservation of popular government, and he singled out for praise the provision of the Article of Confederation “barring all titles of nobility in the American states.”<sup>166</sup> Webster, although doubtful that the Cincinnati were a true threat to American liberty, noted that “[t]he jealousy even of the southern states in regard to the establishment of rank and hereditary titles, was remarkable in the opposition which appeared against the Cincinnati.”<sup>167</sup> As the Constitutional Convention convened in May 1787, a writer in the *Pennsylvania Gazette* emphasized that the federal union should be strengthened because a “body of men may arise, who may form themselves into an order of hereditary nobility, and, by surprise or stratagem, prostrate our liberties at their feet.”<sup>168</sup>

The Nobility Clauses occasioned little debate in the Constitutional Convention itself; indeed, as carry-overs from the Articles of

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Independence or were members of the Constitutional Convention, only eight are known to have had fathers who attended college.” CARL J. RICHARD, *THE FOUNDERS AND THE CLASSICS* 51 (1994).

164. Noah Webster, *Sketches of American Policy*, ST. GAZETTE OF SOUTH CAROLINA, Jan. 26, 1786, at 2.

165. *Id.*

166. NOAH WEBSTER, *SKETCHES OF AMERICAN POLICY* 26 (Hudson and Goodwin, Hartford 1785).

167. *Id.*

168. Harrington, *To the Freemen of the United States*, PA. GAZETTE, May 30, 1787.

Confederation they were unlikely to be the subject of much comment. It is not until the ratification period that we can find significant statements about the meaning of these clauses. Even then, however, explanations were often perfunctory. In the *Federalist*, James Madison simply stated, “The prohibition with respect to titles of nobility, is copied from the Articles of Confederation, and needs no comment.”<sup>169</sup> His coauthor, Alexander Hamilton, was slightly more expansive, stating:

Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.<sup>170</sup>

He emphasized that the Constitution’s Nobility Clauses, along with the prohibition on ex post facto laws and the establishment of the writ of habeas corpus, “are perhaps greater securities to liberty and republicanism than any it contains.”<sup>171</sup>

Nonetheless, there are enough statements in the ratification period to lend strong support to an interpretation of the Clauses as a substantive prohibition on hereditary privilege. Indeed, one *Federalist* writer in 1787 explicitly linked equivalent educational opportunities to the absence of a hereditary nobility. He argued that senators would “have none of the peculiar follies and vices of those men, who possess power merely because their fathers held it before them, for they will be educated (under equal advantages, and, with equal prospects) among and on a footing with the other sons of a free people.”<sup>172</sup> A similar point was made in 1799:

Since knowledge is the foundation of Republicanism, let us be careful to render the avenues to it easy and accessible. Let us put into the hands of the poor man, as well as the rich, the means of ennobling his nature. No hereditary distinctions, no titles of nobility, will ever be suffered to trample on our equal liberties. Genius and exalted abilities will always receive sufficient encouragement under a free government.<sup>173</sup>

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169. THE FEDERALIST NO. 44, at 227 (James Madison) (Garry Wills ed., 1982).

170. THE FEDERALIST NO. 84, at 436 (Alexander Hamilton) (Garry Wills ed., 1982).

171. *Id.* at 435.

172. *On the Safety of the People, from the Restraints Imposed upon the Senate*, PA. GAZETTE, Oct. 24, 1787.

173. EXTRACTS FROM PROFESSOR ROBISON’S “PROOFS OF A CONSPIRACY” 11 (Manning & Loring, Boston 1799); cf. Thomas Jefferson, A Bill for the More General Diffusion of Knowledge,

Other Federalists stressed the broad egalitarian implications of the Nobility Clauses. The paradigmatic example was holding office. One Federalist emphasized that it was not “necessary to be of noble blood or of a powerful family” to hold office in America.<sup>174</sup> Rather, “it is declared that there shall be no titles, rank or nobility” and power is vested “in the people themselves.”<sup>175</sup> In the Massachusetts ratifying convention, Isaac Backus praised the Constitution for “excluding all titles of nobility, or hereditary succession of power. . . . Such a door is now opened, for the establishing of righteous government, and for securing equal liberty, as never was before opened to any people upon earth.”<sup>176</sup> But the scope of Nobility Clauses was not limited to holding office. It extended to any form of privilege provided by government. As another Federalist explained, under the Constitution there “never can be any nobility in the states, or person possessed of any rights or privileges but what are common to the meanest subject . . . .”<sup>177</sup> Others contended that the Nobility Clauses demonstrated that the Convention had no idea of “establishing an order in the State, with rights independent of the people.”<sup>178</sup> A similar point was made by James Wilson in the Pennsylvania ratifying convention, where he asked rhetorically, “What peculiar rights have been reserved to any class of men, on any occasion? . . . Have [the members of the Convention] made any particular provisions in favor of themselves, their relations, or their posterity?”<sup>179</sup>

Some states sought to go even further in the prohibition on titles of nobility. The New Hampshire ratifying convention recommended various amendments to the Constitution, including an amendment prohibiting Congress from granting its consent to any federal officeholder accepting a title of nobility from any foreign state.<sup>180</sup> Some Americans opposed these proposed amendments, but not on any ground favoring hereditary

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1779, in 2 *THE PAPERS OF THOMAS JEFFERSON* 526, 527 (Julian P. Boyd ed., 1950) (stating that liberal education should be available “without regard to wealth, birth or other accidental condition or circumstance”).

174. *To the Honorable the Members of the Convention of Virginia*, PA. GAZETTE, May 28, 1788, reprinted in IX *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 889, 893 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

175. *Id.*

176. Isaac Backus on Religion and the State, Slavery, and Nobility, Feb. 4, 1788, in *THE DEBATE ON THE CONSTITUTION* 931, 933 (Bernard Bailyn ed., 1993).

177. *To the People of Pennsylvania*, PA. GAZETTE, Nov. 7, 1787.

178. [BURWELL STARKE], *OBSERVATIONS UPON THE PROPOSED PLAN OF FEDERAL GOVERNMENT* 34 (Petersburg, Virginia, Hunter and Prentis 1788).

179. James Wilson’s Summation and Final Rebuttal, Dec. 11, 1787, in *THE DEBATE ON THE CONSTITUTION* 832, 862 (Bernard Bailyn ed., 1993).

180. *WORCESTER MAGAZINE* 3 (July 3, 1788).

privilege. Rather, they argued that such awards would arise in rare cases, and mostly from “great personal merit.”<sup>181</sup> It was the custom “among all civilized nations to reward the distinguished citizens of each other by various marks of honor” and “American philosophers, poets and artists” should not be excluded from such awards.<sup>182</sup> Nonetheless, if such awards produced “a lust after domestic nobility,” they “must be absolutely prohibited.”<sup>183</sup>

## 2. *Discussions of the Nobility Clauses in the 1790s*

The years following the ratification of the Constitution provided Americans an opportunity to look back at what the Revolution had accomplished. Not surprisingly, many of them pointed to the prohibitions on titles of nobility and the elimination of hereditary privilege as some of the Revolution’s most significant achievements. An almanac pointed out that American government was not “committed to the weak and worthless, merely because they might boast an hereditary right.”<sup>184</sup> South Carolina Federalist David Ramsay explained that the Revolution had changed monarchical subjects into citizens. “Subjects look up to a master, but citizens are so far equal, that none have hereditary rights superior to others.”<sup>185</sup> The 1790 Pennsylvania Constitution declared that the legislature shall “not grant any title of nobility or hereditary distinction.”<sup>186</sup> An identical provision appeared in the South Carolina Constitution of the same year,<sup>187</sup> and in the 1792 Kentucky Constitution.<sup>188</sup>

In 1791, the president of the Massachusetts Senate delivered an oration prior to Samuel Adams’s inauguration as governor. He returned to the “first principles” of government, particularly the provision of the Massachusetts Constitution that explicitly stated, “the idea of a man born a magistrate, legislator or judge, is absurd and unnatural.”<sup>189</sup> “May it not

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181. FED. GAZETTE, Dec. 5, 1788, at 2.

182. *Id.*

183. *Id.*

184. THE NEW-JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND AND VIRGINIA ALMANAC (Baltimore, Samuel & John Adams, 1790).

185. DAVID RAMSAY, A DISSERTATION ON THE MANNER OF ACQUIRING THE CHARACTER AND PRIVILEGES OF A CITIZEN OF THE UNITED STATES 3 (1789), *quoted in* WOOD, *supra* note 38, at 169.

186. PA. CONST. of 1790, art IX, § 24. Such state constitutional provisions may provide additional bases for legal challenges to legacy preferences.

187. S.C. CONST. of 1790, art. IX, § 5.

188. KY. CONST. of 1792, art. VII, cl. 26.

189. BOSTON GAZETTE, May 30, 1791, at 1.

hence be inferred," he asked, "that claims to hereditary right, to shares in sovereignty, or in the administration of government, transmissible to children, or relations by blood are usurpations of the natural rights of men, as well as totally repugnant to the first principles of our free Constitution."<sup>190</sup> That same year Governor Thomas Mifflin of Pennsylvania argued that "[s]o many dangers attend the perpetuation of any office whatever, by hereditary succession, that the people of America ought to tremble at the idea of seeing a law passed to establish even hereditary bailiffs or constables."<sup>191</sup> A New Hampshire minister in 1792 preached, "While clouds of hereditary rights, shadows of aristocracy, and the darkness of monarchical governments involve other nations in slavery, we are free."<sup>192</sup> The next year, a newspaper writer argued, "Titles of nobility are properly discarded in the federal constitution, because they convey a legal right to hereditary rank and consequence."<sup>193</sup>

Thomas Paine, the celebrated author of *Common Sense*, returned in the early 1790s with *The Rights of Man*, his famous defense of the French Revolution. Paine's work found a large American audience. At least four American editions were printed by 1791, each bearing praise from Thomas Jefferson, and the work was widely excerpted in newspapers across the country.<sup>194</sup> Paine's attack on hereditary privileges had lost none of its punch since *Common Sense*. Paine contended, "[T]he idea of hereditary legislators is as inconsistent as that of hereditary judges, or hereditary juries, and as absurd as an hereditary mathematician, or an hereditary wise man, and as ridiculous as an hereditary poet laureate."<sup>195</sup> The "hereditary system" was as "repugnant to human wisdom as to human rights, and is as absurd as it is unjust."<sup>196</sup> The "absurdity of hereditary government" was amply demonstrated by the "descendants of those men, in any line of life, who once were famous."<sup>197</sup> "Is there scarcely an instance in which there was not a reverse of the character? It appears as if the tide of mental faculties flowed as far as it could in certain channels and then forsook its course, and arose in others."<sup>198</sup> In a published letter, Paine reiterated that

190. *Id.*

191. PA. GAZETTE, Sept. 7, 1791.

192. WILLIAM MORRISON, A SERMON DELIVERED AT DOVER 38 (Henry Ranlet, Exeter, New Hampshire 1792).

193. *The American—No. 4*, CONN. COURANT, Jan. 28, 1793, at 1.

194. *See, e.g.*, CITY GAZETTE & DAILY ADVERTISER, June 29, 1791, at 2.

195. THOMAS PAINE, THE RIGHTS OF MAN, in 1 THE COMPLETE WRITINGS OF THOMAS PAINE 241, 269 (Philip S. Foner ed., 1945).

196. *Id.* at 367.

197. *Id.* at 368.

198. *Id.*; *see also* *The American—No. 3*, CONN. COURANT, Jan. 21, 1793, at 1 ("Stupidity or

the notion of hereditary succession was “the most base and humiliating idea that ever degraded the human species, and which, for the honor of humanity, should be destroyed forever.”<sup>199</sup> In another letter Paine noted, “The system of government purely representative, unmixed with anything of hereditary nonsense, began in America.”<sup>200</sup>

In 1794, in a speech to the Massachusetts legislature, Samuel Adams pointedly linked the Nobility Clauses to the Declaration of Independence’s assertion that “all men are created equal.”<sup>201</sup> The doctrine of “liberty and equality [was] an article in the political creed of the United States,” and the framers of the Constitution had accordingly properly rejected titles of nobility as “introductory to the absurd and unnatural claim of hereditary and exclusive privileges.”<sup>202</sup> Looking back on the American Revolution in 1798, Stephen Burroughs recalled that the revolutionaries considered “a man’s merit to rest entirely with himself, without regard to family, blood, or connection.”<sup>203</sup> A grand jury charge the same year emphasized, “Hereditary succession being unknown in our government, there can be no danger that the right of birth will ever place those in office, under our constitution, who have no meritorious claims of their own, but what they derive from the rank and glory of their ancestors.”<sup>204</sup>

In 1795, Congress required any person who had “borne any hereditary title, or been of any of the orders of nobility, in the kingdom or state from which he came” to make a formal renunciation “of his title or order of nobility” prior to obtaining United States citizenship.<sup>205</sup> This requirement remains in force today.<sup>206</sup> James Madison noted approvingly that this legislation would “exclude all persons from citizenship who would not renounce forever their connection with titles of nobility.”<sup>207</sup> The Revolution, he stated, had “infallibly . . . abolished” any titled orders in America.<sup>208</sup> As he later put it, “[A]bolition of titles was essential to a

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insanity are the portion of half the crowned heads in Europe.”).

199. THOMAS PAINE, LETTERS, BY THE AUTHOR OF COMMON SENSE 21 (Albany, Charles R. & George Webster 1792).

200. *Id.* at 3.

201. N.Y. DAILY GAZETTE, Jan. 27, 1794, at 2.

202. *Id.*

203. *Quoted in* WOOD, *supra* note 38, at 180.

204. FED. GALAXY, Aug. 18, 1798, at 3; *see also* JOSIAH DUNHAM, AN ORATION FOR THE FOURTH OF JULY 1798, 6 (Hanover, New Hampshire, Benjamin True 1798) (“For, till virtues and talents become hereditary, the idea of hereditary succession, in a free government, is chimerical and absurd.”).

205. Act of Jan. 29, 1795, 1 Stat. 414.

206. 8 U.S.C. § 1448(b) (2000).

207. 4 ANNALS OF CONG. 1032 (1795).

208. *Id.*

Republican revolution . . . . The sons of the Cincinnati could not have inherited their honors, and yet the minds of the Americans were universally disgusted with the institution.”<sup>209</sup> Another approvingly noted that in America all citizens “are esteemed equal to any of their fellow-citizens” and “all offices are open to them and their children,” if “they may be qualified to fill them.”<sup>210</sup> Opponents of the measure argued that it was meaningless, since titles of nobility had no legal effect in America anyway. As one congressman argued, requiring renunciation “clearly admit[ted] that such person does or may possess such privilege.”<sup>211</sup>

In his 1803 edition of *Blackstone*, the famed Virginia jurist St. George Tucker explained why *Blackstone*’s support of hereditary honors was erroneous:

Had nature in her operations shewn that the same vigour of mind and activity of virtue which manifests itself in a father, descends unimpaired to his son, and from him to latest posterity, in the same order of succession, that his estate may be limited to, some appearance of reason in favour of hereditary rank and honors might have been offered. But nature in every place, and in every age, has contradicted, and still contradicts this theory. The sons of Junius Brutus were traitors to the republic; the emperor Commodus was the son of Antoninus the philosopher; and Domitian was at once the son of Vespasian, and the brother of Titus.<sup>212</sup>

As Tucker explained, titles of nobility “can not be too cautiously guarded against; and their total exclusion seems to be the only mode by which this caution can [be] operated effectively.”<sup>213</sup>

209. 4 ANNALS OF CONG. 1054 (1795). In 1792, Madison had claimed that the Republicans were the party that “hat[ed] hereditary power as an insult to the reason and outrage to the rights of man.” (quoted in BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* 25 (2005)).

210. INDEP. GAZETTEER, Jan. 24, 1795, at 3.

211. 4 ANNALS OF CONG. 1046 (1795) (statement of Rep. Hillhouse). In 1810, Congress approved a constitutional amendment that would remove American citizenship from anyone who “shall accept, claim, receive, or retain any title of nobility or honour, or shall, without the consent of Congress, accept and retain any present, pension, office or emolument of any kind whatever, from any emperor, king, prince or foreign power.” DAVID KYVIG, *EXPLICIT AND AUTHENTIC ACTS* 117 (1996). The amendment was not ratified by a sufficient number of states, although confusion on this point led to the amendment being included in some later printed versions of the Constitution. See generally Jol A. Silversmith, *The “Missing Thirteenth Amendment”*: *Constitutional Nonsense and Titles of Nobility*, 8 S. CAL. INTERDISC. L.J. 577 (1999).

212. Excerpted in 3 *THE FOUNDERS’ CONSTITUTION* 386, 387 (Philip B. Kurland & Ralph Lerner eds., 1987).

213. *Id.* at 388.

### C. Summary

The evidence recounted in this Part provides significant evidence that the Nobility Clauses were widely understood at America's founding as vital components of America's commitment to the core principle of equality. As Joseph Story would put it in his 1833 treatise on constitutional law, "[P]erfect equality is the basis of all our institutions."<sup>214</sup> He continued, "[D]istinctions between citizens, in regard to rank, would soon lay the foundation of odious claims and privileges, and silently subvert the spirit of independence and personal dignity, which are so often proclaimed to be the best security of a republican government."<sup>215</sup>

The commitment to equality entailed a deep-rooted conviction that hereditary privileges were fundamentally wrong, both legally and morally. Americans of the founding era repeatedly linked their denunciations of hereditary privilege to the constitutional prohibition on titles of nobility. The debate on the Cincinnati shows that the idea of nobility was not confined to the granting of particular titles such as duke or earl. Rather it was the substance of nobility—the unearned privilege that descends from parent to child—that grated revolutionary sensibilities most intently.

The remainder of this Article explores how this revolutionary commitment to the abolition of hereditary privilege should inform modern constitutional interpretation.

## II. A JURISPRUDENCE OF NOBILITY

In Part I, I placed considerable emphasis on the original meaning of the Nobility Clauses. In so doing, I do not mean to suggest that original meaning is the sole or even necessarily the most determinative source of constitutional interpretation. Without opening up endless interpretative controversies, suffice it to say that I believe original meaning is often highly informative, and that is particularly true when dealing with provisions such as the Nobility Clauses that have not been the subject of significant judicial interpretation.

More importantly, nothing in subsequent American constitutional or social history justifies a significant departure from the anti-hereditary privilege reading of the Nobility Clauses. No one could plausibly argue that American constitutional development or the general conditions of

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214. *Excerpted in* 3 THE FOUNDERS' CONSTITUTION 390 (Philip B. Kurland & Ralph Lerner eds., 1987).

215. *Id.*

American society have broadly shifted in favor of hereditary privilege in meaningful ways over the last two hundred years. Indeed, the seminal event of American constitutional history—the emancipation of the slaves and the passage of the Reconstruction Amendments—is itself fundamentally about the rejection of hereditary privilege.

An attentive reader of Part I may well have wondered how any of these recurring denunciations of hereditary privilege could be squared with the contemporary law of chattel slavery, under which slave status descended to the children of slaves. The simple answer, of course, is that they could not. As Akhil Reed Amar has asked, “Was not South Carolina, a land of light-skinned lords and dark-skinned serfs, in violation of the spirit of the antinobility clause?”<sup>216</sup> Any fair reading of the Nobility Clauses would surely prohibit making slave status descendible. Yet as Amar admits, the more explicit constitutional provisions protecting slavery probably trumped the broader principles of the Nobility Clauses.<sup>217</sup> With the passage of the Thirteenth Amendment, however, slavery was permanently banished from America, and with it any notion of hereditary slave status. The Thirteenth Amendment is thus a further anti-hereditary privilege gloss on the original Nobility Clauses. That revolutionary Americans failed to live up to their professed principles in the area of slavery is no reason for modern Americans to water down those principles, particularly when the primary revolutionary failure has been erased by civil war and constitutional amendment.

In this Part, I seek to build a workable jurisprudence of hereditary privilege under the Nobility Clauses. In Section A, I explore the limited case law touching on the issue of hereditary privilege. In Section B, I offer a refined definition of hereditary privilege that differentiates it from hereditary distinctions more generally.

### A. Case Law

The tools for building a jurisprudence of nobility and hereditary privilege are decidedly limited. The Nobility Clauses rarely appear in academic writings,<sup>218</sup> and the case law is similarly frugal. Most cases

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216. AMAR, *supra* note 54, at 126.

217. *Id.*

218. In addition to Delgado, *supra* note 35, and Heldt, *supra* note 35, other articles discussing the Nobility Clauses include Akhil Reed Amar, *Becoming Lawyers in the Shadow of Brown*, 40 WASHBURN L.J. 1 (2000) (arguing that the Nobility Clauses bar racial segregation); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2349–53 (1997) (arguing that the Nobility Clauses serve to prevent or dismantle status hierarchies); Cass Sunstein, *The Anticaste Principle*, 92 MICH. L. REV.

addressing the Nobility Clauses address frivolous arguments by pro se litigants,<sup>219</sup> and no decided case has ever invoked them to invalidate federal or state action.<sup>220</sup>

Potentially more troubling for a serious jurisprudence of nobility is the Supreme Court's 1947 decision in *Kotch v. Board of River Port Pilot Commissioners*.<sup>221</sup> Under Louisiana law, only those persons who served an apprenticeship with an incumbent river pilot could apply for a pilot's license.<sup>222</sup> The plaintiffs brought an equal protection challenge to the law as applied, alleging that the incumbent pilots "had selected, with occasional exception, only the relatives and friends of incumbents."<sup>223</sup>

By a 5-4 vote, the Supreme Court rejected the plaintiffs' challenge. Applying the most deferential form of review, the Court concluded that various factors, including "the benefits to morale and *esprit de corps* which family and neighborly tradition might contribute, . . . might have prompted the legislature to permit Louisiana pilot officers to select those with whom they serve."<sup>224</sup> Four justices dissented, denouncing the majority for permitting "admission to the ranks of pilots [to] turn finally on consanguinity."<sup>225</sup> A test based on consanguinity, they argued, "cannot be used constitutionally to bar all except a group chosen by such a relationship from public employment."<sup>226</sup>

2410, 2429, 2434-35 (1994) (arguing that the Nobility Clauses support the invalidity of caste-like distinctions among citizens). For an intriguing parallel argument that government may not punish children for the sins of their parents, see Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992).

219. See, e.g., *North Dakota v. Larson*, 419 N.W.2d 897, 898 (N.D. 1988) (holding that driver's licenses are not titles of nobility); *City of Bismarck v. Vetter*, 417 N.W.2d 186 (N.D. 1987) (holding that dog licenses are not titles of nobility); see also Silversmith, *supra* note 211, at 606 n.178 (citing cases); cf. Mark Edward DeForrest & James M. Vache, *Truth or Consequences Part Two: More Jurisprudential Errors of the Militant Far-Right*, 35 GONZ. L. REV. 319, 338-39 (1999-00) (discussing fringe theory that attorney licenses violate the Nobility Clauses).

220. A New York trial court in 1966 denied a man's request to change his name from "Jama" to "von Jama." The court found that "von" signified nobility in German, and that the request was "contrary to the spirit and intent, if not the letter" of the Nobility Clauses. *Application of Jama*, 272 N.Y.S.2d 677, 678 (N.Y. Civ. Ct. 1966). One wonders how the court would have ruled on formal name change applications by musicians such as "Count" Basie or "Duke" Ellington.

Justice Scalia has argued that the Nobility Clauses prohibit "dispositions . . . based on blood." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). Curiously, Justice Scalia joined Justice Thomas's embrace of legacy preferences in *Grutter*, ignoring the fact that legacy preferences are nothing more than dispositions "based on blood."

221. 330 U.S. 552 (1947).

222. *Id.* at 554.

223. *Id.* at 555.

224. *Id.* at 563.

225. *Id.* at 565 (Rutledge, J., dissenting).

226. *Id.* at 566.

From a modern perspective, *Kotch* is puzzling. James Torke, the most careful scholar of the decision, describes it as a “specimen caught in amber.”<sup>227</sup> It has never been overruled, even though commentary on the decision, “both contemporary and recent, is almost uniformly unfavorable.”<sup>228</sup> On its surface, the decision suggests that state-sponsored hereditary privilege has the firm blessing of the Supreme Court. Yet there is little reason to think that *Kotch* poses a serious threat to a robust jurisprudence of nobility. The case was decided as a routine equal protection matter, and thus the Court did not confront, nor did the challengers raise, any claims under the Nobility Clauses.

More importantly, there are a number of reasons to believe that, even as an equal protection decision, *Kotch* lacks any current vitality outside its very specific facts. First, the case arose at the point in time in which the Court was least likely to accept an equal protection challenge—after the abandonment of *Lochner*,<sup>229</sup> but before the rise of modern equal protection doctrine. In 1947, the Court was still feeling the aftershocks of the *Lochner* era. Having repudiated a prior generation’s worth of judicial misadventures invalidating social and economic regulatory legislation, the Court was in no mood to even hint at a return to those decisions. Indeed the case appears to have been ineptly briefed by the plaintiffs, who played directly into this mood by arguing primarily about a generic right to pursue a profession and barely focusing on the hereditary aspects of the case at all. As Torke points out,

the appellants’ briefs are most in tune with the bygone line of substantive due process cases. . . . [A]ppellants seem never to hitch their cause firmly to the most startling aspect of the scheme they attack, the one aspect which might have evoked at least a special attention—that only kin and kith need apply.<sup>230</sup>

Moreover, modern equal protection doctrine had not been fully developed. The case predates not only *Brown*,<sup>231</sup> but a whole series of subsequent cases establishing and justifying various standards of review for particular classifications. As a result, the Court had no occasion to think carefully about the appropriate standard of review, and instead treated the case as an

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227. James W. Torke, *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, 47 *LOY. L. REV.* 561, 562 (2001).

228. *Id.*

229. *Lochner v. New York*, 198 U.S. 45 (1905).

230. Torke, *supra* note 227, at 589–90. Torke suggests that a better brief might well have swayed one vote over to the other side. *Id.* at 606.

231. *Brown v. Bd. of Educ. of Topeka, Kansas*, 347 U.S. 483 (1954).

ordinary economic classification subject to the most deferential rational basis test. It is perhaps noteworthy that despite these powerful historical factors, four justices were nonetheless willing to invalidate Louisiana's actions.

Second, the *Kotch* opinion is written extremely narrowly, relying heavily on the supposedly unique nature of riverboat piloting. The Court accepted as fact the argument that "in pilotage, unlike other occupations, competition for appointment, for the opportunity to serve particular ships and for fees, adversely affects the public interest in pilotage."<sup>232</sup> The Court took pains to point out that its decision carried no implications for other forms of hereditary privilege: "We do not need to consider hypothetical questions concerning any similar system of selection which might conceivably be practiced in other professions or businesses regulated or operated by state governments."<sup>233</sup> Rather, it was sufficient to note that, "considering the entirely unique institution of pilotage in light of its history in Louisiana," the Court could not conclude that an equal protection violation had occurred.<sup>234</sup> This is hardly a full-throated endorsement of hereditary privilege, and indeed, by its very terms, is confined to its peculiar facts. The Eighth Circuit took this approach in 1997, concluding that *Kotch* was grounded on the "unique character of river piloting," and that a "general associational preference for relatives, and a desire to help them . . . is not a reason for hiring someone that can withstand an equal protection objection."<sup>235</sup>

In short, *Kotch* should provide no serious hindrance to building a substantive jurisprudence of hereditary privilege under the Nobility Clauses. More importantly, no other case law holds anything significant to the contrary with respect to the Nobility Clauses.<sup>236</sup> Courts approaching the Nobility Clauses can therefore write on a relatively clean slate.

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232. *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 561.

233. *Id.* at 564.

234. *Id.*

235. *Backlund v. Hessen*, 104 F.3d 1031, 1033 (8th Cir. 1997).

236. In *Rice v. Cayetano*, 528 U.S. 495 (2000), the Supreme Court invalidated under the Fifteenth Amendment a Hawaii law that limited the right to vote for trustees for Office of Hawaiian Affairs to descendants of the peoples inhabiting Hawaii in 1778. Concluding that the ancestry restriction was a proxy for race, the Court noted, "[a]n inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens." *Id.* at 517. Two dissenting justices concluded that the ancestry restrictions did not function as a proxy for race. *Id.* at 540 (Stevens, J., dissenting). No opinion discussed the Nobility Clauses.

*B. Hereditary Privileges Versus Hereditary Distinctions*

To be workable, a jurisprudence of nobility must provide a fairly precise definition of hereditary privilege. It simply cannot be the case that every hereditary distinction made by government is a violation of the Nobility Clauses. Consider the example of intestacy laws. When an individual dies without a will, the laws of every state will award that person's estate to the spouse, if one exists, and to other close relatives, in a defined order of succession.<sup>237</sup> So if John Doe, a widower, dies intestate, leaving one child, that child will receive his entire estate. This is a hereditary distinction pure and simple. John Doe's child, and nobody else, is entitled to Doe's estate, solely because of the parent-child relationship. Yet it would be highly implausible to argue that intestacy laws violate the Nobility Clauses. Indeed, these laws further, rather than contradict, basic constitutional principles of equality. So long as we live in a society in which property is devisable, and in which most people choose to leave a bequest for their children, the absence of intestacy laws would foster an inequality of the most egregious kind. Only those children whose parents had the foresight, ability, and knowledge to make a will would receive any inheritance. Those children whose parents died intestate, a class that would include a high proportion of low-income families, would receive nothing. The intestacy laws, then, serve an important equality-reinforcing function. They ensure that no child is disinherited simply because his or her parent failed to make a will. And, importantly, the intestacy laws apply uniformly—they are the default law that applies to everybody, and can be altered only by a parent's affirmative acts.

Consider another type of hereditary distinction often made by government. Most governments offer a wide variety of health care benefits to their employees, including insurance coverage for the employees' children. Thus, a child of a government employee will receive government-funded health insurance, whereas a child of a private sector employee will not. Yet it would be a perverse reading of the Constitution to find that governments could not offer this type of coverage for the children of their employees unless they also offered it to every other child in their jurisdiction. Surely the Nobility Clauses do not require a

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237. EUGENE F. SCOLES ET AL., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 27–39 (7th ed. 2006); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 2–10 (4th ed. 2006).

government employee to sacrifice the possibility of health insurance for his or her children as a consequence of government employment.<sup>238</sup>

These two examples—intestacy laws and insurance coverage for the children of government employees—are examples of the broad category of hereditary distinctions. It would be surprising indeed if either of these practices offended the Nobility Clauses. It is therefore vitally important to distinguish the broader category of hereditary distinctions from the much narrower category of hereditary privileges—those distinctions that are peculiarly offensive under the Nobility Clauses. But how should the two be distinguished?

This is a difficult problem, presenting tricky issues of line drawing and troublesome borderline cases. Yet such distinctions must be made if the Nobility Clauses are to have any judicially ascertainable meaning. In other areas of law, such as equal protection and free speech, these distinctions are often resolved by balancing tests, such as strict scrutiny. In the context of the Nobility Clauses, however, such balancing tests seem particularly inappropriate. The Constitution prohibits titles of nobility absolutely, both as means and as ends. A state in dire financial straits might conclude that its financial problems might only be solved by selling a hereditary dukedom to a billionaire. The point of the Clauses, however, is to ensure that such options are permanently off the table, no matter how tempting they may seem at the time.<sup>239</sup>

Another approach would be to inquire into the purposes underlying the creation of the hereditary distinction. Distinctions motivated by “good” purposes would be constitutional; those by “bad” purposes would not. Although this is marginally better than a balancing test, it provides little guidance to courts and would create a patchy, ad hoc, and highly subjective jurisprudence.

Thus some form of bright-line definition is needed. The definition I offer here is necessarily tentative, and may well require further refinement and elaboration. Nonetheless, I believe it as good an answer as any to the problem of distinguishing hereditary privilege from hereditary distinctions more generally: A hereditary privilege is a benefit, not available to or shared with others in the relevant jurisdiction, based solely on ancestry, provided, however, that such a benefit may be permissible when (a) it is

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238. Similarly, Abraham Lincoln’s call in his Second Inaugural Address “to care for him who shall have borne the battle, and for his widow, and his orphan” could not plausibly constitute an unconstitutional benefit to the orphans.

239. Indeed, balancing tests are rarely employed to resolve questions of constitutional structure, and the Nobility Clauses are surely as much about structure as they are about individual rights.

provided as an incident of a parent's government employment in circumstances in which the benefit is not part of a zero-sum game;<sup>240</sup> or (b) it is an exemption designed to limit the burdens of mandatory government service on one particular family.

Any such privilege is absolutely forbidden. By contrast, a hereditary distinction that does not meet this definition is likely permissible. To see how this definition plays out in practice, it is useful to work through a number of examples.<sup>241</sup>

(1) The intestacy laws discussed above are permissible because they apply uniformly to everybody and single nobody out for special privileges. They simply apply a default rule that approximates what the decedent most likely wanted done with his or her property.<sup>242</sup>

(2) Health insurance coverage for dependent children falls comfortably within the exception of an incident of a parent's government employment.<sup>243</sup> But it is important to note that such coverage is not part of a zero-sum game. Thus a public university, for example, might offer a tuition discount to employees who are sending their children to that university and who are themselves paying the bills. But such a university could not offer an extra bonus in a selective admissions process to those children, because this would constitute a benefit in a zero-sum game.<sup>244</sup>

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240. By zero-sum game, I mean a situation in which benefits to one individual accrue only at the expense of other individuals.

241. A brief note on American Indian tribes is appropriate here. Most tribes define tribal membership at least in part based on ancestry. See, e.g., Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 308 (2000–2001). These definitions, however, are unproblematic, because the tribes, as sovereign dependent nations, are not subject to the Nobility Clauses. See AM. INDIAN LAW DESKBOOK 249–50 (3d ed. 2004).

242. Any possible payment of reparations to descendants of slaves does not likely raise Nobility Clause concerns either. Such payments could plausibly be viewed as uncollected judgments due to the slaves that pass by canons of descent to heirs. On reparations generally, see Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006).

The relation between the Nobility Clauses and the creation of new “dynasty trusts” would be a worthwhile subject for a separate article. See, e.g., Letter from Timothy Pickering to Charles Tillinghast, Dec. 24, 1787, in 1 THE DEBATE ON THE CONSTITUTION 289, 291 (Bernard Bailyn ed., 1993) (“If great *hereditary estates*, the foundation of *nobility*, are suffered to *continue* or to be *created* by entails it will be the fault, of the individual states, and not of the general government. . . . And when all existing entails shall be broken, & future ones forbidden, we may make ourselves easy about aristocratic ambition. Great accumulations of wealth will then be rare, of short continuance, and consequently never dangerous.”); cf. Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601 (2000) (lamenting Americans’ indifference to the creation of perpetual trusts).

243. This category would also encompass the Secret Service protection provided to children of the President, admittedly a *sui generis* category of employment. See 18 U.S.C. § 3056(a) (2000).

244. For a discussion of this widespread practice, see GOLDEN, *supra* note 4, at 179–94.

This government employment exception also covers, for example, a variety of benefits provided to veterans and their families.<sup>245</sup>

(3) Under federal law, children born in other countries to United States citizens are themselves United States citizens.<sup>246</sup> Children born in other countries to non-United States citizens are not. This is a hereditary distinction, but a permissible one. It would be absurd to suggest that the United States could not grant citizenship to this narrow category without also granting it to every other inhabitant of the globe. With respect to the United States (the relevant jurisdiction), this law treats everybody equally and ensures that children do not lose citizenship simply because their parents happened to go abroad at the time of their birth.

(4) Any person whose parent, brother, or sister was killed in action or died in the line of the duty while serving in the armed forces is exempt from the federal draft laws.<sup>247</sup> This law is derived from the original 1948 law that created the “sole surviving son” exception from the draft laws.<sup>248</sup> Unlike the benefits discussed above, however, this is part of a zero-sum game. If this person is exempt from the draft, somebody else will go in his or her place.

Nonetheless, it would be difficult to argue that this exemption is a violation of the Nobility Clauses. In *McKart v. United States*,<sup>249</sup> the Supreme Court discussed some of the reasons motivating passage of this law: “to provide ‘solace and consolation’ to the remaining family members by guaranteeing the presence of the sole surviving son;” “to avoid extinguishing the male line of a family through the death in action of the only surviving son;” “providing financial support for the remaining family members, fairness to the registrant who has lost his father in service of his country, and the feeling that there is, under normal circumstances, a limit to the sacrifice that one family must make in the service of the country.”<sup>250</sup>

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245. See DEPARTMENT OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS (2006); see also 38 U.S.C. § 2402(5) (2000) (permitting the burial of a veteran’s minor child in national cemeteries).

246. 8 U.S.C. § 1401 (2000).

247. 50 U.S.C. app. § 456(o) (2000).

248. This statute provided that where “one or more sons or daughters of a family” were killed in military service, “the sole surviving son of such family shall not be inducted for service.” Act of June 24, 1948, 62 Stat. 613. In 1964, the statute was amended to include sole surviving sons of fathers killed in military service. Act of July 7, 1964, 78 Stat. 296. In 1971, the statute was amended to cover any person whose father, brother or sister was killed. Act of Sept. 28, 1971, 85 Stat. 351. A 1984 amendment extended the exemption to any person whose mother was killed. Act of Oct. 19, 1984, 98 Stat. 2631.

249. 395 U.S. 185 (1969).

250. *Id.* at 191–92.

This last reason is the strongest. Death in military service is the ultimate sacrifice one can make for one's country. This exemption furthers basic equality principles by ensuring that the most extreme burdens of mandatory government service are spread out among particular families and not concentrated heavily on one.<sup>251</sup> Thus, it is important that a definition of hereditary privilege distinguish between hereditary privilege and laws such as this that provide exemptions designed to spread the burden of mandatory government service.

(5) In 1890, Congress passed a law permitting members of the United States military to wear the insignia of the Society of the Cincinnati and other hereditary military organizations on their military uniforms on occasions of ceremony if they "were members of said organizations in their own right."<sup>252</sup> Although there was evidence suggesting that Congress intended with this language to preclude hereditary members from wearing the insignia, a 1901 opinion of the Attorney General rejected that interpretation.<sup>253</sup> Attorney General Knox reasoned that the statute's specific reference to "associations of men who served in the war of the Revolution" would make no sense if it was intended to apply only to those individuals who actually served.<sup>254</sup> In 1890, of course, all Revolutionary War veterans were dead. Knox added that the statute should not be construed to "forbid to a brave soldier or sailor the display of tokens showing that he is descended also from a brave ancestor."<sup>255</sup> This law remains in effect today.<sup>256</sup>

It is hard to see this law as anything other than an obvious violation of the Nobility Clauses, a hereditary privilege pure and simple. By 1890, the

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251. The poignancy of Abraham Lincoln's famous letter to Mrs. Bixby exemplifies the unfairness of uneven burdens of military service:

Dear Madam: I have been shown in the files of the War Department a statement of the Adjutant-General of Massachusetts that you are the mother of five sons who have died gloriously on the field of battle. I feel how weak and fruitless must be any words of mine which should attempt to beguile you from the grief of a loss so overwhelming. But I cannot refrain from tendering to you the consolation that may be found in the thanks of the Republic they died to save. I pray that our Heavenly Father may assuage the anguish of your bereavement, and leave you only the cherished memory of the loved and lost, and the solemn pride that must be yours to have laid so costly a sacrifice upon the altar of freedom.

Letter from Abraham Lincoln to Mrs. Bixby, Nov. 21, 1864, in *ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS* 766 (Roy P. Basler ed., 1946).

252. Act of Sept. 25, 1890, 26 Stat. 681. Although the Act does not specifically refer to the Cincinnati by name, the legislative history refers to it repeatedly. See 21 CONG. REC. 107 (1889) (statement of Sen. Manderson); 21 CONG. REC. 689 (1890) (statement of Sen. Manderson).

253. 23 Op. Att'y Gen. 454 (1901).

254. *Id.* at 457.

255. *Id.*

256. 10 U.S.C. § 1123(a) (2000).

memory of the battle over the Cincinnati appears to have faded completely and the law breezed through Congress without objection or serious debate. Although a defender of the law might question whether sufficient state action is present, Congress knowingly tied decoration on military uniforms to membership in private exclusive hereditary societies. It was fear of precisely this sort of action and the corresponding danger of a hereditary military aristocracy that drove most of the opposition to the Cincinnati in the first place. Pace General Knox, public recognition of descent from a brave ancestor—on a military uniform, no less—was exactly what contemporaries thought the Nobility Clauses forbade.

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These examples are designed to illustrate the functionality of my definition of hereditary privilege. It protects the core values of equality while providing a workable test for courts to apply. It is not a balancing test, but provides clear, bright-line rules. I do not mean to suggest that it is the only possible definition of hereditary privilege, or that it might not be further elaborated, but I believe it should provide the basis for jurisprudence under the Nobility Clauses going forward. And no current practice is more offensive to a jurisprudence of nobility than the granting of legacy preferences in admissions to public schools.

### III. THE UNCONSTITUTIONALITY OF LEGACY PREFERENCES IN PUBLIC SCHOOL ADMISSIONS

This Part applies the ideas developed in Part I and II to the issue of legacy preferences in public school admissions. Section A argues that such preferences are a clear violation of the Nobility Clauses' prohibition of hereditary privilege. It also addresses some counterarguments to my main thesis that the Nobility Clauses should be seen as a prohibition on hereditary privilege with respect to state institutions. Section B considers and rejects a variety of counterarguments that are unique to the legacy preference context.

#### *A. Legacy Preferences as Hereditary Privilege*

The importance of higher education in modern American life cannot be overestimated. As University of California at Berkeley sociologist Jerome Karabel points out, “[T]he acquisition of educational credentials has taken

its place alongside the direct inheritance of property as a major vehicle for the transmission of privilege from parent to child.”<sup>257</sup> Yale Law Professor John Langbein goes even further, arguing that “in modern times the business of educating children has become the main occasion for intergenerational wealth transfer.”<sup>258</sup>

This importance is especially pronounced at America’s most selective universities. Harvard Law Professor Lani Guinier notes:

At selective institutions of higher education, admissions decisions have a special political impact: rationing access to societal influence and power, and training leaders for public office and public life . . . . Admissions decisions affect the individuals who apply, the institutional environments that greet those who enroll, and the stability and legitimacy of our democracy.<sup>259</sup>

And it is precisely in these selective universities where legacy preferences are most likely to be employed.

Thus for many college applicants, access to these significant higher educational benefits will turn, at least in part, on the simple fact of whether or not an ancestor attended the institution in question. Such admissions practices are impossible to square with the history recounted in Part I or with the definition of hereditary privilege offered in Part II. It is a distinction that turns solely on ancestry and is unrelated to any parental government service.

In this respect, legacy preferences bear a close relationship to (one may even say are direct descendants of) one of the most repulsive creations of American law—the notorious grandfather clauses used in the American South to disenfranchise African Americans following the Reconstruction Amendments. As Akhil Amar and Neal Katyal have pointed out, legacy preferences are “quite literally, educational grandfather clauses.”<sup>260</sup> Like legacy preferences, grandfather clauses provided a special benefit, in this case exemption from otherwise applicable voting requirements, to certain people based solely upon their ancestry. For example, the Oklahoma grandfather clause invalidated in *Guinn v. United States*<sup>261</sup> provided that literacy requirements did not apply to any

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257. KARABEL, *supra* note 6, at 3.

258. John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 732 (1988).

259. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 (2003).

260. Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745 (1996).

261. 238 U.S. 347 (1915).

person who was, on January 1st, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.<sup>262</sup>

The Oklahoma Supreme Court had upheld this provision, noting “the virtue and intelligence of the ancestor will be imputed to his descendants, just as the iniquity of the fathers may be visited upon the children unto the third and fourth generation.”<sup>263</sup>

The United States Supreme Court in 1915 unanimously struck down this provision as a blatant end-run around the Fifteenth Amendment. The entire purpose of the law was to “disregard the prohibitions of the Amendment by creating a standard of voting which on its face was in substance but a revitalization of conditions which, when they prevailed in the past, had been destroyed by the self-operative force of the Amendment.”<sup>264</sup>

The *Guinn* Court focused on the Fifteenth Amendment because the law was directed at suffrage, but an analysis of grandfather clauses more broadly suggests that they are equally invalid under the Nobility Clauses. Suppose, for example, that a state awarded one hundred extra points on a civil service examination to any person who was a lineal descendent of a state employee, or exempted the children of highway patrol officers from traffic fines, or awarded the majority of hunting licenses to children of state legislators. Such programs would not violate the Fifteenth Amendment, but would run afoul of the Nobility Clauses’ prohibition on hereditary privilege. The examples seem strange only because in most areas of life we have thoroughly expunged legal vestiges of such privilege. University admission policies are one of the few areas in modern life where such practices persist.

Before turning to objections specific to the legacy context, two potential objections to my general reasoning on the Nobility Clauses and hereditary privilege are worth addressing immediately.

First, one might object that legacy preferences are not absolute. After all, they certainly do not guarantee admission; at most, they give one an extra boost in a regime in which large numbers of seats still go to non-

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262. *Id.* at 357.

263. *Atwater v. Hassett*, 111 P. 802, 812 (Okla. 1910).

264. *Guinn*, 238 U.S. at 363–64. For an extensive analysis of *Guinn* and its companion cases, see Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 835 (1982).

legacy applicants. Thus they are different in kind from preferences that guarantee privilege based on ancestry. This objection is unconvincing. The difference between a system that reserved one hundred percent or ninety percent of the seats for alumni children and the legacy preferences currently employed is one of degree, not of kind. Suppose a city made one seat on a five-member city council hereditary. Would one argue that this is constitutional because everybody else could still compete for the other four seats? Suppose instead the city said every child of a city council member started with a hundred-vote bonus. Or suppose a state gave fifty extra points on the bar exam to children of bar members. What about five hundred points? Two points? These examples all raise the basic question of how much hereditary privilege is permissible. That question was answered in 1787, and the answer is none whatsoever.

Second, one might object that the Nobility Clauses only forbid hereditary powers with respect to government. The true evil is placing persons in positions of power over others based on heredity. Hereditary distinctions in the selection of university students, who exercise no such power, therefore should not raise any distinctive nobility concerns.<sup>265</sup> Again, this objection is unconvincing. Certainly the fear of hereditary governmental power was a paradigmatic concern of the Nobility Clauses, but there is no reason to construe the clauses so narrowly. First, ample evidence in contemporary sources indicates a concern about hereditary privilege generally, not just in positions of governmental power.<sup>266</sup> Second, and more importantly, such an argument would permit the government to create a host of hereditary privileges that would fundamentally undermine basic principles of equality. Hereditary exemptions from the income tax or from certain criminal laws, hereditary business licenses, hereditary driver's licenses, and hereditary bar memberships would all be permissible. And if we were concerned only about the exercise of governmental power, there would be little problem with hereditary public university professorships, hereditary poets laureate, hereditary astronauts, hereditary janitors at the state capitol, or hereditary governmental clerical workers of any sort. Finally, there would be no

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265. Even this might be challenged. Access to higher education is almost a de facto prerequisite to influence and power in American society. *Cf.* *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments. . . . It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

266. *See, e.g., supra* notes 46, 47, 49, 51, 91, 102, 109, 114, 157, 173, 177, 186 and accompanying text.

constitutional barrier to creating a public university that limited enrollment solely to children of alumni or children of state legislators. Any argument that the Nobility Clauses are limited to positions of power in government must concede that all of these examples are permissible. The better argument, surely, is that the Nobility Clauses constrain government when it awards benefits just as much as when it decides who will exercise positions of power.

Constitutional law, for understandable reasons, has not been as attentive to the provision of benefits as it has been to the imposition of disabilities. As Abraham Bell and Gideon Parchomovsky point out in the property context, “takings—government seizures of property—have been the subject of an elaborate body of scholarship, givings—government distributions of property—have been largely overlooked by the legal academy.”<sup>267</sup> Similarly, in the equal protection context, the Court has been reluctant to invalidate special exemptions from otherwise applicable economic regulations. In *Morey v. Doud*,<sup>268</sup> the Court invalidated a state law exempting the American Express Company from otherwise applicable currency exchange regulations, but forcefully repudiated this decision nineteen years later in *City of New Orleans v. Dukes*.<sup>269</sup> The Court explained, “*Morey* was the only case in the last half century to invalidate a wholly economic regulation solely on equal protection grounds,” and it “so far departs from proper equal protection analysis in cases of exclusively economic regulation that it should be, and it is, overruled.”<sup>270</sup>

The Court’s reluctance to invalidate awards of benefits is readily explained by the lack of clear, discernible standards to evaluate such awards, by problems of party standing to challenge such benefits, and by a fear of opening a Pandora’s box of new constitutional challenges. These concerns may be quite relevant in other constitutional contexts, but they have little application to the Nobility Clauses. First, the Nobility Clauses, unlike almost every other constitutional limitation, are explicitly about limiting governmental awards of benefits. That is the whole point; the government cannot single out certain people for special privileges. Second, a prohibition on hereditary privilege poses few of the problems associated with judicial scrutiny of benefits more generally. Judicial application of the Nobility Clauses asks the narrow question of whether a

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267. Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 549 (2001).

268. 354 U.S. 457 (1957).

269. 427 U.S. 297 (1976).

270. *Id.* at 306.

law awards benefits on ancestral lines;<sup>271</sup> it does not entail further inquiry with respect to all other forms of benefits and exemptions.<sup>272</sup>

*B. The Weaknesses of Other Potential Counterarguments*

At least three other potential counterarguments might have considerable salience in the specific context of legacy preferences. First, there is the argument from long-standing practice and tradition. Legacy admissions in public universities ostensibly have a long history; surely, if they were unconstitutional, someone would have noticed before now. At the very least, their long acceptance by the American people suggests that this is an area in which courts should tread lightly, if at all. Second, invalidating legacy preferences would harm the financial interests of public universities by decreasing alumni contributions and potentially further eroding their position with respect to their private counterparts. Third, no principled line can be drawn between legacy preferences and other types of preferences that universities commonly employ in making admissions decisions, including affirmative action programs. These arguments, although initially plausible, prove to be insubstantial.

*1. The Not-So-Historical Practice of Legacy Preferences*

*a. Origins*

Although American universities date to the founding of Harvard College in 1636, truly selective admissions are a creature of the twentieth century. As historian Herbert Wechsler explains, “Throughout the nineteenth century and into the twentieth most American colleges admitted students on the basis of straightforward, published entrance requirements. All students who could demonstrate acceptable mastery of the requirements were admitted.”<sup>273</sup> Indeed, prior to the 1920s, even Harvard, Yale, and Princeton had no limits on the size of their entering classes. Any student who passed the qualifying examination was eligible to enroll. In practice, of course, these requirements eliminated the vast majority of the American population from consideration, but, in theory at least, no qualified applicant would be rejected.<sup>274</sup> In such an admissions regime,

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271. *See supra* Part II.B.

272. *Cf. id.* (noting the problem of evaluating benefits more generally under the Nobility Clauses).

273. HAROLD S. WECHSLER, *THE QUALIFIED STUDENT: A HISTORY OF SELECTIVE COLLEGE ADMISSION IN AMERICA* 4 (1977).

274. *See KARABEL, supra* note 6, at 1, 22–23, 76, 128–29.

there was little place for legacy preferences, because admissions was not a zero-sum game.<sup>275</sup>

By the 1920s, these admissions rules had led to an unanticipated consequence. Jewish students, often recent immigrants from Southern and Eastern Europe, consistently performed well on qualifying examinations and they began to enter the Ivy League in large numbers. The leaders of these universities, displaying the reflexive anti-Semitism so prominent at the time, concluded that something had to be done to curb the number of Jewish students. Their solution was to limit the size of the entering class and to employ a variety of considerations other than academic merit in making admissions decisions.<sup>276</sup> As Harvard President A. Lawrence Lowell explained in 1925, the only way “to prevent a dangerous increase in the proportion of Jews,” was to “limit the numbers, accepting only those who appear to be the best,” based on a “personal estimate of character.”<sup>277</sup>

With this change, America’s first truly selective admissions regimes were in place. For the first time, applicants otherwise qualified for admission under traditional categories might be denied admission due to the limitation of class size. And hand-in-hand with this limitation came a forthright acceptance of legacy preferences—preferences that would clearly benefit the existing elite at the expense of recent Jewish immigrants. At Yale, for example, the new legacy preference increased the percentage of alumni sons from thirteen percent in 1920 to twenty-four percent in 1930.<sup>278</sup> As Jerome Karabel, the leading scholar of these admission policies, explains,

the preference for alumni sons [dates from] one of the most reactionary moments in American history—a few years in the first half of the 1920s defined by rising xenophobia and anti-Semitism, widespread political repression, the emergence of the Ku Klux Klan as a genuine mass movement, the growing prominence of eugenics

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275. Thomas Jefferson had pointed out in 1813 that with free public schools, “[w]orth and genius would [be] sought out from every condition of life, and completely prepared by education for defeating the competition of wealth and birth for public trusts.” Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 3 *THE FOUNDERS’ CONSTITUTION* 388, 89 (Philip B. Kurland & Ralph Lerner eds., 1987).

276. See KARABEL, *supra* note 6, at 77–136.

277. Quoted in *id.* at 107; see also FULLINWIDER & LICHTENBERG, *supra* note 1, at 83–84 (discussing introduction of legacy preferences at Dartmouth in 1922); WECHSLER, *supra* note 273, at 162–68 (discussing limitations on class size as a means of reducing Jewish enrollment at Columbia in the 1920s).

278. KARABEL, *supra* note 6, at 116.

and scientific racism, and the imposition by Congress of a racially and ethnically biased regime of immigration restriction.<sup>279</sup>

Although the details are far from clear, it appears that legacy preferences only spread to public universities in the latter half of the twentieth century, as certain universities adopted limitations on class sizes.<sup>280</sup> Accordingly, it is not at all surprising that no one has previously made the connection between legacy preferences and the Nobility Clauses. By the time that public universities began employing legacy preferences in a serious way, equality-based constitutional arguments had come to rest almost exclusively on the Equal Protection Clause and the three-tiered categories of scrutiny. The role of the Nobility Clauses in limiting hereditary privilege was long forgotten.

*b. Hereditary Privileges at West Point: A Case Study*

There is one significant exception to this general trend in the history of higher education—the United States Military Academy at West Point, which has had limits on enrollment since its founding. Not surprisingly, admission to West Point quickly became a highly desirable prize, particularly for individuals who sought a career in the United States military. West Point thus became the first institution of higher education that confronted the issues raised by selective admissions policies. Importantly, West Point does not, and has never, employed any legacy preferences for admission. Nonetheless, under governing federal law, there are three categories of hereditary distinction that provide special consideration for access to West Point. First, there is a special category of competitive admissions for up to sixty-five children of members of the armed forces who were killed in action, missing in action, or who became completely disabled while serving in the armed forces.<sup>281</sup> Second, there is a special category for children of career members of the military.<sup>282</sup> Third, there is a provision for unlimited appointments for “children of persons who have been awarded the Medal of Honor for acts performed while in the armed forces.”<sup>283</sup> These distinctions, however, are of relatively recent vintage, and thus lend little historical support to the practice of legacy

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279. *Id.* at 135.

280. *See, e.g.*, Guinier, *supra* note 259, at 130 (noting growth in selectivity at the University of Texas from the 1960s to 2001).

281. 10 U.S.C. § 4342(a)(1) (2000).

282. 10 U.S.C. § 4342(b)(1).

283. 10 U.S.C. § 4342(c).

admissions. Moreover, while the third preference is a clear violation of the Nobility Clauses, the first and second can be reconciled with the Nobility Clauses with only minor modifications. The history of these preferences, and the history of admission to West Point generally, demonstrates the considerable unease with which Americans treated any hereditary distinctions in the matter of admissions.

*i. Early Controversy*

The United States Military Academy was founded in 1802, when Congress provided for a “corps of engineers” that would be stationed at West Point and “constitute a military academy.”<sup>284</sup> The size of the academy, however, was limited to a total of twenty officers and cadets.<sup>285</sup> Congress did not specify any particular mode of admission. Ten years later, Congress increased the number of cadets to 250, but again stated nothing with respect to admissions.<sup>286</sup> However the Academy was selecting its cadets, it quickly attracted criticism. As early as 1816, Congressman Cyrus King of Massachusetts contended that “none but the sons of the rich and powerful can gain admission there,”<sup>287</sup> a charge that would continue to resonate over the following decades.

In 1818, a bill was introduced in the House of Representatives that would give a preference in West Point admissions to “the sons of officers and soldiers who were killed in battle or who died in the military service of the United States in the late war; and a further preference shall be given to those least able to educate themselves, and best qualified for the military profession.”<sup>288</sup> This appears to be the first time that specific hereditary preferences were contemplated for an American institution of higher education. The bill was immediately subjected to withering criticism. One congressman argued that it would “create a privileged order in the country” and it would be “highly improper for Congress by a formal act to sanction such a distinction.”<sup>289</sup> Another argued that it would preclude the Academy from “selecting the most fit and most worthy” and would pervert “the true object of the institution, which was established for the general benefit.”<sup>290</sup> The bill’s defenders, by contrast, emphasized its

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284. Act of Mar. 16, 1802, ch. 9, §§ 26–27, 2 Stat. 132, 137.

285. Act of Mar. 16, 1802, ch. 9, § 26, 2 Stat. 132, 137.

286. Act of Apr. 29, 1812, ch. 72, § 3, 2 Stat. 720, 731.

287. BALT. PATRIOT, Jan. 16, 1816, at 2.

288. H.R. 106, 15th Cong. (1818).

289. 31 ANNALS OF CONG. 388 (1818) (statement of Rep. Taylor).

290. *Id.* at 387–88 (statement of Rep. Strother).

charitable purposes, arguing that it would give “to the poor their portion of the benefits of an institution now confined chiefly to the rich.”<sup>291</sup> The problem, however, was that the bill was not explicitly confined to a benefit for the poor, and it utilized a hereditary distinction rather than a simple definition of need. The House finally concluded that no “good would grow out of this bill,” and agreed to leave the whole matter of admissions in the hands of the Secretary of War.<sup>292</sup>

By at least 1824, the Secretary of War was admitting cadets on a rough geographical principle, based upon each state’s representation in Congress, and likely based on nominations by congressmen.<sup>293</sup> But complaints about the Academy continued. In 1820, Congressman Newton Cannon of Tennessee argued that, “with very few exceptions, [the Academy is] enjoyed by wealthy people who are competent to educate their [own] sons at their own expense anywhere without any assistance from the Government.”<sup>294</sup> It amounted to a “system of aristocracy” and should be abolished.<sup>295</sup> By 1822, supporters of the Academy were already on the defensive, pointing out that “we find no color for the assertion that the sons of the wealthy and influential are preferred.”<sup>296</sup>

In 1828, Congress requested that the Secretary of War explain the considerations he employed in admitting cadets. The Secretary, James Barbour, responded that he initially tried to “appoint a cadet from every congressional district, and two from each state.”<sup>297</sup> He also frankly admitted to employing other factors: “[O]ne of the leading considerations inducing a preference, is the claim of the applicants on the ground of public service rendered by their ancestors.”<sup>298</sup> Barbour argued, “I eagerly seize the opportunity of canceling a debt of gratitude by the appointment of the descendants of those who have been thus distinguished by such services, *civil* or *military*.”<sup>299</sup> He noted that poverty was also a ground for

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291. *Id.* at 388 (statement of Rep. Southard).

292. *Id.* at 389.

293. LETTER FROM THE SECRETARY OF WAR 6 (Washington, Gales & Seaton 1824).

294. 36 ANNALS OF CONG. 1632 (1820) (statement of Rep. Cannon).

295. *Id.* at 1631.

296. Military Academy-West Point, NEWBURYPORT HERALD, Nov. 1, 1822, at 1. Three years later, a Senate committee rejected a bizarre proposal by Senator Nathaniel Macon of North Carolina that would have excluded the brothers of all persons educated at the Academy from admission. 1 REG. DEB. 136 (1825).

297. JAMES BARBOUR, LETTER FROM THE SECRETARY OF WAR 3 (Washington, Gales & Seaton 1828).

298. *Id.*

299. *Id.*

preference, but that it was important that the cadets not be drawn exclusively from the ranks of the poor.<sup>300</sup>

Barbour's frank admission that he looked to the accomplishments of applicants' ancestors did not sit well in Jacksonian America, and such views were quickly replaced by more egalitarian perspectives. In 1830, Representative James Blair of South Carolina introduced a resolution requiring the Secretary of War to provide information on the number of West Point cadets "whose fathers and guardians were, or are now, members of Congress, or other officers of the General Government, or Governors of States . . ."<sup>301</sup> Blair believed that West Point, "although nominally a military school, open to all, [was] in fact, a school only for the great and the wealthy, where none but the sons or favorites of men possessing power or popularity could be entered."<sup>302</sup> He was concerned that "the favors and benefits of the institution were principally bestowed upon those least in need of them."<sup>303</sup> A few weeks later, Representative Davy Crockett of Tennessee proposed abolishing the Academy entirely, claiming that it was "kept up for the education of the sons of the noble and wealthy, and of members of Congress, people of influence, and not for children of the poor."<sup>304</sup> It was not only "aristocratic, but a downright invasion of the rights of the citizen, and a violation of the civil compact called 'the constitution.'"<sup>305</sup> That same year, Alden Partridge, the former superintendent of West Point, published a pamphlet under the pseudonym "Americanus," in which he denounced the Academy as "monarchical," "corrupt," and tending to create a "privileged order of the very worst class—a military aristocracy—in the United States."<sup>306</sup> Among his many criticisms, Partridge alleged that the majority of vacancies at West Point were filled by the sons of congressmen, state governors, and other federal and state officeholders.<sup>307</sup>

The Academy's Board of Visitors sought to answer some of these criticisms in its June 1830 report. Stung by the barrage of criticism, the Board announced that it had "scrutinized with jealousy, and perceived no

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300. *Id.* at 3–4.

301. 6 REG. DEB. 553 (1830) (statement of Rep. Blair).

302. *Id.* at 553.

303. *Id.*

304. 6 REG. DEB. 583 (statement of Rep. Crockett).

305. *Id.*

306. [ALDEN PARTRIDGE], *THE MILITARY ACADEMY, AT WEST POINT, UNMASKED: OR CORRUPTION AND MILITARY DESPOTISM EXPOSED* 2 (Washington, 1830). On Partridge's authorship, see STEPHEN E. AMBROSE, *DUTY, HONOR, COUNTRY: A HISTORY OF WEST POINT* 113–14 (1966).

307. PARTRIDGE, *supra* note 306, at 20–21.

ground for insinuating that the distribution of cadetships is the appendage of power or the tool of political patronage.”<sup>308</sup> The Board concluded that the widespread public criticism of the Academy might be reduced if the geographical assignments were formalized, provided that a “wide margin should be left for the sons of deceased officers and the discretion of the War Department.”<sup>309</sup>

Andrew Jackson’s Secretary of War, John Eaton, made clear that any hint of special favors for the powerful was inappropriate. In 1831, he informed the House of Representatives that, though the Academy was “said to be an institution to which the sons of the wealthy alone obtain admission, . . . [n]o consideration of the kind influences in the selections which are made.”<sup>310</sup> Rather, the “rules which govern, are first, to select those of best seeming merit, and, next, to distribute them as equally as possible throughout the States.”<sup>311</sup> If anything, “other things being equal,” the Academy favored “the parentless and the poor, upon the calculation that they have the least opportunity to obtain an education.”<sup>312</sup> A starker contrast with Secretary Barbour’s policies would be hard to imagine.

Yet even under the Jackson administration, controversy over the Academy’s admissions policies continued to simmer. In 1834, after two states formally called for the abolition of West Point, the House Committee on Military Affairs issued a report strongly defending the Academy.<sup>313</sup> The Report surveyed the history of the Academy, and noted that “the doors of an institution which was sustained by the munificence of the country, should first be opened to receive the sons of those who had bravely perilled, or who had nobly lost, their lives in its defence.”<sup>314</sup> Far from being a school for the rich, only “one fifteenth of any one class could have received, without this aid, more than a common English school education.”<sup>315</sup> These assertions did nothing to stop the criticisms. A month later, a congressman from Tennessee denounced the Academy as “being exclusively confined to the children of members of Congress and other influential persons,”<sup>316</sup> and a member of the Academy’s Board of Visitors

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308. 7 REG. DEB. App. xlvii, lii (1830).

309. *Id.*

310. Letter from John H. Eaton to the House of Representatives (Jan. 28, 1831), in 4 AMERICAN STATE PAPERS: MILITARY AFFAIRS 676 (1832).

311. *Id.*

312. *Id.*

313. H.R. REP. No. 23-466 (1834).

314. *Id.* at 12.

315. *Id.* at 13.

316. 10 REG. DEB. 4483 (1834) (statement of Rep. Dickinson).

complained that “a large proportion of [cadets] have been drawn from the rich, the influential, and the wealthy classes of the community.”<sup>317</sup> Later that year, the House passed by a vote of 182-27 a resolution appointing a committee to consider amending the laws relating to West Point.<sup>318</sup> Supporters of the resolution pointed to an impression that West Point was “conducted, not for the general benefit, . . . but for the sons of military officers, members of Congress, and other Government officers.”<sup>319</sup> The resolution was opposed by the authority of the Military Affairs Committee report,<sup>320</sup> and others who argued that any problem with admissions was the fault of members of Congress, who recommended candidates for admission.<sup>321</sup>

In the early 1840s, former West Point superintendent Alden Partridge continued to be critical of the Academy. In a memorial to Congress, Partridge contended that West Point practices “not only constituted an aristocracy in the United States, but that this aristocracy has already become, in a great degree, *hereditary*.”<sup>322</sup> An 1843 report of the Board of Visitors rejected that argument, noting that the cadets “are the sons, in most cases, of the farmers and working men of the country.”<sup>323</sup> In fact, 182 out of 217 were of “indigent, reduced, or moderate circumstances.”<sup>324</sup>

The early history of West Point thus reveals an intense concern that the institution welcome cadets from every walk of life and that it not be limited to the sons of the wealthy and powerful. Critics of the institution knew no more powerful charge than that it was favoring those who were already the most favored. Academy officials repeatedly took pains to rebut these charges as factually unfounded. No one ever suggested anything like an explicit legacy preference, and indeed almost everyone would have

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317. H.R. REP. NO. 23-2, at 168 (1834) (statement of John Hamm).

318. 11 REG. DEB. 755, 759-60 (1834).

319. *Id.* at 755 (statement of Rep. Clayton).

320. *Id.* at 760 (vote of Rep. Richard M. Johnson in the negative).

321. *Id.* at 757 (statement of Rep. Hardin); *see also* 10 REG. DEB. 4491-92 (1834) (statement of Rep. Ward) (placing blame for admissions decisions on members of Congress).

322. Memorial of Alden Partridge, S. DOC. NO. 26-79, at 2 (1841).

323. Report of the Board of Visitors [sic] of the U.S. Military Academy, ARMY & NAVY CHRONICLE, Feb. 23, 1843, at 201.

324. *Id.*; *see also* U.S. Military Acad., ARMY & NAVY CHRON., Feb. 8, 1844, at 161-68 (citing statistics on backgrounds of cadets); H.R. REP. NO. 476, at 16 (1844) (surveying statistics and stating, “The home-spun clothes, the sun-burnt countenance, the provincial dialect, the hardened hand, and the brawny arm of the new recruit, will attest, beyond any possibility of cavil, that he has been a stranger to the elegancies of the ‘drawing room,’ and that his paternity is of that great and important ‘middle class,’ which constitutes the mass, as it does also the pride, the excellence, and the safety of the nation.”).

viewed such a policy as fundamentally inappropriate for a public institution that drew its support from all American taxpayers.

*ii. The Origin of Formal Preferences*

*a. Children of Military Officers*

In 1843, Congress for the first time formalized the West Point admissions process by statute. Congress provided that “each congressional and territorial district and the District of Columbia shall be entitled to have one cadet at [the] Academy,” with up to ten additional cadets appointed at large.<sup>325</sup> Significantly, Congress made no formal provision for the sons of any particular group. Although the statute did not specify a role for congressmen in the admissions process, it was the long-standing practice for congressmen to nominate the cadets from their districts, subject to ultimate approval by the President, usually acting through the Secretary of War.<sup>326</sup>

The context of congressional nomination explains the importance of the ten at-large appointments. These appointments were likely intended for the sons of military officers, not because of any special preference for such sons, but because military officers were unlikely to have strong ties to any one state. As historian Stephen Ambrose explains, “For most army officers, moving from post to post with no roots or political connections within the states, this was the only way they could get their sons into their old school.”<sup>327</sup> In 1857, for example, Jefferson Davis recommended the son of a captain in the army for an at-large appointment, because “he belongs to that class not eligible for an appointment from a Congressional

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325. Act of Mar. 1, 1843, 5 Stat. 606, §2. Congress increased the numbers of cadets in 1900, 1918, 1935, 1942, 1950, 1964, and 2002. Act of June 6, 1900, 31 Stat. 656; Act of July 9, 1918, ch. XXII, 40 Stat. 894; Act of June 7, 1935, 49 Stat. 332; Act of June 3, 1942, 56 Stat. 306; Act of June 30, 1950, 64 Stat. 303; Act of Mar. 3, 1964, 78 Stat. 148; Act of Dec. 2, 2002, 116 Stat. 2545.

326. By at least the 1880s, it had become common for many Congressmen to employ competitive examinations to select their nominees. See Fred Perry Powers, *West Point, the Army, and the Militia*, LIPPINCOTT’S MONTHLY MAG., July 1887, at 111, 112; see also Owen MacDonald, *The United States Military Academy at West Point—Where the American Officer is Trained*, SCI. AM., Mar. 14, 1908, at 188 (discussing congressional use of competitive examinations).

327. AMBROSE, *supra* note 306, at 128; see also *The West Point Academy*, LITTELL’S LIVING AGE, Mar. 23, 1850, at 549–50 (purpose of this provision was to ensure that military sons were not “utterly disenfranchised” with respect to the Military Academy); JAMES L. MORRISON, JR., “THE BEST SCHOOL IN THE WORLD”: WEST POINT, THE PRE-CIVIL WAR YEARS, 1833–1866, at 63 (1986) (“Traditionally, the sons of army and navy officers received preference in awarding “At Large” appointments, with first priority given to boys whose fathers had died on active duty.”).

District.”<sup>328</sup> Davis’s letter suggests that the at-large appointments thus served an important principle of equality by ensuring that the children of military officers were not significantly disadvantaged with respect to the admissions process. Moreover, it suggests there was at least an informal practice whereby such children were excluded from consideration for congressional appointments.

This informal practice of using the at-large appointments for children of military officers was not formalized by statute until 1964, when Congress provided for seventy-five cadets “selected by the President from the sons of members of regular components of the armed forces.”<sup>329</sup> The House committee report noted that “under present practice, this source is so limited administratively.”<sup>330</sup> Two years later, Congress broadened this category to sons of all career members of the armed forces, and increased the number to one hundred.<sup>331</sup>

The origins of this particular preference thus reveal that it was never intended as special benefit for children of members of the armed forces, and is thus as far as possible in spirit from the general legacy preferences employed by many universities today. This preference was intended to ensure a rough equality in a rigidly geographic admissions system dominated by congressmen. Absent such a distinction, a child of an American serviceman stationed in Germany, for example, might have no chance whatsoever to attend West Point. It would be deeply troubling if such children were excluded from consideration as a result of their parents’ government service. Nonetheless, the preference as enacted in 1964 cannot be perfectly squared with the Nobility Clauses, as it uses a military parent as a proxy for lack of geographic ties to a particular state. Some military members rotate through many states or foreign countries, but many do not. The statute, however, is relatively easy to fix. The at-large appointments could be limited to those applicants who do not reside in a particular state and those who have resided in the state in which they are living for less than, say, seven years. Alternatively, the category might

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328. Letter from Jefferson Davis to Jonathan B. Floyd, Dec. 16, 1857, in *An Interesting Historical Letter*, 25 PA. MAG. OF HIST. & BIOG. 76A (1901); see also *Hearing on S. 2254 Before the Senate Comm. on Naval Affairs*, 77th Cong. 8, 11 (1942) (statement of Asst. Adjutant Gen. William C. Rose) (stating that the at-large appointments were provided for the sons of military and naval personnel, and “since that time, it has been the practice, with few exceptions, to make such appointments from among own [sic] sons of Army and Navy personnel”).

329. Act of Mar. 3, 1964, 78 Stat. 149.

330. H.R. REP. NO. 88-538, at 11 (1963); see also S. REP. NO. 88-869, at 14 (1964).

331. Act of Oct. 13, 1966, 80 Stat. 896.

be limited to those applicants who have repeatedly moved and lack ties to any one state as a result of a parent's federal government service.

*b. Children of Deceased Servicemembers*

In 1926, Congress created forty additional cadetships from the United States at large, "to be appointed by the President from among the sons of officers, soldiers, sailors, and marines of the Army, Navy, and Marine Corps" who were killed in World War I.<sup>332</sup> This marked the first time Congress had explicitly tied admission to West Point to ancestry. Congress provided that twenty would be appointed from the sons of officers, and twenty from the sons of enlisted men.<sup>333</sup>

Two features of this law are worth noting. First, preference was available only to the sons of soldiers actually killed in service, not to the sons of veterans generally. As such, it was clearly intended as a form of charity and compensation to those families that had made the ultimate sacrifice for their country. The act's sponsor explicitly justified the law as a form of compensation to fatherless families, noting that a war widow loses payments "when she is most in need of funds to complete the education of her children or prepare them to be self-supporting."<sup>334</sup> In an age where welfare laws were nowhere near as robust as today, provisions for the widows and children of fallen soldiers presented the strongest claim to the nation's benevolence. Second, the act's sponsor was careful to point out that the law would not limit any preexisting opportunities for admission to the Academy.<sup>335</sup> Clearly, the law was contemplated as an extra form of compensation to a limited number of children of fallen soldiers, and not as a general preference in admission.

The law has survived into modern times through a series of largely mechanical extensions. In 1945, Congress provided that the sons of soldiers killed in World War II would also be eligible for this category, with the additional proviso, however, that appointees in this category should be "selected in order of merit as established by competitive

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332. Act of June 8, 1926, 44 Stat. 703, 704.

333. *Id.* Because the original act required the father to have died by July 2, 1921, the Act was amended in 1943 to provide for the sons of those veterans who had died of war-related injuries after that date. Act of Dec. 1, 1942, 56 Stat. 1024; *see also* H.R. REP. No. 77-2322 (1942) (discussing reasons for the change and noting that approximately sixteen cadets per year had been appointed in the previous five years under this provision).

334. 67 CONG. REC. 6216 (1926) (statement of Sen. Harris).

335. *Id.*

examination.”<sup>336</sup> The category was broadened again in 1954 to include sons of soldiers killed in the Korean conflict,<sup>337</sup> and in 1966 to all sons of soldiers killed or rendered one hundred percent disabled in active service.<sup>338</sup> Finally, in 1972, the number of cadets eligible under this category was increased to sixty-five, and was extended to the sons of service members who were missing in action.<sup>339</sup>

Although the origins of the law are largely benign, the current law raises significant problems under the Nobility Clauses, because it continues to use ancestry as a simple proxy for need. A better way of providing for the children of fallen soldiers would be to offer college scholarships to those who could demonstrate that the loss of their parent resulted in financial hardship. Such scholarships could be used at any university in the country, and would thus be a form of compensation for the lost income and opportunities due to the parent’s death while in government service. They would not limit anybody else’s opportunities, and thus would not be part of a zero-sum game.

*c. Children of Medal of Honor Winners*

In 1945, Congress enacted what is perhaps one of the starkest hereditary privileges in modern American law. The law permitted the President to appoint as many additional cadets to West Point as he saw fit from among the “sons of persons who have been or shall hereafter be awarded a Medal of Honor in the name of Congress for acts performed while in any of the armed forces of the United States.”<sup>340</sup> Although the law did require that such appointees be “otherwise qualified for admission,”<sup>341</sup> the law made no pretense of being based on any sort of need. Unlike the 1926 law, which was ostensibly a form of welfare for the struggling sons who had lost a father to war, this privilege applied to any son of a Medal of Honor winner, regardless of whether the father was dead or alive, rich or poor. An act more likely to raise the hackles of the Revolutionary generation is hard to imagine. By 1945, the clamor surrounding the Society of the Cincinnati was clearly long forgotten and the concerns about a hereditary military elite had vanished from congressional consciousness. The War Department, however, had opposed an earlier

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336. Act of Nov. 24, 1945, 59 Stat. 586, 587.

337. Act of June 3, 1954, 68 Stat. 168.

338. Act of Oct. 13, 1966, 80 Stat. 896.

339. Act of Aug. 7, 1972, 86 Stat. 505.

340. Act of Nov. 24, 1945, 59 Stat. 586.

341. *Id.*

version of this proposal, noting that there was “no particular need for this new source of appointment” and that it would “result in preferential treatment of a small group.”<sup>342</sup> By 1945, the War Department had resigned itself to registering simply “no objection,”<sup>343</sup> rather than approval, and the measure passed without any substantive recorded debate. Indeed, the bill’s House sponsor seems to have confused the substance of the bill with that of the bill for the sons of World War II veterans.<sup>344</sup> The House committee report simply stated, “[T]hose persons who perform such outstanding act of courage to warrant receiving the Congressional Medal of Honor . . . are most deserving of provisions being made for their sons to attend the Military or Naval Academy if they desire to do so without being barred from entrance because of a fixed quota.”<sup>345</sup> The virtually identical Senate committee report was similarly cursory.<sup>346</sup>

Although the nation clearly owes an enormous debt to those men and women whose valorous actions merit the Medal of Honor, this preference simply cannot be squared with the federal Nobility Clause. It singles out children for special privilege solely because of the accomplished deeds of their parents and is thus inconsistent with almost every principle that the Revolutionary generation held dear. Medal of Honor winners can be rewarded in a variety of other ways that do not run afoul of the Constitution’s prohibition of hereditary privilege.

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The experience of West Point thus provides little support for legacy preferences in public universities. West Point has never employed a preference for children of alumni, and it appears that such preferences have never been proposed or even considered. The school was the early subject of frequent complaints that it favored the sons of the wealthy and the powerful, and it took aggressive steps to ensure that this was not the case. No explicit hereditary preferences were written into law until the 1920s, and even these were intended primarily as forms of charity. Of the three current preferences, the purposes of two can be readily accomplished by minor changes in the law, whereas the third, enacted in 1945, is a clear violation of the federal Nobility Clause. If legacy preferences were deeply

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342. *Hearing on S. 2254 Before the Senate Comm. on Naval Affairs*, 77th Cong. 8, 11 (1942) (statement of Asst. Adjutant Gen. William C. Rose).

343. H.R. REP. NO. 79-898, at 2 (1945).

344. 91 CONG. REC. 10,779 (1945) (statements of Rep. Sparkman).

345. H.R. REP. NO. 79-898, at 1-2 (1945).

346. S. REP. NO. 79-623 (1945).

grounded in history, we would expect to find something like legacy preferences regularly employed in the nineteenth century. But we do not. Whatever else might be said about the West Point experience, nothing in the record of America's first selective university provides consistent historical support for the modern practice of legacy preferences.

## 2. *The "Costs" to Public Schools*

Defenders of legacy preferences will also likely point to the role that legacy preferences play in encouraging alumni contributions to the university. There is a tacit agreement that universities will provide special consideration for alumni children in exchange for continued alumni financial support. Eliminating legacy preferences, it is argued, will thus erode the university's financial status, potentially weakening the quality of education for legacy and non-legacy students alike.

As an initial matter, there is ample reason to doubt that the financial consequences would be so dire. The California Institute of Technology, one of America's finest private universities, receives extraordinary funding from donors, yet is fiercely resistant to any hint of legacy preference in its admissions policies.<sup>347</sup> Similarly, the two greatest universities in England, Oxford and Cambridge, somehow manage to function without employing legacy preferences.<sup>348</sup>

Nonetheless, it is plausible to assume that at least some diminution in alumni support will occur. In other words, complying with what I believe the Nobility Clauses command might cost money. But almost every constitutional provision imposes some costs on government.<sup>349</sup> It would be cheaper for the government to house convicts in dog cages rather than in prison cells, but the Eighth Amendment prohibits that. It would be cheaper to build highways by taking private land without just compensation, but the Fifth Amendment prohibits that. It would be cheaper not to provide jury trials to criminal defendants, but the Fifth Amendment prohibits that also. In short, we rarely recognize monetary costs as sufficient to override important constitutional principles, and the Nobility Clauses should not be treated any differently. Revolutionary Americans were fully aware that granting hereditary privileges might be financially rewarding; the Stuart kings had notoriously raised revenue by selling titles of nobility for large

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347. GOLDEN, *supra* note 4, at 261–64.

348. *Id.* at 125.

349. See generally STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* (1999) (arguing that all rights entail corresponding costs to the government).

sums of money.<sup>350</sup> But the framers and ratifiers prohibited titles anyway, because no amount of money they might provide would be worth the sacrifice of core principles of equality.

A related objection is that a potential loss in alumni support would affect only public universities, as only they are subject to the Nobility Clauses. Private universities, which include the bulk of the nation's most selective universities, could still employ them. This would put public universities at a significant disadvantage vis-à-vis their private counterparts. This disadvantage, however, is simply inherent in the nature of being bound by the Constitution; public employees, for example, have many costly rights under the First Amendment that private employees lack. More importantly, nothing stands in the way of aggressive efforts to limit the use of legacy preferences by private universities. Most selective private universities receive large amounts of money in the form of research grants from the federal government.<sup>351</sup> It would be quite reasonable for the federal government to distribute its research money only to those institutions that do not offer legacy preferences. Such a policy would solve the current prisoner's dilemma-type problem in which one private selective university would be reluctant to give up legacy preferences without a similar commitment from its competitors. Similarly, the American people might well ask why their taxes should subsidize, through tax-exempt status, institutions that so blatantly contradict fundamental American values of equality of opportunity. It is also possible that an adjudication that legacy preferences are unconstitutional in the public sector could have valuable spillover effects for private universities. Such a ruling would taint the practice considerably and might lead private universities to reconsider its legitimacy.

### *3. Implications for Other Admissions Preferences*

A final objection worth considering is the argument that selective universities employ a wide variety of preferences in making admissions decisions. They might provide special consideration, for example, to members of underrepresented racial or ethnic groups, to musicians, to athletes, or to applicants from particular states or regions. These admissions decisions constitute a core part of what universities do and lie

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350. MARK KISHLANKSY, *A MONARCHY TRANSFORMED* 24, 57 (1996).

351. *See, e.g.*, KARABEL, *supra* note 6, at 262 (discussing growing importance of federal research money at Harvard in the 1950s).

at the heart of their academic freedom.<sup>352</sup> As Justice Powell noted in *Bakke*, “The freedom of a university to make its own judgments as to education includes the selection of its student body.”<sup>353</sup> A judicial decision invalidating legacy preferences might open the door to further challenges to other preferences employed by universities.

This concern is fundamentally misplaced, because legacy preferences are unique in the only way that is salient for Nobility Clause purposes: they grant a preference based solely on a particular characteristic of an *ancestor*. The other preferences are all based on some characteristic of the *applicant* that the university feels will make that applicant a beneficial addition to its community. Thus, athletes are preferred for their own athletic ability, not that of their parents.<sup>354</sup> Musicians are preferred for their own musical ability, not that of their parents. And, importantly, members of underrepresented racial and ethnic groups are preferred because of the unique personal experiences and perspectives they bring to the university, not because their parents happen to be members of particular groups. As Justice O’Connor wrote for the Court in *Grutter*, “Just as growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”<sup>355</sup> In short, any constitutional

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352. For an exploration of this idea, see Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005).

353. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

354. In noting that athletic preferences do not pose constitutional problems, I do not mean to imply any endorsement of them as a policy matter; from that perspective they are equally repugnant as legacy preferences. Cf. KARABEL, *supra* note 6, at 1 (“Just try to explain to someone from abroad—from, say, France, Japan, Germany, or China—why the ability to run with a ball or where one’s parents went to college is relevant to who will gain a place at our nation’s most prestigious institutions of higher education, and you immediately realize how very peculiar our practices are.”). And despite the visibility of black recruited athletes in sports such as basketball and football, most beneficiaries of athletic preferences are affluent whites who participate in sports such as crew, squash, water polo, and sailing. GOLDEN, *supra* note 4, at 147–76. “[V]arsity athletes at elite colleges are more homogenous, both racially and socioeconomically, than the student bodies as a whole.” *Id.* at 150.

355. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). It might be objected that racial preferences are nonetheless quite similar to legacy preferences given that one’s race is generally inherited from one’s parents. There are two answers to this argument. First, the increasing numbers of mixed-race children and the growing recognition that race is a social construction with no discernible genetic basis make the argument of hereditary racial identity increasingly suspect. See generally Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal are White*, 2005 WIS. L. REV. 1283, 1295–97 (summarizing literature on social construction of race). Second, even assuming that race does have a strong hereditary component, the argument would still prove too much. Many traits have hereditary components, including eye color, height, gender, and various physical abilities. But that in itself doesn’t mean that a classification with respect to that trait is a hereditary classification. The Air Force can surely preclude people who are eight feet tall from piloting fighter planes designed for much

objections to particular affirmative action programs or other admissions preferences must be rooted in the Equal Protection Clause, and not in the Nobility Clauses.

#### IV. CONCLUSION

Legacy preferences, in some sense, will always exist. Inevitably, the children of those persons fortunate enough to have been educated at America's most selective universities will have advantages that other children will lack. The pressing question is whether the state may augment these advantages even further, using those very advantages as the reason for augmentation.

The history of the Nobility Clauses and the long struggle against entrenched hereditary privilege should tell us that the answer is clearly no. Selective college admissions were unknown in the eighteenth century, but we do know what the Revolutionary generation thought about hereditary privilege. They denounced it in every form it might potentially appear. Equality was thus a fundamental theme, not just of the amended Constitution of 1868, but of the Constitution of 1787. And it is in the Nobility Clauses that this command of equality speaks most loudly.

Why, then, the satisfied complacency that allows legal thinkers to assume that legacy preferences are perfectly constitutional? It is largely a matter of timing. By the time that public universities began employing legacy preferences, much of the outrage over hereditary privilege had been forgotten, largely because the Nobility Clauses and the Revolution itself had so successfully eradicated most vestiges of hereditary privilege in American life. Jurisprudentially, we had to come to think about equality as a constitutional value deriving almost entirely from the Equal Protection Clause.<sup>356</sup> The Nobility Clauses had become little more than quaint curiosities, the perfect example of text that is so clear that it has never

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shorter people, or prohibit blind people from flying airplanes at all, even if the blindness is caused by a hereditary disease. What it cannot do is prohibit the children of very tall people or the children of blind people from doing these things. Even if the relevant trait may have a strong rooting in heredity, it is ultimately the trait of the individual that matters, not the trait of the parents.

*Grutter's* emphasis on the unique qualities of the individual, of course, does not apply to the types of affirmative action implemented in response to desegregation orders or to remedy prior segregation in a particular institution. Such desegregation programs in selective public educational institutions, however, must be extremely rare in 2007, if any exist at all.

356. The analysis of the Nobility Clauses in this Article would also support the application of a higher standard of review under the Equal Protection Clause. The Nobility Clauses, however, are absolute, and should not be subject to the balancing tests employed under the Equal Protection Clause. *See supra* Part II.

been violated, and which pose no interpretive difficulties whatsoever. I hope this Article has demonstrated that this view is wrong. As John Edwards argued in 2004, legacy preferences belong more to the world of eighteenth-century British aristocracy than to the world of twenty-first-century American democracy. It is that British world of inherited privilege that the Revolutionary generation sought to destroy forever. And each day legacy preferences remain in place in public universities is a betrayal not only of America's highest aspirations, but of the explicit command of the Constitution itself.