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NO DISTINCTIONS EXCEPT THOSE WHICH MERIT ORIGINATES: THE UNLAWFULNESS OF LEGACY PREFERENCES IN PUBLIC AND PRIVATE UNIVERSITIES

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INTRODUCTION

Legacy preferences in college admissions infringe fundamental American values. Preferring the applications of alumni children gives them a substantial benefit based not on merit, but lineage—on the identity, status, or accomplishments of their parents. Inherited preferences for publicly-available goods are appropriate only in status-based, feudal societies,[1] not in one founded on equality and committed to social and economic mobility based on talent and merit.[2]

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1. *See* KENNETH L. KARST, BELONGING TO AMERICA 34 (1989) ("In feudal society the law effectively governing an individual's rights and obligations—and, especially, privileges—was very much the product of his personal status.").

2. *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 549 (2005) (legacy preferences are "a peculiar practice more suited to feudal aristocracy than a society that prides itself on its commitment to equality of opportunity"); MICHAEL LIND, THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION 330 (1995) (legacy preferences have made the

Without any substantial legal analysis, commentators have generally assumed that the Equal Protection Guarantee does not prohibit public universities from granting legacy preferences.[3] Professor Larson has recently argued that legacy preferences in public universities violate the Constitution's prohibition on granting titles of nobility, but he leaves untested the conventional wisdom that the preferences do not offend the Equal Protection Guarantee.[4] Two early commentators said that legacy preferences cannot survive even rational-basis scrutiny under the Guarantee, but they, too, provided no substantive legal analysis.[5]

This article fills that gap, examining in detail the relevant legislative history and case law under the Equal Protection Guarantee. And given the close relationship between the Guarantee and the Civil Rights Act of 1866,[6] we

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Ivy League "a credentialing institution for a social oligarchy"); PETER SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 3 (2007) ("[S]elective colleges can much more accurately be described as bastions of privilege."); Jacques Steinberg, *Of Sheepskins and Greenbacks*, N.Y. TIMES, Feb. 13, 2003, at A1 (legacy preferences are "a relic of white supremacy and Northeastern establishment dominance"); *see also* Goodwin Liu, *Race, Class, Diversity, Complexity*, 80 NOTRE DAME L. REV. 289, 301 (2004) ("[O]ur best schools [should] be a beacon of opportunity to students from every station in life, and not just an entitlement of the well-heeled.").

3. *See, e.g.*, Charles W. Collier, *Affirmative Action and the Decline of Intellectual Culture*, 55 J. LEGAL EDUC. 3, 5 (2005); John D. Lamb, *The Real Affirmative Action Babies: Legacy Preference at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 491, 512 (1993). In *Grutter v. Bollinger*, Justice Thomas stated, without analysis, that "the Equal Protection Clause does not . . . prohibit the use of unseemly legacy preferences or many other kinds of arbitrary admissions procedures." Grutter v. Bollinger, 539 U.S. 306, 368 (2003) (Thomas, J., concurring in part and dissenting in part); *see also* Hopwood v. Texas, 783 F.3d 932, 946 (5th Cir. 1996) (stating in dicta that "an admissions process may also consider an applicant's . . . relationship to school alumni"); Rosenstock v. Bd. of Governors of the Univ. of North Carolina, 423 F. Supp. 1321 (M.D.N.C. 1976) (upholding legacy preferences where plaintiff did not contend that they used a suspect classification). *But see* Gratz v. Bollinger, 135 F. Supp. 2d 790, 802 (E.D. Mich. 2001) (referring in dicta to legacy status as a "suspect criter[ion]").

4. *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions,* 84 WASH. U. L. REV. 1375 (2007).

5. *See* Ernest Gellhorn & D. Brock Hornby, *Constitutional Limitations On Admissions Procedures and Standards—Beyond Affirmative Action*, 60 VA. L. REV. 975, 1006 (1974).

6. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (re-enacted in the Enforcement Act of 1870, ch. 114, §§ 16, 18, 16 Stat. 140). Section 1 of the Act originally provided, in relevant part,

canvass the latter's legislative history and case law as well. We conclude that legacy preferences in both public and private universities are presumptively unlawful.

That conclusion is grounded in history. The Founders intended to establish a society based on individual merit rather than the hereditary distinctions of the feudal societies that the colonists had abandoned. Accordingly, the principle against hereditary distinctions is reflected in the history and text of both the Declaration of Independence and the 1787 Constitution, including the Guaranty Clause, the ban on titles of nobility, and the "corruption of blood" clauses.[7]

This principle did not remain a mere ideal but was given the force of positive law by the 39th Congress in the wake of the Civil War. Three aspects of the debates on the 1866 Act and the Guarantee show that the Republicans who dominated that Congress rejected distinctions based on heredity or family lineage.

First, the Republicans understood the Declaration's statement that all men are created equal—what Lincoln described as the "white man's charter of freedom"—specifically to reject hereditary distinctions among white men. The abolitionists and Radical Republicans urged that this principle be broadened to prohibit discrimination against African Americans. The 39th Congress codified the Declaration's principle against hereditary distinctions among white men and extended it to proscribe discrimination based on inherited race.[8]

Second, the Republicans believed that the essential conflict was between the democracy of the North and the aristocracy of the South. Lincoln and other Republicans

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> that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . .

The portion of this Act that we are concerned with—the prohibition on discrimination in the right "to make and enforce contracts"—is currently codified at 42 U.S.C. § 1981 (1991).

7. *See infra* Part IIA1a.

8. *See infra* Part IIA1b.

thought that the southern aristocrats were "restoring [principles] of classification, caste and legitimacy" that posed a danger to the democratic institutions and people of the North. Providing each citizen with the "same right" to make and enforce contracts, and with equal protection of the laws, the Republicans intended both the 1866 Act and the Equal Protection Guarantee to be bulwarks against a status-based southern aristocracy.[9]

Third, the Republicans' Free Labor ideology asserted that each worker, if allowed the fruits of his labor, could achieve social and economic mobility. This guiding Republican ideology was incompatible not only with southern slavery, but also with the condition of southern white laborers who had no hope of ever rising through southern society. The Republicans of the 39th Congress believed that the right to contract was among the fundamental rights necessary to secure the fruits of labor and thus ensure social mobility. These rights were codified in the 1866 Act and then made part of the organic law of the land in the Fourteenth Amendment.[10]

The 1866 Act implemented the ban on hereditary distinctions by providing that all "citizens" shall have the same right to make and enforce contracts, and by defining a citizen as anyone (with limited exceptions) who was born in the United States. Chief Justice Taney's opinion in *Dred Scott* had held that U.S. citizenship was determined by lineage—that citizenship was restricted to lineal descendents of those who were citizens when the Constitution was adopted. Likewise, the southern States had defined State citizenship specifically by reference to family lineage, denying citizenship to children of "colored" mothers, whether free or slave. The 1866 Act rejected such citizenship-by-lineage, confirming the rejection of lineage as a basis for discrimination in the Act's citizenship-based substantive rights. The Republicans ultimately viewed even the 1866 Act as too status-based, so they extended the Equal Protection Guarantee to "all persons" rather than only citizens.[11]

This legislative history, reflecting both the Republicans' own bases for the Civil War and their understanding of the

9. *See infra* Part IIA2.
10. *See infra* Part IIA3.
11. *See infra* Part IIA4.

Founders' principles, shows that the right to be free from discrimination based on heredity or lineage is a foundational right enjoyed by Americans.

From the nation's founding, the social movement against hereditary distinctions has been so successful that litigation against such distinctions simpliciter is rare.[12] Instead, litigation has focused on efforts to realize the full meaning of "equality," beyond its origins in the principle against hereditary preferences.[13] As we show below, however, Supreme Court precedent amply supports the application of strict scrutiny to hereditary distinctions under the Equal Protection Guarantee, and likewise supports a challenge to those distinctions under the 1866 Act. This existing case law, especially when supplemented with the extensive legislative history developed below, provides a sound basis for litigation against legacy preferences in college admissions.

We also suggest that legacy preferences will not survive the strict scrutiny to which they are subject. The universities' principal justification for legacy preferences—that they result in increased alumni donations—is not legally cognizable. An otherwise unlawful preference is not redeemed because its beneficiaries are willing to pay for it.[14] In any event, analysis of extensive data from more than 100 elite universities shows

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12. *See* J. M. Balkin, *The Constitution of Status,* 106 YALE L. J. 2313, 2350 (1997) (noting that the title of nobility clauses "have little meaning for us today precisely because of the success of the American Revolution in dismantling a profound and pervasive form of status hierarchy"). Legacy preferences have survived into the twenty-first century because they benefit the nation's political elites. *See* DANIEL GOLDEN, THE PRICE OF ADMISSION 234 (2006) (noting "the bipartisan array of powerful insiders in the executive branch, Congress, and the judiciary who sent their children to their old schools or who are themselves legacies"); *see also* Cameron Howell & Sarah E. Turner, *Legacies In Black and White: The Racial Composition of the Legacy Pool*, 45 RES. IN HIGHER EDUC. 325, 329 (2004).

13. We should emphasize the modesty of what we claim in this article. For example, there is a rich literature asserting that the Equal Protection Guarantee prohibits the States from treating identifiable groups as "second-class citizens." *See, e.g.*, KARST, *supra* note 1; Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410 (1994). Our analysis supports those claims, but is not dependent on them. We argue only that, whatever the ultimate scope of the Guarantee, its drafters *at a minimum* intended it to give effect to the anti-hereditary-distinction principle of the Founders. Our argument does not require courts to expand the concept of equality, but only to remember its origin.

14. *See infra* Part IIIB.

that legacy preferences are not correlated with increased alumni giving rates, and are likely not correlated with increased private donations.[15]

I. THE UGLY HISTORY AND UNTENABLE FUTURE OF LEGACY PREFERENCES

Jerome Karabel has documented the origin of legacy preferences in 1920s anti-Semitic efforts at Harvard, Yale, and Princeton that were implemented to stem an influx of the "wrong" types of students.[16] Legacy preferences shielded WASP applicants from unwelcome Jewish and Catholic competition.[17] Today the preferences insulate the children of alumni from full competition with other applicants and from the reduced admissions spaces resulting from affirmative action for minorities.[18]

Our research shows that fifty-two of sixty-eight top national universities and fifty of fifty-three of the best liberal arts colleges currently grant legacy preferences.[19] These preferences at elite universities give an advantage to alumni children equivalent to an extra twenty-three to 160 SAT points (on a 1600-point scale).[20] The legacy admissions rate,

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15. *See infra* Part IIIC.

16. *See* KARABEL, *supra* note 2, at 76. Quotas on admission of Jewish students betrayed the schools' public statements against racial prejudice and in favor of admission based on merit. *Id.* at 198, 207; SCHMIDT, *supra* note 2, at 24.

17. *See* KARABEL, *supra* note 2, at 76, 102, 114–17; *see also* JOSEPH A. SOARES, THE POWER OF PRIVILEGE 48–50 (2007); Lamb, *supra* note 3, at 493.

18. KARABEL, *supra* note 2, at 521; *see The Curse of Nepotism*, ECONOMIST, Jan. 1, 2004, at 27; *see generally* SCHMIDT, *supra* note 2, at 211 (noting that, after the *Grutter* and *Gratz* decisions, civil rights organizations lost interest in attacking legacy preferences).

19. We gathered data on the top seventy-five national universities and top seventy-five liberal arts colleges as ranked in the 2007 U.S. News & World Report. *See* our database, described *infra* Part IIIC.

20. *See* GOLDEN, *supra* note 12, at 131; SCHMIDT, *supra* note 2, at 31; Thomas J. Espenshade, Chang Y. Chung, & Joan L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI. Q. 1422 (2004); Howell & Turner, *supra* note 12, at 329; Douglas S. Massey & Margarita Mooney, *The Effects of America's Three Affirmative Programs on Academic Performance*, 54 SOC. PROBS. 99, 109 (2007). The Department of Education in 1990 found that beneficiaries of legacy preferences at Harvard were "significantly less qualified" than their non-legacy peers in academics, extra-curriculars, personal qualities, and recommendations—in *all* categories except athletics. *See* Letter and Enclosure: Statement of Findings, Compliance Review 01-88-6009 from Thomas J. Hibino, Acting Reg'l Director of U.S. Dep't of Educ., Office for Civil Rights, to Derek Bok, President of Harvard

as compared to the overall admissions rate, is shown here for some of the nation's elite private institutions:

Table 1. Overall Admit Rate and Legacy Admit Rate

School	Year	Overall Admit Rate (%)	Legacy Admit Rate (%)
Amherst[f]	2005	20	50
Bowdoin[a]	1980	21	52
Columbia[c]	1993	32	51
Dartmouth[a]	1991	27	57
Harvard[e]	2002	11	40
Middlebury[b]	2006	27	45
Notre Dame[f]	2005	20	50
Pennsylvania[d]	2004	21	51
Princeton[e]	2002	10	35
Stanford[b]	2006	13	25
Yale[e]	2002	11	29

a John D. Lamb, *The Real Affirmative Action Babies: Legacy Preference at Harvard and Yale*, 26 COLUM. J.L. & SOC. PROBS. 506 n.94 (1993).

b Jacques Steinberg, *Of Sheepskins and Greenbacks*, N.Y. TIMES, Feb. 13, 2003, at A1.

c Theodore Cross, *Suppose There Was No Affirmative Action at the Most Prestigious Colleges and Graduate Schools*, 3 J. BLACKS HIGHER EDUC. 44, 47 (1994).

d Douglas S. Massey & Margarita Mooney, *The Effects of America's Three Affirmative Programs on Academic Performance*, 54 SOC. PROBS. 99, 100 (2007).

e JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 521, 550 (2005).

f DANIEL GOLDEN, THE PRICE OF ADMISSION 131, 228 (2006). The figures for Amherst represent a fifteen-year average. *Id.* at 288.

Among flagship State universities, there is wide variability in the magnitude of the preference. At the University of Michigan, for instance, in 2003 legacy status garnered four of the 100 points required for admission.[21] The

Univ., at 37 (Oct. 4, 1990) (on file with author).

21. *See* Gratz v. Bollinger, 539 U.S. 244, 278 (2003) (O'Connor, J., concurring). By comparison, an applicant's personal achievements, leadership, and public service could garner a total of only five points. *Id.* In the wake of *Gratz*, the University of Michigan eliminated its point system, but legacy status,

University of Virginia's admission rate for legacy applicants is fifty-seven percent versus an overall rate of twenty-three percent.[22] A major Midwestern land-grant research university, ranked among the top 100 national schools by U.S. News & World Report, automatically admits all alumni children unless their SAT scores put them in the bottom twenty-five percent of applicants.[23]

At both public and private schools, the *relative* advantage conferred by legacy preferences is increasing as intensified competition drives overall admission rates lower.[24] At preference-granting elite schools, legacy applicants typically represent ten to fifteen percent of admittees,[25] as compared to 1.5% at CalTech, which grants no preferences.[26] The number of legacy admittees is often double the total number of enrolled African Americans.[27]

Legacy preferences are opposed by three-quarters of Americans[28] and by advocacy groups and political leaders of diverse ideological stripes.[29] But the wealth and political clout of the elite universities, and the fact that legislators and their children are among the direct beneficiaries of legacy

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which is specifically noted on the admissions rating sheet, is still "taken into account" in the admissions process. Telephone Interview with Admissions Official, Univ. of Mich. (Apr. 2008).

22. Howell & Turner, *supra* note 12, at 333.

23. Research Assistant's December 2007 Telephone Interview with Admissions Official. Even legacy applicants in the bottom twenty-five percent can be denied admission only on the approval of the Dean of Admissions. *Id.*

24. *See* KARABEL, *supra* note 2, at 550.

25. *See* GOLDEN, *supra* note 12, at 121–22; *see also* SCHMIDT, *supra* note 2, at 30.

26. *See* GOLDEN, *supra* note 12, at 262.

27. *See Naked Hypocrisy: The Nationwide System of Affirmative Action for Whites,* 18 J. BLACKS HIGHER EDUC. 40, 41 (1997–98). Today at the University of Notre Dame, legacy beneficiaries comprise twenty-five percent of the student body; African Americans four percent. GOLDEN, *supra* note 12, at 118.

28. Jeffery Selingo, *U.S. Public's Confidence in Colleges Remains High*, 50 CHRON. HIGHER EDUC. A1 (2004), *available at* http://chronicle.com/free/v50/i35/35a00101.htm.

29. *See, e.g.*, Ben Adler, *Inside the Higher Ed Lobby: Welcome to One Dupont Circle, Where Good Education-Reform Ideas Go to Die*, 39 WASH. MONTHLY 35 (2007) (discussing Senator Kennedy's opposition); Peter Schmidt, *New Pressure Put on Colleges to End Legacies in Admissions,* 50 CHRON. HIGHER EDUC. A1 (2004) (noting Center for Individual Rights' opposition); Elisabeth Bumiller, *Bush, a Yale Legacy, Says Colleges Should Not Give Preference to Children of Alumni*, N.Y. TIMES, Aug. 7, 2004, at A12; John Edwards, Op-Ed., *End Special Privilege*, USA TODAY, Jan. 26, 2004, at 12A; Richard D. Kahlenberg, *Class Based Affirmative Action in College Admissions* (2000), http://www.tcf.org/Publications/Education/AffirmativeAction.pdf.

preferences, make a legislative solution unlikely.[30]

This poses a significant problem because generations of Americans have viewed higher education as the fundamental engine of social and economic mobility.[31] Equal access to higher education, and especially to elite schools, plays a vital role in sustaining the legitimacy of "our democratic ideal of equal opportunity for all."[32] That legitimacy will erode if access to elite higher education is seen, at best, as reflecting society's substantial inequality and social stratification, and, at worst, as a means of reproducing it. The class stratification at elite universities is now scandalous.[33] The average family income of students at these schools is more than twice that of students in other universities.[34]

The effect of parents' educational backgrounds on admission to elite institutions has grown exponentially over

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30. *See* GOLDEN, *supra* note 12, at 124 (twelve elite universities account for fifty-four percent of corporate leaders and forty-two percent of government leaders); Lani Guinier, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 n.5 (2003) (noting that a small group of schools produces a disproportionate number of U.S. Senators, Representatives, and judges); *see also* SCHMIDT, *supra* note 2, at 11.

31. *See* ANTHONY P. CARNEVALE & STEPHEN J. ROSE, SOCIOECONOMIC STATUS, RACE/ETHNICITY, AND SELECTIVE COLLEGE ADMISSIONS 29 (2003).

32. Guinier, *supra* note 30, at 137–38; *see* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 276 (1998) (admission to elite universities "is an exceedingly valuable resource—valuable both to the students admitted and to the society at large—which is why admissions need to be based 'on the merits'"); PETER SACKS, TEARING DOWN THE GATES: CONFRONTING THE CLASS DIVIDE IN AMERICAN EDUCATION 122 (2007) ("[F]or any nation that purports to uphold egalitarian and democratic values, it matters who is educated at these [elite] institutions."); John K. Wilson, *The Myth of Reverse Discrimination in Higher Education,* 10 J. BLACKS HIGHER EDUC. 88, 93 (1995–96) ("[T]hese elite degrees are part of an intricate certification process that gives their recipients a huge advantage in the job market and a network of alums to help them.").

33. *See* CARNEVALE & ROSE, *supra* note 31, at 11, 32; JOHN AUBREY DOUGLASS, THE CONDITIONS FOR ADMISSION: ACCESS, EQUITY AND THE SOCIAL CONTRACT OF PUBLIC UNIVERSITIES 246 (2007); RICHARD D. KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION 146 (1996); DOUGLAS S. MASSEY, ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES 43 (2003); SCHMIDT, *supra* note 2, at 17; Liu, *supra* note 2, at 292–93; Walter Benn Michaels, *Why Identity Politics Distracts Us From Economic Inequalities,* 53 CHRON. HIGHER EDUC. B10 (2006).

34. SACKS, *supra* note 32, at 156; *see also* SCHMIDT, *supra* note 2, at 4 ("[A] rich child has about 25 times as much chance as a poor one of someday enrolling in a college rated as highly selective or better.").

the last decades.[35] From 1971 to 2000, the proportion of students in elite universities whose parents were highly educated grew from twenty-eight percent to sixty-one percent, while those whose parents had no college education declined from twenty-five percent to nine percent.[36] Legacy preferences deter the advancement of children from low-income, low-education families while artificially propping up the children from high-income, high-education families. They are a signal to low and moderate-income students that the gates to the highest stations in society are closed to them.[37]

It is against this background that legacy preferences at elite universities are judged. Access to higher education is widely seen as a primary means of social mobility; elite higher education is in fact a principal means of gaining access to economic, cultural, and political power; and low-income applicants already face a significant disadvantage in meeting "objective" criteria that systematically favor those with well-educated and well-off parents. The question is whether in addition to these *de facto* disadvantages, low-income and other wrong-birth students should face the *de jure* disadvantage of an expressly inherited attribute that, by definition, is possessed almost exclusively by those at the top of the socioeconomic order.

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35. Upper-class parents, who themselves tend to be college graduates, have the social and economic capital to help their children succeed on SAT tests and other "objective" measures of merit. *See* BOWEN & BOK, *supra* note 32, at 49; Guinier, *supra* note 30, at 146 n.135, 149 n.148. Indeed, SAT scores tend to rise in lockstep with family income. *See* CARNEVALE & ROSE, *supra* note 31, at 34; KAHLENBERG, *supra* note 33, at 99; *see also* SACKS, *supra* note 32, at 14–15 (summarizing studies showing overwhelming effects of family background and wealth on educational attainment).

36. SACKS, *supra* note 32, at 123–24.

37. More than 5000 high schools nationwide graduated students in 2004 with qualifications sufficient for admission to Harvard, but did not have a single student apply there. *See Large Numbers of Highly Qualified, Low-Income Students Are Not Applying to Harvard and Other Highly Selective Schools*, J. BLACKS HIGHER EDUC. (2006), http://www.jbhe.com/news_views/52_low-income-students.html; *see generally* LIND, *supra* note 2, at 331 ("In an industrial, bureaucratic society in which access to wealth and power depend on educational credentials, alumni preference in university admissions is the managerial-professional equivalent of primogeniture.").

II. LEGACY PREFERENCES, IN BOTH PUBLIC AND PRIVATE UNIVERSITIES, ARE PRESUMPTIVELY UNLAWFUL

Admissions decisions at public universities are subject to the strictures of the Equal Protection Guarantee.[38] We show in detail below that the Supreme Court has held that discrimination by government based on "ancestry," including an individual's family lineage, is inherently suspect.[39] Admissions decisions in *private* universities are unlikely to be held to constitute "state action" and are thus likely beyond the reach of the Guarantee.[40] But the Civil Rights Act of 1866 does reach private schools and it prohibits discrimination based on "race" in their admissions decisions.[41] We show that the Court has construed "race" broadly under the 1866 Act to prohibit private discrimination based on "ancestry," and in dicta has indicated that "race" includes family lineage.[42]

Our analysis begins, however, with a detailed review of the legislative history of the Act and the Guarantee. That history, which establishes that Congress intended both provisions to prohibit discrimination based on family lineage, provides an important adjunct to the Court's cases addressing discrimination based on the identity, status, or conduct of an individual's parents.

A. The 39th Congress Intended to Protect All Citizens from Discrimination Based on Lineage.

The legislative history of the 1866 Act and the Joint Resolution that became the Fourteenth Amendment shows that Congress considered the prohibition of discrimination based on heredity or family lineage to be essential to the foundation of American society. That discrimination is subject to strict scrutiny because Congress intended the 1866

38. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

39. *See infra* Part IIB.

40. *See* Hack v. President & Fellows of Yale Coll., 237 F.3d 81 (2d Cir. 2000); *see generally* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995).

41. *See infra* text accompanying note 283. For ease of reference, and to emphasize the history of the statute, we refer throughout this article to the "1866 Act." The currently effective provision, found at 42 U.S.C. § 1981 (1991), provides, in relevant part, that, "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

42. *See infra* Part IIC1.

Act and Guarantee to proscribe it.[43]

1. The 39th Congress Codified and Extended to All Americans the Principle Against Hereditary Distinctions That Was Established in the Declaration of Independence and the Egalitarian Provisions of the 1787 Constitution.

The drafters of the 1866 Act intended to codify, for the first time in history, the principle of equality that the Founders inscribed in the Declaration and in the Guaranty Clause and other egalitarian provisions of the 1787 Constitution. So an understanding of the 1866 Act begins with understanding what the Founders were rebelling against. When they asserted that "all [white] men are created equal," what then-extant distinctions among white men were they rejecting?

a. The Declaration and Egalitarian Provisions of the 1787 Constitution Established a Principle Against Hereditary Distinctions.

A primary purpose of the Revolution was to reject a society based on hereditary privilege in favor of one founded on the equality of white men.[44] Before the Revolution, many still believed that the aristocracy and common people were so different that they were "two orders of being."[45] There were widespread calls for the creation of a titled nobility or life peerage in the colonies to counter-balance the power of the king, on the one hand, and the elected assemblies, on the

43. A classification is "suspect" not only when modern criteria would so categorize it, but also when the legislative history shows that Congress intended to proscribe discrimination on that basis. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 23 (1948) (Guarantee must be construed according to what "the framers sought to achieve"); Strauder v. West Virginia, 100 U.S. 303, 305 (1879) (Guarantee must be construed according to "the times when [it was] adopted, and the general objects [it] plainly sought to accomplish").

44. *See, e.g.*, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992); Mark E. Brandon, *Family at the Birth of the American Constitutional Order*, 77 TEX. L. REV. 1195, 1206–17, 1223–25 (1999); Richard Delgado, *An Equality 'From The Top': Applying An Ancient Prohibition To An Emerging Problem Of Distributive Justice*, 32 UCLA L. REV. 100, 109–13 (1984); Roderick M. Hills, Jr., *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, 1600–02 (1997); James W. Torke, *Nepotism and the Constitution: The Kotch Case—A Specimen in Amber*, 47 LOY. L. REV. 561, 611–18 (2001).

45. WOOD, *supra* note 44, at 27.

other.[46] But the Revolution, "conceived in the spirit of equal rights and privileges," made the "creat[ion] [of] a privileged order . . . unthinkable."[47]

As shown by Gordon Wood, the Revolution pitted patriots against "courtiers," persons "whose position or rank came artificially from above—from hereditary or personal connections that ultimately flowed from the crown or court."[48] The essence of republicanism was that "a man's merit [would] rest entirely with himself, without any regard to family, blood, or connection."[49] The rallying cry was equality of opportunity, which rejected hereditary privileges and embraced "social movement both up and down founded on individual ability and character."[50] In short, the Revolution was "a vindication of frustrated talent at the expense of birth and blood."[51]

i. The Declaration

The rejection of hereditary privilege was made explicit in the Declaration of Independence. Jefferson was driven by the desire to abolish the aristocracy of birth and in its stead to erect an "aristocracy of virtue and talent, which nature has wisely provided for the direction of the interests of society, & scattered with equal hand through all it's (sic) conditions."[52]

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46. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 272–280 (enlarged ed. 1992); *see also* ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 125 (2005); MARK PULS, SAMUEL ADAMS: FATHER OF THE AMERICAN REVOLUTION 49 (2006).

47. BAILYN, *supra* note 46, at 281.

48. WOOD, *supra* note 44, at 175.

49. *Id.* at 180 (quoting STEPHEN BURROUGHS, MEMOIRS OF STEPHEN BURROUGHS OF NEW HAMPSHIRE 3 (1988)).

50. *Id.* at 233–34; *see also id.* at 195; BAILYN, *supra* note 46, at 319 (Revolution ensured that "the status of men flowed from their achievements and from their personal qualities, not from distinctions ascribed to them at birth").

51. WOOD, *supra* note 44, at 180; *see also* HARRY V. JAFFA, A NEW BIRTH OF FREEDOM 408 (2000) ("[I]f the American Revolution meant anything at all, it meant that no man ought to be limited by the condition into which he is born."); Balkin, *supra* note 12, at 2316 ("America's commitment to a democratic culture began with the social revolution against aristocratic privilege that formed the basis of the American Revolution."); Larson, *supra* note 4, at 1384 (hereditary distinctions "were unthinkable in a nation founded upon principles of equality").

52. THOMAS JEFFERSON, *Autobiography*, *in* THOMAS JEFFERSON: WRITINGS 32 (Merrill D. Peterson ed., 1984). Jefferson believed that inherited privileges were a principal cause of European poverty. *See* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 112 (2005); *see also* YEHOSHUA ARIELI, INDIVIDUALISM AND NATIONALISM IN AMERICAN IDEOLOGY 78 (1964). Like many others, he also thought that the American Revolution was

Democratic society arrays "science, talents and courage against rank and birth" and thus ensures that "rank, and birth, and tinsel-aristocracy will finally shrink into insignificance."[53]

Accordingly, the Declaration asserts independence not in the name of an aristocracy or the gentry, but "in the Name, and by the Authority of the good People of the Colonies." The first self-evident truth invoked by the people is that "all men are created equal." Jefferson understood the "natural equality of man" to encompass "particularly the denial of a preeminence by birth."[54] On the fiftieth anniversary of the Declaration, Jefferson famously wrote that the Revolution had been founded on the principle that "the mass of mankind has not been born with saddles on their backs, nor a favored few, booted and spurred, ready to ride them legitimately, by the grace of God."[55]

The origin of the Declaration confirms its rejection of hereditary distinctions among white men. Jefferson's close friend, Tom Paine, shared with him "an egalitarian vision of

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the first step in a global evolution from feudalism and monarchy to equality and democracy. Ellis, *supra* at 128.

53. THOMAS JEFFERSON, Letter to John Adams (Oct. 28, 1813), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 1309–10; *see generally* Ellis, *supra* note 52, at 249 (discussing Jefferson-Adams correspondence regarding aristocracy). It is easy for us today to see hypocrisy in the Founders' failure to *immediately* extend the no-hereditary-distinction principle to African Americans. Enemies of the Declaration were quick to point out the inconsistency. *See* CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS 27 (1972). But establishing this principle as the basis for American society ensured a future conflict between the principle and hereditary slavery: "With the revolutionary movement, black slavery became excruciatingly conspicuous in a way that it had not been in the older monarchical society with its many calibrations and degrees of unfreedom . . . . The revolution in effect set in motion ideological and social forces that doomed the institution of slavery in the North and led inexorably to the Civil War." WOOD, *supra* note 44, at 186–87.

54. THOMAS JEFFERSON, Letter to George Washington (Apr. 16, 1784), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 791. Jefferson wrote this letter to urge Washington to oppose the hereditary privileges granted by the Society of the Cincinnati. *Id.* Those privileges were also opposed by John Adams and Benjamin Franklin, who participated in drafting the Declaration. *See* Larson, *supra* note 4, at 1393–95; *see also infra* text accompanying note 80. Professor Larson illuminates the dispute over the Cincinnati and its importance in understanding the Founders' rejection of hereditary privileges. *See* Larson, *supra* note 4, at 1387–99; *see also* WOOD, *supra* note 44, at 241.

55. THOMAS JEFFERSON, Letter to Roger C. Weightman (June 24, 1826), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 1517; *see generally* Ellis, *supra* note 52, at 289 (discussing provenance of Jefferson's phraseology).

republicanism as a rejection of the class-stratified society of the old world."[56] Paine's enormously influential pamphlet, *Common Sense*, called in January 1776 for the publication of a "manifesto" announcing independence from Great Britain and setting forth the principles that would make the American Revolution more than a war for separation of one people from another.[57] On June 7, 1776, the Lee Resolutions pressed the Continental Congress to issue the manifesto urged by Paine,[58] and on June 11 Congress gave Jefferson his task.[59]

Paine's language and tone, designed to appeal to artisans and mechanics as well as the political elite, was highly original, but his theme of "the absurdity of hereditary privilege" was a staple of Whig thought in the colonies.[60] *Common Sense* asserted that, "For all men being originally equals, no *one* by *birth* could have a right to set up his own family in perpetual preference to all others for ever, and tho' himself might deserve *some* decent degree of honours of his cotemporaries, yet his descendants might be far too unworthy to inherit them."[61] The pamphlet rejected "monarchical tyranny in the person of the king" and "aristocratical tyranny in the person of the peers."[62] "[O]ne honest man" was worth more to society than "all the crowned ruffians that ever

56. FONER, *supra* note 46, at 103.

57. THOMAS PAINE, *COMMON SENSE, in* THOMAS PAINE, COLLECTED WRITINGS 45 (Eric Foner ed., 1995); *see generally* CRAIG NELSON, THOMAS PAINE: ENLIGHTENMENT, REVOLUTION, AND THE BIRTH OF MODERN NATIONS 96–97 (2006).

58. NELSON, *supra* note 57, at 96–97.

59. *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 43 (1997).

60. FONER, *supra* note 46, at 79–80, 82; *see also* NELSON, *supra* note 57, at 80–82.

61. PAINE, *supra* note 57, at 16 (emphasis in original); *see generally* ARIELI, *supra* note 52, at 71 (noting "the great influence of *Common Sense* on the independence movement and on the rise of American democracy"). As Professor Brandon summarized, "Paine's enemy, most simply, was a system in which privilege, property, and power were determined by inheritance." Brandon, *supra* note 44, at 1213; *see also* Delgado, *supra* note 44, at 111; *see generally* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY 23 (2005) ("Paine considered aristocratic government, established by a parasitic caste of the pedigreed and privileged, as the chief author of human misery.").

62. PAINE, *supra* note 57, at 9. These ideas had circulated throughout the colonies long before Paine took up his pen. *See, e.g.*, MAIER, *supra* note 59, at 92–93, 128; PAULINE MAIER, FROM RESISTANCE TO REVOLUTION 288–94 (1972).

lived."[63] By sweeping away the inherited privileges of the feudal world, the new American society would "prepare in time an asylum for mankind."[64] The enormous circulation of *Common Sense* indicated the extent to which it articulated the views of the mass of colonists,[65] among whom was Jefferson.[66]

The sources relied on by Jefferson also confirm the Declaration's rejection of hereditary privileges. When drafting the Declaration, Jefferson likely had in front of him[67] a copy of George Mason's draft of the Virginia Declaration of Rights, which had been published in the *Pennsylvania Gazette* on June 12, 1776.[68] The Virginia Declaration asserted, in its first article, that "all men are created equally free and independent," and its fourth article provided that, "no 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."[69] The fourth article "repudiated the notion of

63. PAINE, *supra* note 57, at 20.

64. *Id.* at 36. For Paine, private wealth "contributed to the welfare of society . . . only if [it was] obtained by individual effort, not artificial privilege." FONER, *supra* note 46, at 95. Inequalities of wealth should "reflect differences in individual ability and effort," not "hereditary privilege, court sinecures and governmental favors." *Id.* at 96.

65. *See* FONER, *supra* note 46, at 79, 82; NELSON, *supra* note 57, at 81; MAIER, *supra* note 59, at 135.

66. Nelson asserts that "[t]here are so many common elements between Paine's first American writings and the Declaration that some historians have claimed that Paine himself secretly wrote it, or that Jefferson copied him so thoroughly that it amounted to the same thing." NELSON, *supra* note 57, at 98. Jefferson himself asserted that he "profess[es] the same principles" that Paine later elaborated in the RIGHTS OF MAN. *See id.* at 206; *see also id.* at 204. Other admirers of Paine included Presidents Jackson and Lincoln. *See* FONER, *supra* note 46, at 269.

67. MAIER, *supra* note 59, at 165; Joseph J. Ellis, *The Enduring Influence of the Declaration, in* WHAT DID THE DECLARATION DECLARE? 19 (Joseph J. Ellis ed., 1999).

68. MAIER, *supra* note 59, at 126.

69. HELEN HILL, GEORGE MASON: CONSTITUTIONALIST 136–37 (Peter Smith 1966) (1938) (quoting Virginia Declaration of Rights in 1776, as originally drafted by Mason). In order to accommodate the institution of slavery, the Virginia legislature qualified Mason's assertion that "all men are created equally free and independent" by providing that men are so only "when they enter into a state of society." *See* JEFF BROADWATER, GEORGE MASON: FORGOTTEN FOUNDER 84 (2006). The influence of Mason's draft of the Virginia Declaration on other State constitutions, the federal Bill of Rights, and the French Declaration of the Rights of Man is discussed in Jeff Broadwater's book,

hereditary aristocracy" and was "a succinct statement of [one of] the republican principles that underlay the Revolution."[70]

Mason's Virginia Declaration was heavily influenced by Locke's *Second Treatise of Civil Government*.[71] Jefferson also acknowledged the national Declaration's indebtedness to Locke.[72] Indeed, educated Americans in 1776 "had absorbed Locke's works as a kind of political gospel."[73]

In the *First Treatise*, Locke rejected the intellectual underpinnings of hereditary succession, as typified in Filmer's *Patriarcha*.[74] Building on that rejection, the *Second Treatise* asserts that, in the state of nature, men are in "[a] state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another. . . ."[75] Each person is "equal to the greatest and subject to nobody."[76] Accordingly, when men enter into a state of society, legislators "are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at Court, and the countryman at plough."[77] The rejection of hereditary right is also the foundation for the requirement of government by consent of the governed: "Men being, as has been said, all free, equal,

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GEORGE MASON. *Id.* at 90.

70. BROADWATER, *supra* note 69, at 81–82. George Mason had earlier drafted the Fairfax Resolves, which announced the "fundamental principle" that legislators must be "affected by the laws they enact equally with their constituents, to whom they are accountable, and whose burthens they share," and had urged election and frequent rotation of militia officers on the ground that, "[w]e came equals into this world, and equals we shall go out of it. All men are by nature born equally free and independent. To protect the weaker from the injuries and insults of the stronger were societies first formed. . . . Every power, every authority vested in particular men, is, or ought to be, ultimately directed to this sole end [of the general good of society]." HILL, *supra* note 69, at 113 (quoting Fairfax Resolves); *id.* at 118–19 (quoting Mason's speech to the Independent Company). On the influence of the Fairfax Resolves, *see* BROADWATER, *supra* note 69, at 67.

71. BROADWATER, *supra* note 69, at 88; HILL, *supra* note 69, at 140.

72. THOMAS JEFFERSON, Letter to Henry Lee (May 8, 1825), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 1501.

73. BECKER, *supra* note 53, at 27; *see also* ALLEN JAYNE, JEFFERSON'S DECLARATION OF INDEPENDENCE: ORIGINS, PHILOSOPHY AND THEOLOGY 56 (1998); MAIER, *supra* note 59, at 135; PULS, *supra* note 46, at 116, 185.

74. JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 6–7, 64–67 (E.P. Dutton & Co. 1953) (1689). Jefferson likely read Filmer as well as Locke's rejection of him. *See* BECKER, *supra* note 53, at 27.

75. LOCKE, *supra* note 74, at 118.

76. *Id.* at 179.

77. *Id.* at 189.

and independent, no one can be put out of his estate, and subjected to the political power of another, without his consent."[78] Thus, the rejection of hereditary superiority underlies the Declaration's assertions of both equality and the need to obtain the consent of the governed.[79]

Before submitting his draft to Congress, Jefferson circulated it to John Adams and Benjamin Franklin.[80] John Adams was a fierce opponent of inherited privileges. When he wrote in 1766 that "all men are born equal," he intended the phrase specifically to reject "the doctrine that a few nobles

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78. *Id.* at 164.

79. *See, e.g.*, BECKER, *supra* note 53, at 64–72; JAYNE, *supra* note 73, at 60, 109, 137. Whether grounded in the Lockean notion of reason available to all, *e.g.*, BECKER, *supra* note 53, at 65, or in the Scottish moral philosophers' notion of a common moral sense, *e.g.*, JAYNE, *supra* note 73, at 67–72; GARY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 187, 228 (1978), Jefferson clearly repudiated the "organization of kings, hereditary nobles, and priests," the "privileged orders [that live in] splendor and idleness ... and excite in [the people] an humble adoration and submission, as to an order of superior beings" because "wisdom and virtue [are] not hereditary." THOMAS JEFFERSON, Letter to Justice William Johnson (June 12, 1823), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 1470. "[E]ducating the common people" is the surest defense against the rise of "kings, priests & nobles." THOMAS JEFFERSON, Letter to George Wythe (Aug. 13, 1786), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 859.

80. MAIER, *supra* note 59, at 182; Ellis, *supra* note 67, at 19. Jefferson, Adams, and Franklin were three of the "Committee of Five" appointed by Congress to draft the Declaration, the other two being Roger Sherman and Robert Livingston. Ellis, *supra* note 67, at 19. Sherman shared Adams's antipathy to hereditary privileges, writing to him that "what especially denominates a republic is its dependence on the public or people at large, without any hereditary powers." Letter from Roger Sherman to John Adams (July 20, 1789) *in* 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 437 (Charles F. Adams ed., 1851). He described the United States as a republic "wherein [there] is no higher rank than that of common citizens, unless distinguished by appointments to office." *Id.* at 438. Similarly, in his writing urging the ratification of the Constitution he noted that the liberties of the people of England were "not as free . . . because much of their government is in the hands of *hereditary majesty and nobility.*" ROGER SHERMAN, Countryman V, *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES: PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787–1788 228 (Paul L. Ford ed. 1892) (emphasis in original). Among the Committee of Five, Livingston held the most pro-aristocratic views. *See generally* GORDON DANGERFIELD, CHANCELLOR ROBERT R. LIVINGSTON OF NEW YORK 1746–1813 (1960). There is no evidence, however, that Livingston played any role in the Declaration's drafting. *Id.* at 78–79. Indeed, so little a role did Livingston play in preparing the document that he never mentioned his involvement in any letter or subsequent writings and was not even present on August 2nd to vote in favor of the Declaration. *Id.* at 79–80.

or rich commons have a right to inherit the earth."[81] Being a "gentleman" was determined by personal merit and education, not by whether one was "high-born or . . . low-born," and the honorific was open to all (white) men "[w]hether by birth they be descended from magistrates and officers of government, or from husbandmen, merchants, mechanics, or laborers . . . ."[82] Indeed, it is "vain and mean to esteem oneself for his Ancestors Merit."[83] Despite his own later yearnings for pomp and titles,[84] he believed that these were earned by personal merit, not inherited.

Adams put this antipathy for inherited preference into practice when he drafted the Massachusetts Constitution of 1780, which states:

> 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 rises 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.[85]

As Gordon Wood concludes, "to his dying day John Adams was haunted by the veneration for family that existed in New

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81. 1 JOHN ADAMS, PAPERS OF JOHN ADAMS 167–68 (Robert J. Taylor, et al. eds., 1977).

82. WOOD, *supra* note 44, at 195 (quoting THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, *supra* note 80, at 185).

83. *Id.* at 201 (quoting 1 JOHN ADAMS, DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 207 (L.H. Butterfield et al. eds., 1961)).

84. *See* NELSON, *supra* note 57, at 204–05. Jefferson referred to Adams's late (i.e., 1791) "apostasy to hereditary monarchy & nobility." THOMAS JEFFERSON, Letter to George Washington (May 8, 1791), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 977. But Adams later maintained that he had been misunderstood, and that he merely thought that elites would always be an important part of society because "[i]nequalities of Mind and Body are so established by God Almighty in his constitution of Human Nature that no Art or policy can ever plain them down to a level." ELLIS, *supra* note 52, at 249 (quoting Letter from John Adams to Thomas Jefferson (July 9, 1813), *in* 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 351 (Lester G. Cappon ed., 1959)); *see generally* DAVID MCCULLOUGH, JOHN ADAMS 406, 410 (2001). As summarized by Foner, "Adams was no less of a republican than Paine, but his republicanism had an unmistakable elitist bias." FONER, *supra* note 46, at 122; *see also* NELSON, *supra* note 57, at 96.

85. MASS. CONST. art. I, § 6.

England."[86]

Franklin shared these views.[87] In 1753, Franklin served on a Pennsylvania Assembly committee that reminded the proprietors, who controlled Pennsylvania politics at the time,[88] that rank and position should be earned rather than conferred by descent:

> As to *Rank,* the Proprietaries may remember, that the Crown has likewise been pleased to give the Assemblies of this Province a Rank; a Rank which they hold, *not by hereditary Descent,* but as they are the voluntary choice of a free People, unbrib'd, and even unsollicited. But they are sensible that *true Respect* is not necessarily connected with *Rank,* and that it is only from a Course of Action suitable to that Rank they can hope to obtain it.[89]

Franklin's views against hereditary privilege were hardened by his close observation of Britain's House of Lords.[90] He mocked the "Hereditary Legislators" who "appear'd to have scarce Discretion enough to govern a Herd of Swine," and he believed that, "[t]here would be more Propriety, because less Hazard of Mischief, in having [(as] in some University of Germany,) Hereditary Professors of Mathematicks!"[91]

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86. WOOD, *supra* note 44, at 182.

87. *See* WALTER ISAACSON, BENJAMIN FRANKLIN: AN AMERICAN LIFE 322 (2003) ("Franklin focused much of his writing on egalitarian, anti-elitist ideas for building a new American society based on middle class virtues.").

88. *See* H.W. BRANDS, THE FIRST AMERICAN: THE LIFE AND TIMES OF BENJAMIN FRANKLIN 210–12 (2000).

89. BENJAMIN FRANKLIN, Pennsylvania Assembly Committee: Report on the Proprietors' Answer (Sept. 11, 1753), *in* 5 THE PAPERS OF BENJAMIN FRANKLIN 42 (Leonard W. Larabee ed., 1962), *available at* http://www.franklinpapers.org/franklin/ (upon agreeing to the license, follow the "Begin Browsing" hyperlink under the "Browsing by date" then follow "Volume 5 1753–55" hyperlink, then follow the "Pennsylvania Assembly Committee Report on the Proprietors' Answer" hyperlink).

90. *See* BRANDS, *supra* note 88, at 488–90.

91. BENJAMIN FRANKLIN, To William Franklin: Journal of the Negotiations in London (Mar. 22, 1775), *in* 21 THE PAPERS OF BENJAMIN FRANKLIN 540 (William B. Wilcox ed., 1978), *available at* http://www.franklinpapers.org/franklin/ (upon agreeing to the license, follow the "Begin Browsing" hyperlink under the "Browsing by date" then follow "Volume 21 1774–75" hyperlink, then follow the "To William Franklin: Journal of the Negotiations in London" hyperlink). This statement presaged Paine's later assertion that, "the idea of hereditary legislators is as inconsistent as that of hereditary judges, as hereditary juries; and as absurd as a hereditary mathematician, or an hereditary wise man; as ridiculous as an hereditary poet-laureat." THOMAS PAINE, *Rights of Man, in* COLLECTED WRITINGS 53 (Gregory

Franklin wrote to his own daughter that,

> *descending Honour*, to Posterity who could have had no Share in obtaining it, is not only groundless and absurd, but often hurtful to that Posterity, since it is apt to make them proud . . . .[92]

He explained to the world that in America, "people do not enquire of a stranger, What is he? but, What can he do?"[93]

Others who played a leading role in the adoption of the Declaration, such as Samuel Adams, endorsed its rejection of hereditary distinctions. Adams, like the drafters, expressly understood the Declaration's statement of equality to preclude "the absurd and unnatural claim of hereditary and exclusive privileges."[94] Men could not properly "exalt themselves & their family upon the ruins of the common liberty,"[95] because "[t]he son of an excellent man may never inherit the great qualities of his father."[96]

In short, the Declaration's assertion of equality was both intended and widely understood to encompass a rejection of hereditary privileges among white men.

ii. The 1787 Constitution

Multiple provisions of the 1787 Constitution memorialize

Claeys ed., Hacket Publishing 1992) (1791–1792).

92. BENJAMIN FRANKLIN, Letter to Sarah Bache (Jan. 26, 1784), *in* 9 WRITINGS OF BENJAMIN FRANKLIN 162 (Albert H. Smyth ed., 1906). This letter, like Jefferson's of April 1784 to George Washington, *see supra* note 54, was prompted by the controversy over the Society of the Cincinnati. Franklin described the Society as "an Attempt to establish something like an hereditary Rank or Nobility," which he rejected because "all *descending* Honours are wrong and absurd; [and] the Honour of virtuous Actions appertains only to him that performs them, and is in its nature incommunicable." Letter to George Whatley (May 23, 1785), *in* 9 WRITINGS OF BENJAMIN FRANKLIN, *supra* at 336 (emphasis in original).

93. ISAACSON, *supra* note 87, at 423 (stating that Ben Franklin's essay " 'Information to Those Who Would Remove to America' is one of the clearest expressions of belief that American society should be based on the virtues of the middle (or 'mediocre,' as he sometimes called them meaning it as a word of praise) classes, of which he still considered himself a part").

94. Larson, *supra* note 4, at 1406 (quoting N.Y. DAILY GAZETTE, Jan. 27, 1794, at 2).

95. Puls, *supra* note 46, at 214 (quoting Letter to Elbridge Gerry (Apr. 19, 1784), *in* THE WRITINGS OF SAMUEL ADAMS 299 (Harry Alonzo ed., 1904)).

96. *Id.* at 224–25 (quoting THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS, *supra* note 80, at 421).

the victory against hereditary privilege.[97] To begin with, Article IV, Section 4 provides that, "the United States shall guarantee to every State in this Union a Republican Form of Government."[98] The Founders disputed the particular meaning of "republican" in this context, with Hamilton urging that it meant a proscription on hereditary status and Madison asserting that it meant government by consent of the governed.[99] But even Madison held that consent must be "derived from the great body of the society, not from any inconsiderable proportion, or of a favored class of it."[100] The essential feature of a republican government was its treatment of citizens without regard to their birth status; to denominate a government "republican" was to distinguish it from an *aristocratic* one.[101]

Next, Article I prohibits the national (Section 9, clause 8) and State (Section 10, clause 1) governments from granting any title of nobility.[102] These provisions were included in the earliest proposals at the constitutional convention and sparked little debate because they were entirely uncontroversial.[103] Professor Larson amasses a mountain of research establishing that the title of nobility clauses were intended to prohibit the granting of hereditary privileges by government.[104] He concludes that legacy preferences in public

97. On the continuities of the egalitarian nature of the Declaration and the 1787 Constitution, *see* FONER, *supra* note 46, at 205–09.

98. U.S. CONST. art. IV, § 4.

99. Brandon, *supra* note 44, at 1223–24.

100. THE FEDERALIST NO. 39 (James Madison), *in* 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 27 (1993). Accordingly, Brandon concludes, "in fact, as Hamilton's and Madison's contributions to The Federalist indicate, establishing representative democracy and abolishing hereditary status were merely two sides of the same coin; both were fundamental principles of republican government and aimed at the same basic goal: liberty." Brandon, *supra* note 44, at 1223–24.

101. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 276–78 (2005).

102. U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

103. *Torke*, *supra* note 44, at 615. The Articles of Confederation had prevented Congress from granting any title of nobility. *See* Articles of Confederation, Art. VI, § 1.

104. *See* Larson, *supra* note 4, at 1375; *see also* Brandon, *supra* note 44, at 1223. Torke notes that the ban on granting titles of nobility is closely related to the guarantee of a republican form of government because prohibiting positions from being passed lineally keeps them available to all. Torke, *supra* note 44, at 615 & nn.358–60 (citing THE FEDERALIST No. 85 (Alexander Hamilton), No. 39 (James Madison), No. 36 (Alexander Hamilton)).

universities are "egregious violation[s] of the constitutional prohibition of titles of nobility."[105]

Article III, section 3, clause 2 provides that, "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted."[106] Under English and certain American state law at the time, persons convicted of treason and other specified capital crimes suffered a hereditary curse—they were prohibited from passing property on to their heirs or inheriting property from their ancestors, the property being forfeited to the sovereign.[107] The Constitution prohibited these "corruption of blood" statutes that stained a family's lineage.[108] "Just as no favorite son should be handed his sire's government post, so no child should be punished for the sins of his father."[109]

Similarly, Article I, Sections 9 and 10 prohibit the federal and state governments, respectively, from passing any bills of attainder.[110] Alexander Hamilton explained that these clauses protected defined groups of citizens from legislative disenfranchisement and banishment, because such acts could result in an "aristocracy or an oligarchy."[111] More generally, the Attainder clauses prohibit the government from penalizing persons based on their identity or status rather than their conduct.[112] These provisions, together with the ban

105. Larson, *supra* note 4, at 1379.

106. U.S. CONST. art. III, § 3, cl. 2.

107. Brandon, *supra* note 44, at 1217.

108. *Id.* at 1224; *see also Hills*, *supra* note 44, at 1601; Torke, *supra* note 44, at 615.

109. AMAR, *supra* note 101, at 243.

110. U.S. CONST. art. I, §§ 9, 10.

111. United States v. Brown, 381 U.S. 437, 441–42, 444 (1965) (quoting III John C. Hamilton, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1959)).

112. *See* Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 215 (1996); *see also* Balkin, *supra* note 12, at 2350; Torke, *supra* note 44, at 616 n.356. Numerous other provisions similarly reflect an insistent effort to stamp out hereditary distinction, although sometimes in more subtle ways. *See* Torke, *supra* note 44, at 615–16 (requirement of Presidential appointments with the advice and consent of the Senate guards against "family attachment") (quoting THE FEDERALIST No. 76 (Alexander Hamilton)); Delgado, *supra* note 44, at 112 (title of "President" was chosen to avoid exalted, noble title); *id.* at 112 n.90 (noting preamble's reference to "We the People" and Fifth Amendment's guarantee of due process to all "persons"). In THE FEDERALIST No. 57, Madison emphasized the egalitarian nature of voting qualifications for the House of Representatives: "Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the

on titles of nobility, ensured that citizens would be "judged on the basis of their behavior, not their birth status."[113] When the States ratified the federal Constitution, many added their own condemnations of hereditary privileges.[114]

iii. The Abolitionists and Radical Republicans

Jefferson's election in 1800 marked another milestone in the nation's turn away from hereditary privilege.[115] In the civil and economic spheres, as well as in government affairs, the foundation of American society would be "our equal right to the use of our own faculties, to the acquisitions of our industry, to honor and confidence from our fellow-citizens,

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humble sons of obscure and unpropitious fortune. . . . No qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people." THE FEDERALIST No. 57 (James Madison), *in* 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 213–14 (1993). Contemporaries noted that even the Senate, which some saw as having an aristocratic flavor, was composed "without one distinction in favor of the birth, rank, wealth or power of the senators or their fathers." WILENTZ, *supra* note 61, at 33 (quoting *Independent Gazeteer* [Philadelphia], Nov. 6, 1787).

113. AMAR, *supra* note 101, at 125.

114. *See, e.g.*, Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 9, 1788), http://constitution.org/rc/rat_ma.htm (statement of Rev. Backus) ("Another great advantage, sir, in the Constitution before us, is, its excluding all titles of nobility, or hereditary succession of power, which hath been a main engine of tyranny in foreign countries. But the American revolution was built upon the principle that all men are born with an equal right to liberty and property, and that officers have no right to any power but what is fairly given them by the consent of the people."). Following independence, the constitutions drafted by both former colonies and new States reflected the revolutionary rejection of hereditary privilege. *See, e.g.*, ROBERT J. HARRIS, THE QUEST FOR EQUALITY 18–19 (1960); FRANKLIN B. HOUGH, AMERICAN CONSTITUTIONS (1872); MAIER, *supra* note 59, at 167; Larson, *supra* note 4, at 1385–86. The new States similarly rejected hereditary punishment, as shown by provisions that enjoined the use of bills of attainder or corruption of blood penalties. *See generally* Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 730–31 (1992). After the Revolution, the States also abolished the remnants of feudal land law, including primogeniture and fee tail. *See* WOOD, *supra* note 44, at 183; Brandon, *supra* note 44, at 1215–17; Delgado, *supra* note 44, at 111 n.78. Repealing these hereditary land laws "laid the axe to the root of Pseudo-aristocracy." THOMAS JEFFERSON, Letter to John Adams (Oct. 28, 1813), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 1308.

115. *See* KARST, *supra* note 1, at 36 (Jefferson's election reflected a definitive rejection of aristocratic values); ARIELI, *supra* note 52, at 124 ("[E]qualitarian democracy . . . envisioned a radical breakup of economic, social, and political privileges.").

resulting not from birth but from our actions and their sense of them."[116] The no-hereditary-privileges principle was further expanded by the Jacksonians,[117] who "dismantled the ramparts of privilege" wherever they could across the country.[118]

These egalitarian ideas soon made their way to the abolitionists and Radical Republicans, who interpreted them to demand an end to chattel slavery.[119] Many abolitionists relied on the Guaranty Clause, asserting that equality is "[t]he very pith and essence of a republican form of

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116. THOMAS JEFFERSON, First Inaugural Address (March 4, 1801), *in* THOMAS JEFFERSON: WRITINGS, *supra* note 52, at 494. Of course, there have always been dissenting voices. The Widow Douglas asserted that being "well born" like the Grangerford aristocrats was "worth as much in a man as it is in a horse." MARK TWAIN, ADVENTURES OF HUCKLEBERRY FINN, *in* MARK TWAIN: MISSISSIPPI WRITINGS 728 (Guy Cardwell ed., 1982); *see also id.* at 876 (honoring "noble" things and "ancesters" "that come over from England with William the Conqueror in the *Mayflower* or one of them early ships").

117. Jackson's 1832 veto message on the rechartering of the Second Bank of the United States provided the nation with a powerful vision of equality:

> In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society -- the farmers, mechanics, and laborers who have neither the time nor the means of securing like favors to themselves -- have a right to complain of the injustice of their Government.

Veto Message (July 10, 1832), *in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1153 (James D. Richardson ed., 1897); *see generally* Balkin, *supra* note 12, at 2347 (Jackson's opposition to class legislation resulted from his "distrust of governments granting monopoly charters and other special privileges to the rich and powerful").

118. Paul D. Carrington, *Legal Education for the People: Populism and Civic Virtue,* 43 U. KAN. L. REV. 1, 6–7 (1994); *see generally* William M. Gouge, *The Artificial Inequality of Wealth, in* IDEOLOGY AND POWER IN THE AGE OF JACKSON 110–21 (Edwin C. Rozwenc ed., 1964) (popular Jacksonian writer who extolled the virtues of economic opportunity and criticized economic privilege). The relationship between the Jacksonian democratic principles and the constitutional vision of the Republicans of the 39th Congress is undeniable. *See* Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, the Bill of Rights and Fourteenth Amendment,* 66 TEMP. L. REV. 361, 403 (1993) (the Republicans relied on Jackson's veto message for the concept of "equal protection"). Of course, Jackson's idea of equality conspicuously failed to encompass African Americans, women, or Native Americans. *See* LIND, *supra* note 2, at 46; ROBERT V. REMINI, THE REVOLUTIONARY AGE OF ANDREW JACKSON 17 (1976); HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 13–14 (1990).

119. *See* WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 16–17 (1988).

government."[120] Others, such as Frederick Douglass, argued that "[t]he Constitution forbids the passing of a bill of attainder: that is, a law entailing upon the child the disabilities and hardships imposed upon the parent. Every slave law in America might be repealed on this very ground. The slave is made a slave because his mother is a slave."[121]

Most importantly, the pre-War Republicans asserted that the Declaration's guiding principle of equality was always intended to include African Americans and should be extended to protect them.[122] The Declaration—which Lincoln called "the white man's charter of freedom"[123]—ensured that "having kicked off the King and Lords of Great Britain, we should not at once be saddled with a King and Lords of our own."[124] Lincoln and the moderates[125] expressly understood

120. JACOBUS TENBROEK, EQUAL UNDER LAW 75 (enlarged ed. 1965) (quoting WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY (1844)); *see also* Theodore Parker, The Relation of Slavery to a Republican Form of Government: A Speech Delivered at the New England Anti-Slavery Convention (May 26, 1858), http://memor0y.loc.gov/cbi-bin/query.

121. Balkin, *supra* note 12, at 2350 n.113 (quoting FREDERICK DOUGLASS, *The Constitution of the United States: Is It Pro or Anti-Slavery?, in* 2 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE 1850–1860 478 (Philip S. Foner ed., 1950)); *see generally* LIND, *supra* note 2, at 379–83 (discussing Douglass's contribution to idea of equal rights).

122. TENBROEK, *supra* note 120, at 85 n.20, 118; *see also* MAIER, *supra* note 59, at 198; Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment,* 1 CONST. COMMENT. 235, 249 (1994) ("Perhaps the most important source of antislavery Republicanism was the Declaration of Independence.").

123. ABRAHAM LINCOLN, Eulogy on Henry Clay at Springfield, Missouri (July 6, 1852), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1832–1858, at 269 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS I]. For Lincoln, the Declaration was "the sheet anchor of American republicanism." Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), *in* SPEECHES AND WRITINGS I, *supra* at 328. Lincoln "never had a feeling politically that did not spring from the sentiments embodied in the Declaration of Independence." ABRAHAM LINCOLN, Speech at Independence Hall, Philadelphia, Pennsylvania (Feb. 22, 1861), *in* ABRAHAM LINCOLN, SPEECHES AND WRITINGS 1859–1865, at 213 (Don E. Fehrenbacher ed., 1989) [hereinafter SPEECHES AND WRITINGS II]. As Jaffa shows, "One might epitomize everything Lincoln said between 1854 and 1861 as a demand for recognition of the Negro's human rights, as set forth in the Declaration of Independence." JAFFA, *supra* note 51, at 290; *see also* JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION 126 (1990); WILENTZ, *supra* note 61, at 737.

124. Speech on the *Dred Scott* Decision at Springfield, Illinois (June 26, 1857), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 400.

125. Lincoln was squarely at the center of the Republican party. Farber & Muench, *supra* note 122, at 250.

the Declaration to proscribe hereditary disadvantage, and they asserted that this principle should be extended to protect African Americans.[126] Slavery pitted "the common right of humanity" against "the divine right of kings":

> It is the same spirit that says, "You work and toil and earn bread, and I'll eat it." No matter in what shape it comes, whether from the mouth of a king who seeks to bestride the people of his own nation and live by the fruit of their labor, or from one race of men as an apology for enslaving another race, it is the same tyrannical principle.[127]

The Nation had been "dedicated to the proposition that all men are created equal," and in extending the no-hereditary-privilege principle to the children of African American slaves, the War brought to the Nation "a new birth of freedom."[128]

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126. Lincoln asserted that the Founders intended to include the slaves among the "all men" referred to in the Declaration—declaring their *right* to be equal, and leaving the *enforcement* of that right to follow as soon as it became politically feasible. *See* JAFFA, *supra* note 51, at 21, 300, 352–53.

127. Seventh Lincoln-Douglas Debate, at Alton, Illinois (Oct. 15, 1858), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 811; *see also* Response to Serenade, Washington, D.C. (July 7, 1863), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 476 ("[A]t the bottom of [the Rebellion] is an effort to overthrow the principle that all men were created equal."). Benjamin Wade had made the same point in the Senate in 1854, arguing that the Declaration was incompatible with slavery because the assertion of a right of one man to control another was equivalent to "the divine right of every king, and every emperor, and every monarch, to reign over his subjects, and the right of privileged orders everywhere." CONG. GLOBE, 33rd Cong., 1st Sess. app. 311 (1854). To assert such a right was to contradict the "principle [that] was established by the American Revolution." *Id.* at app. 310; *see generally* MAIER, *supra* note 59, at 200–04. Opponents such as Alexander Stephens asserted that the Confederate's new government was "founded upon exactly the opposite idea . . . its cornerstone rests upon the great truth that the Negro is not equal to the white man." JAFFA, *supra* note 51, at 222 (quoting The Cornerstone Speech (March 21, 1861), *in* ALEXANDER H. STEPHENS IN PUBLIC AND PRIVATE WITH LETTERS AND SPEECHES 721–22 (1866)); *see also* EUGENE D. GENOVESE, THE WORLD THE SLAVEHOLDERS MADE 123 (1969) (in the South, "[t]he Declaration of Independence and Lockeian political philosophy came under heavy attack"). Lincoln hated slavery "especially because it forces so many really good men amongst ourselves into an open war with the very fundamental principles of civil liberty—criticizing the Declaration of Independence." Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 315.

128. Lincoln's critics immediately recognized the significance of the Gettysburg Address in confirming the centrality of the Declaration's principle of equality and its extension to encompass blacks. *See* DAVID HERBERT DONALD, LINCOLN 465–66 (1995).

b. *Congress Codified and Extended the Declaration's Principle.*

The debates reveal that Congress intended the 1866 Act to codify the Declaration's no-hereditary-privilege principle and extend it to encompass African Americans.[129] Senator Trumbull of Illinois, the author of the Act, noted that the Declaration and the Constitution's egalitarian provisions had set forth the *principle* that all men are created equal.[130] But the mere statement of principle had failed to protect oppressed whites or millions of African Americans, so it was "the intention of this bill to secure those rights."[131] The principle of equality among white men had been the cornerstone of the founding of the republic; the 1866 Act would codify and extend that principle, and thus create a new foundation for the reborn nation.[132]

The debates overflow with references to the fact that Congress intended the 1866 Act to embody and give effect to

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129. Upon being elected Speaker of the House, Schuyler Colfax asserted that the goal of the 39th Congress would be to enact legislation that would "afford what our Magna Charta, the Declaration of Independence, proclaims is the chief object of government—protection to all men in their inalienable rights." CONG. GLOBE, 39th Cong., 1st Sess. 1157 (1865) (Rep. Colfax); *see also* Robert J. Kaczorowski, *Revolutionary Constitutionalism In the Era of the Civil War and Reconstruction,* 61 N.Y.U.L. REV. 863, 893–94 (1986) (discussing Colfax's speech). Northern newspapers urged Congress to propose an amendment that would embody the Declaration's principle and thereby prohibit any "privileged class." NELSON, *supra* note 57, at 76.

130. CONG. GLOBE, 39th Cong., 1st Sess. 434 (1866) (Sen. Trumbull).

131. *Id.* (1866 Act was intended to protect the civil rights that had been "intended to be secured by the Declaration of Independence and the Constitution of the United States originally"). Senator Sumner asserted that the greatest victory of the Civil War was that "the Declaration of Independence is made a living letter instead of a promise." DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 423 (1970) [hereinafter DONALD, SUMNER II] (quoting XIII CHARLES SUMNER, THE WORKS OF CHARLES SUMNER 175–78 (2008)).

132. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1262 (1866) (Rep. Broomall) ("[I]t is . . . well that a return to the principles of the founders of the Government should be made manifest to future generations by a declaration upon the statute-books."); *id.* at 1157 (Rep. Windom) ("A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, white and black. Upon this the only foundation which can permanently endure, we professed to build our republic; but at the same time we not only denied to a large portion of the people equality of rights, but we robbed them of every right known to human nature."). The Thirteenth Amendment had also been inspired in large part by the Declaration. *See* Farber & Muench, *supra* note 122, at 257 (detailing the invocation of the Declaration in 13th Amendment debates).

the Declaration's principle.[133] The planter aristocracy's domination of blacks and poor whites was impermissible because "we have accepted the sublime truths of the Declaration of Independence. We stand as the champions of human rights for all men, black and white, the wide world over, and we mean that just and equal laws shall pervade every rood of this nation."[134] The Act was "one of those measures that are absolutely necessary to carry into effect the decisions of the late war" by "carry[ing] into effect the doctrine of the Declaration."[135]

After the extensive debates on the 1866 Act, references to the Declaration as a source for the Equal Protection Guarantee became routine.[136] In a typical statement, Senator

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133. *See* Reinstein, *supra* note 118, at 388–89 ("[T]he consistency of the references to and reliance upon the Declaration in relation to the Civil Rights Act and Section 1 [of the Fourteenth Amendment] is remarkable."). Senator Sumner, the Republicans' intellectual leader on the issue of equality, had early articulated the idea that all distinctions based on birth—whether advocated by the slavocrats or the Know-Nothings—were precluded by "[t]he emphatic words of the Declaration of Independence, which our country took upon its lips as baptismal vows." Charles Sumner, Speech: The Slave Oligarchy and Its Usurpations 3 (Nov. 2, 1855) (transcript available at http://www.archive.org/details/slaveoligarchyan00sumnrich) [hereinafter Sumner, The Slave Oligarchy]; *see generally* DAVID DONALD, CHARLES SUMNER AND THE COMING OF THE CIVIL WAR 153 (1961) [hereinafter DONALD, SUMNER I] (throughout his career "Sumner was to echo [John Q.] Adam's doctrines that the Declaration of Independence, with its pledge of universal human equality, was as much a part of the public law of the land as the Constitution"); DONALD, SUMNER II, *supra* note 131, at 208 (when Lincoln "said he never had an idea, politically, that did not spring from the Declaration, he used words which Sumner could have echoed").

134. CONG. GLOBE, 39th Cong., 1st Sess. 344 (1866) (Sen. Wilson); *id.* at 1157 (Rep. Windom) ("[T]his, I believe, is one of the first efforts made since the formation of the Government to give practical effect to the principles of the Declaration of Independence; one of the first attempts to grasp as a vital reality and embody in the forms of law the great truth that all men are created equal."); *id.* at 1117 (Rep. Wilson) ("We are reducing to statute form the spirit of the Constitution."); *id.* at 571 (Sen. Morrill) (Declaration prohibits "any other distinction than that of condition").

135. CONG. GLOBE, 41st Cong., 2d Sess. app. 547 (Rep. Prosser) (debate on Enforcement Act of 1870); *see infra* text accompanying note 232.

136. Advocates believed that the Guarantee was "almost entirely declaratory of the great natural rights of men already embodied in the Declaration of Independence, lying at the foundations of all Republican governments, and expressed in the Constitution itself." TENBROEK, *supra* note 120, at 232; *see* CONG. GLOBE, 39th Cong., 1st Sess. 2459 (1866) (Rep. Stevens) ("Our fathers have been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more propitious time. That time ought to be present now."); *id.* at 2510 (Rep. Miller) ("[T]he equal protection guarantee is so clearly within the spirit of the Declaration of Independence of the 4th of July,

Poland asserted that the Guarantee "is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. . . . It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government."[137]

The Guarantee was authored by Representative John Bingham of Ohio, who invoked the biblical prescriptions that God "hath made of one blood all nations of men" and is "no respecter of persons," and asserted that the Declaration was "a reiteration of the[se] great truth[s]."[138] Bingham argued that the Guarantee confirmed the protections that the Declaration and the Constitution had secured for whites and extended those protections to African Americans: "the divinest feature of your Constitution is the recognition of the absolute equality before the law of all persons, . . . subject only to the exception made by reason of slavery, now happily abolished."[139] By ratifying the Amendment, the American people would "declare their purpose to stand by the foundation principle of their own institutions."[140]

The public likewise understood the Guarantee as

1776, that no member of this House can seriously object to it."); *id.* at 2539 (Rep. Farnsworth) ("Is not [equal protection] the very foundation of a republican government?"); *id.* at 3037 (Sen. Yates) ("I would write in the fundamental and unchangeable law of the land, that the Declaration . . . was a verity."); *id.* at 3032 (Sen. Henderson) ("In forming his opinion in [*Dred Scott*, Justice Taney] abandoned the Constitution and the Declaration of Independence."); *id.* at app. 256 (Rep. Baker) ("[T]he equal protection guarantee appeals irresistibly to the democratic instinct of the people, and it will be a jewel of beauty when placed in the Constitution of the country.").

137. CONG. GLOBE, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland).

138. CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (Rep. Bingham) (referring, in debate on slavery in District of Columbia, to Acts of the Apostles 17:26 and 10:34); *see generally* ERVING BEAUREGARD, BINGHAM OF THE HILLS 95–96, 97, 108 (1989) (tracing Bingham's reverence for Declaration to presbyterian minister's class on American history).

139. *See* CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (Rep. Bingham).

140. *Id.* at 432 (Rep. Bingham); *accord id.* at 429, 431 (Rep. Bingham). When later explaining the meaning of the Guarantee, Bingham again invoked the Declaration. CONG. GLOBE, 42d Cong., 1st Sess. app. 86 (1871) (Rep. Bingham). Most Republicans believed that Congress had constitutional authority to pass the 1866 Act before ratification of the Fourteenth Amendment because "equality of civil rights is the fundamental rule that pervades the Constitution." CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (Rep. Lawrence). Bingham agreed that equality was the foundation of the Constitution, but thought Congress lacked authority to pass the Act until the Amendment was ratified. *Id.* at 1291–92 (Rep. Bingham).

codifying and extending to African Americans the Founders' republican principles and, in particular, the Declaration's ban on "untitled nobles."[141]

2. *The 39th Congress Codified the Principle Against Hereditary Distinctions in Order to Suppress Southern Aristocracy.*

Republicans believed that the North's fundamental moral and economic precepts were threatened not (only) by slavery, but, more broadly, by a southern aristocratic society founded on lineage and status. Having won the war, the Republicans of the 39th Congress codified the no-hereditary-distinction principle in order to suppress the southern aristocracy.

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141. *See, e.g.*, Scrapbook on the Fourteenth Amendment 20 (E. McPherson ed.), *in* Edward McPherson Papers, container 100 (collection available in Library of Congress) [hereinafter Scrapbook on Fourteenth Amendment] (National Anti-Slavery Standard July 22, 1865) (Guarantee will "[r]efuse to the States what we have always refused to the Nation—the right to maintain an order of untitled nobles: to breed up one class booted and spurred, and another saddled and bridled for the first class to ride"); *id.* at 61 (Hartford Daily Courant) ("What the American people want is a fair start in life for every American citizen. . . . [Winning the war] meant that Slavery, with all its abominable distinctions of class, its aristocracy of caste, its undemocratic depreciation of the laborer, should be forever annihilated."). "Madison" wrote a series of articles characterizing both universal manhood suffrage and equal civil rights as natural extensions of the Founders' republican principles. *See id.* at 47 (New York Times, Nov. 23, 1866) (national citizenship and its guarantee of equal civil rights is extension of elimination of "old fallacies" such as "real estate qualifications" and "primogeniture and other aristocratic notions"); *id.* at 56 (unidentified newspaper) (the nation "will never be complete, as a great Republic, until it clearly defines citizenship and protects every man entitled to the name of American citizen. . . ."). The public had understood the 1866 Act to be aimed at the same goals. *See, e.g.*, Scrapbook on the Civil Rights Bill 37 (E. McPherson ed.), *in* Edward McPherson Papers, container 99 (collection available in Library of Congress) [hereinafter Scrapbook on the Civil Rights Bill] (Rochester [N.Y.] Democrat) (Act "effect[s] that equality of all men before the law which the theory of our Government declares, but which has never yet been carried out"); *id.* at 56 (Boston Journal) (Act's purpose "is to secure the equality of American citizenship, to realize for the first time the fundamental doctrines of the Declaration of Independence, and carry out the avowed purposes of the Constitution"); *id.* at 54 (Rochester Express) (Act is "entirely in accordance with republican ideas"); Letter from George A. Hackett to Lyman Trumbull (April 26, 1866), collected in 65 Lyman Trumbull Papers (collection available in the Manuscript Division, Library of Congress) ("The Declaration of Independence was received by the American People with no greater pleasure than the Civil Rights Bill by the Colored Population of the United States.").

a. The Republicans Believed That Southern Aristocracy Threatened the Nation.

In asserting that the "irrepressible conflict" was between a "republic or democracy" in the North and a "ruling aristocracy" in the South, Senator Seward was voicing a prevailing northern view.[142] Southerners agreed that the War was a clash between a society founded on the proposition "that all men are equal and that equality is right," thus forming a "horizontal plane of a democracy," and another society contending that "all men are not equal, that equality is not right," and thus forming "a social aristocracy."[143]

The Republicans believed that the immediate victims of southern aristocracy were not only slaves, but also non-slaveholding whites.[144] Slaveholders and their families constituted only about twenty-five percent of free southerners but owned ninety-three percent of the South's agricultural wealth.[145] They had fourteen times the average wealth of non-slaveholding whites.[146] This wealth was highly concentrated in only some ten thousand families,[147] and poor whites had no hope of ever joining the slaveholding aristocracy.[148] Northern newspapers noted that, "fortunes are frequently inherited in the South—they are rarely made."[149]

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142. *See* WILLIAM SEWARD, *On the Irrepressible Conflict, in* IX THE WORLD'S FAMOUS ORATIONS 177–85 (Wm. J. Bryan ed., 1906); *see also* DONALD, *supra* note 128, at 460; ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN 50, 65, 70 (1995); EUGENE D. GENOVESE, THE POLITICAL ECONOMY OF SLAVERY 297 (2d ed. 1989).

143. WILENTZ, *supra* note 61, at 745 (quoting L.W. Spratt, "Report On The Slave Trade," 24 DEBOW'S REV. 473–74 (1858)); *see also id.* at 773, 775; ARIELI, *supra* note 52, at 206, 299; ELIZABETH FOX-GENOVESE & EUGENE D. GENOVESE, THE MIND OF THE MASTER CLASS 114–15 (2005). George Fitzhugh asserted that, "We have an aristocracy with more of privilege . . . than any that we meet with in history." GENOVESE, *supra* note 127, at 189 (quoting GEORGE FITZHUGH, SOCIOLOGY FOR THE SOUTH: OR, THE FAILURE OF FREE SOCIETY 186 (1854)).

144. FONER, *supra* note 142, at 46–47, 64–69, 88; WILENTZ, *supra* note 61, at 615.

145. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 224 n.6 (1999).

146. *Id.*

147. *Id.*

148. FONER, *supra* note 142, at 48. A greater percentage of free blacks in Massachusetts attended school than did whites in South Carolina. DONALD, SUMNER I, *supra* note 133, at 355.

149. FONER, *supra* note 142, at 48, (quoting CINCINNATI GAZETTE, July 31, 1856).

Republicans also saw southern aristocracy as a threat to the democratic institutions of the North. The slavocrats had managed to ban antislavery publications from the southern mails, impose the congressional "Gag Rule" (preventing citizens from petitioning the House to abolish slavery), pass the Fugitive Slave Act, and pressure northern States to punish abolitionist persuasion as seditious libel. [150] And the *Dred Scott* decision threatened to extend slavery throughout the North by judicial fiat.[151]

With the coming of war, therefore, the clarion call in the North was to end southern aristocracy.[152] For example, Lincoln exhorted in 1859:

> [I]t is now no child's play to save the principles of Jefferson from total overthrow in this nation. . . .
>
> One dashingly calls them 'glittering generalities;'[153] another bluntly calls them 'self-evident lies;'[154] and still others insidiously argue that they apply only to 'superior races.'
>
> These expressions, differing in form, are identical in object and effect—the supplanting [of] the principles of free government, and restoring those of classification, caste, and legitimacy. . . . They are the van-guard—the miners, and sappers—of returning despotism. We must repulse

150. Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 SUM. LAW & CONTEMP. PROBS. 175, 191–92 (2004); *see also* GARRETT EPPS, DEMOCRACY REBORN 51–52 (2006) [hereinafter EPPS, DEMOCRACY REBORN]; LEONARD L. RICHARDS, THE SLAVE POWER, 127–28 (2000); Farber & Muench, *supra* note 122, at 238.

151. Epps, *supra* note 150, at 196–97; RICHARDS, *supra* note 150, at 13–14.

152. *See, e.g.*, ARIELI, *supra* note 52, at 309; EPPS, DEMOCRACY REBORN, *supra* note 150, at 67; FONER, *supra* note 142, at 309; RICHARDS, *supra* note 150, at 160; WILENTZ, *supra* note 61, at 673; Kaczorowski, *supra* note 129, at 881.

153. Rufus Choate had urged former Whigs not to join the new Republican party because the South would perceive it as a party whose "mission [was] to inaugurate freedom and put down oligarchy, its constitution the glittering and sounding generalities of the Declaration of Independence." BECKER, *supra* note 53, at 244 (quoting letter from Choate to E. W. Farley (Aug. 9, 1856), *in* S. G. Brown, LIFE OF RUFUS CHOATE 325–26 (1881)).

154. Arguing in support of the Kansas-Nebraska Act, Senator Pettit called the Declaration "a self evident lie." CONG. GLOBE, 33d Cong., 1st Sess. app. 137 (1854). Lincoln said that if Pettit had uttered those words in Independence Hall in 1776, "the very door-keeper would have throttled [him]." Speech on the Kansas-Nebraska Act at Peoria, Illinois (Oct. 16, 1854), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 339.

them, or they will subjugate us.[155]

As summarized by Lincoln, the North fought in order to "lift artificial weights from all shoulders—to clear the paths of laudable pursuit for all—to afford all, an unfettered start, and a fair chance, in the race of life."[156]

b. Congress Intended the 1866 Act and the Guarantee to Suppress Southern Aristocracy.

The debates reveal Congress's intent to embody in positive law the anti-aristocracy views that had animated the Republicans before the War. As seen from the debates on the Thirteenth Amendment, the 1866 Act, the Fourteenth Amendment, and other Reconstruction legislation that was considered by the 39th Congress,[157] references to suppressing aristocracy are ubiquitous.

The Republicans' intellectual leader on the issue of equality, Senator Sumner, was a long-time and incisive critic of southern aristocracy.[158] His speech on February 5 and 6, 1866,[159] invoked the anti-hereditary-privilege principle of the Founders as the basis to suppress the southern aristocracy.

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155. Letter to Henry L. Pierce and Others (Apr. 6, 1859), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 18–19; *see generally* WILENTZ, *supra* note 61, at 793 (noting that "Lincoln did repulse them, and saved Jefferson's principles as he saw them—though at the cost of more than six hundred thousand American lives").

156. Message to Congress in Special Session (July 4, 1861), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 259.

157. As summarized by Epps, "the 'lords of the lash' had been refuted by the egalitarian armies of the North, made up of laborers—the men southerners had scorned as 'mud-sills of society' and former slaves. They had humbled aristocrats like Jefferson Davis and Robert E. Lee. The equality genie was out of the bottle." EPPS, DEMOCRACY REBORN, *supra* note 150, at 108–09. As to aristocracy and the Thirteenth Amendment, *see* CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (Sen. Wilson); *id.* at 2989 (Rep. Ingersoll); *id.* at 2948–49 (Rep. Shannon); CONG. GLOBE, 38th Cong., 2d Sess. 138 (1865) (Rep. Ashley).

158. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 574, 601 (1866) (Sen. Hendricks) (1866 Act responds to Sumner's call for equality under law); DONALD, SUMNER II, *supra* note 131, at 152–61 (discussing Sumner's leadership on issues of equality); John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 141 (1950) ("[T]he fundamental working legal theory of equality before the law, or equal rights, or equal protection was formulated for American law by Sumner, and popularized under his leadership.").

159. CONG. GLOBE, 39th Cong., 1st Sess. 673–87 (1866) (Sen. Sumner). This was days after the Senate had passed the 1866 Act, but before the House had acted; after House modifications, the Senate passed the revised bill on March 15, 1866 and subsequently overrode President Johnson's veto on April 6, 1866.

Proposing that "there shall be no Oligarchy, Aristocracy, Caste, or Monopoly invested with peculiar privileges and powers,"[160] he quoted the Founders:[161]

- Benjamin Franklin—"that *every man* of the commonalty, except infants, insane persons, and criminals, is of common right, and by the laws of God, a freeman and entitled to the free enjoyment of liberty."[162]
- James Madison—

> [I]t is essential for such a government that it be derived from the great body of the society, not from an inconsiderable proportion, OR A FAVORED CLASS OF IT; otherwise a handful of tyrannical nobles, exercising their oppressions by delegation of their powers, might aspire to the rank of republicans, and claim for the government the honorable title of republic.[163]

- Alexander Hamilton—"there can be no truer principle than this, that *every individual of the community has an equal right to the protection of government.* . . . we propose a *free government.* Can it be so, if *partial distinctions* are made?"[164]
- Roger Sherman—"what especially denominates it a *republic* is its dependence on the *public*, or *people at large*, without any hereditary powers."[165]

The nation was founded, "not to create an oligarchy or aristocracy, not to exclude certain persons from the pale of its privileges," but "to establish justice, which is Equality."[166] Sumner defined aristocracy as "the enjoyment of privileges *which are not communicable to other citizens simply by*

160. CONG. GLOBE, 39th Cong., 1st Sess. 674 (1866) (Sen. Sumner). Sumner believed that the Revolution had been a war of democracy against aristocracy, and that the same contest had been continued in the Civil War. DONALD, SUMNER I, *supra* note 133, at 229–30.

161. All italics and capitalization were supplied by Sumner. Senator Sumner occasionally spoke as if the entire white southern population constituted an aristocracy founded solely on race. He just as often made clear, however, that an elite subset of southern whites constituted an aristocracy that oppressed non-slaveholding whites as well as blacks. *See, e.g.*, CONG. GLOBE, 40th Cong., 1st Sess. 50, 167 (1867) (Sen. Sumner).

162. CONG. GLOBE, 39th Cong., 1st Sess. 680 (1866) (Sen. Sumner).

163. *Id.* at 681.

164. *Id.*

165. *Id.*

166. *Id.* at 680.

anything they can themselves do to obtain them,"[167] and he asserted that the 1866 Act prohibited it.[168]

These were not unique views.[169] Senator Fessenden of Maine, a moderate Republican, echoed the prevailing view of the 1866 Act when he asserted that "I agree with the Senator from Massachusetts, that a caste exclusion is entirely contrary to the spirit of our Government, or of any republican form of government."[170] Senator Henderson, of Missouri, added that adoption of the 1866 Act was "a simple act of justice to the negroes and poorer whites of the South," designed to "break down in the seceded States the system of oppression to which I have alluded."[171]

Bingham had repeatedly invoked the Founders' principle

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167. *Id.* at 683 (emphasis Sumner's). Sumner's views had been foreshadowed by his legal argument in *Roberts v. Boston* in 1849 in which he argued that "separate but equal" schools were inherently unequal. *See* Frank & Munro, *supra* note 158, at 136. Relying on Massachusetts's constitutional provision that "all men are born free and equal," Sumner contended that, regardless of lineage, each person "is a MAN, the equal of all his fellow-men." *Id.* at 137 n.29 (quoting 2 CHARLES SUMNER, WORKS OF CHARLES SUMNER 341–42 (1875)); *see also* DONALD, SUMNER I, *supra* note 133, at 180; EPPS, DEMOCRACY REBORN, *supra* note 150, at 68.

168. CONG. GLOBE, 39th Cong., 1st Sess. 684 (1866) (Sen. Sumner).

169. Senator Nye, of Nevada, likewise had seen the War as "a battle between the opposing principles of aristocracy on the one hand and democracy on the other." *Id.* at 1069 (Sen. Nye). The Founders had "thr[own] aside the postulates of aristocracy" and had "started with a new doctrine and a new theory." *Id.* at 1074. The Constitution forbade the slaveholders' attempt "to go back to the feudal system," *id.* at 1070, because "[i]t interdicts the granting of any title of nobility" and proscribes "the establishment of any anti-republican government through privileged class," *id.* at 1072.

170. *Id.* at 704 (Sen. Fessenden).

171. *Id.* at 3034 (Sen. Henderson); *see also id.* at 343 (Sen. Wilson) ("[T]he poorest man, be he black or white, that treads the soil of this continent, is as much entitled to the protection of the law as the richest and the proudest man in the land."); *id.* at 1118 (Rep. Wilson) (Act "protect[s] . . . our citizens from the highest to the lowest"); *id.* at 1629 (Rep. Hart) (purpose of Act was "to guaranty that they have [a republican form of government] speedily"); *id.* at 1836–37 (Rep. Lawrence) (a State that denies the rights secured by the Act to half its citizens "has ceased to be republican in form"); CONG. GLOBE, 41st Cong., 2d Sess. app. 548 (1870) (Rep. Prosser) (debate on Enforcement Act of 1870) (Democrats had "been laboring to build up an oligarchy in the North, and an aristocracy in the South"); G. Sidney Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 HOUS. L. REV. 1069, 1076 (1974) (to drafters of 1866 Act, "slavery constituted class prejudice writ large"); Scrapbook on the Civil Rights Bill, *supra* note 141, at 47 (Evening Bulletin Mar. 30, 1866) (Act protects "the lately emancipated race, as well as . . . the oppressed white class at the South"); *id.* at 79 (American And Gazette Apr. 7, 1866) (Act "prevent[s] the southern oligarchy" from perpetuating "caste bondage").

that merit, not hereditary privilege, would govern in this country.[172] The Constitution's inherent principle of equality "makes no distinction either on account of complexion *or birth*."[173] And the Constitution prohibits titles of nobility because "all are equal under the Constitution; and . . . no distinctions should be tolerated, except those which merit originates, and no nobility except that which springs from [talent and merit]."[174] In the debate on the Guarantee, Bingham summarized the principle against hereditary distinctions, and universalized it, by asserting that the law "should be no respecter of persons."[175] The debates are replete with statements to the same effect.[176]

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172. *See, e.g.*, CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857) (Rep. Bingham) (debate on Lecompton constitution).

173. *Id.* (emphasis added). Bingham revered the Massachusetts law that granted the franchise to all men "in no wise dependent upon complexion or the accident of birth," CONG. GLOBE, 37th Cong., 2d Sess. 1639 (1862) (Rep. Bingham), and the Northwest Ordinance that protected "all the inhabitants without respect to complexion or birth," CONG. GLOBE, 37th Cong., 3d Sess. 265 (1863) (Rep. Bingham).

174. CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857) (Rep. Bingham). Bingham and all Republican representatives who voted against the admission of Oregon, did so in part because the exclusion of free negroes from that State "is not republican in its spirit, but, on the contrary, is oligarchical and aristocratic." CONG. GLOBE, 35th Cong., 2d Sess. 948 (1859); *id.* at 985 (Rep. Bingham) ("[A]ll men are sacred, whether white or black, rich or poor, strong or weak."); *see also* CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858) (Rep. Bingham) (decrying the "despotism or an oligarchy fastened upon the people by brute force"); CONG. GLOBE, 37th Cong., 3d Sess. 256 (1863) (Rep. Bingham) (South had erected "the meanest aristocracy and the most oppressive despotism upon the face of the earth"); REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, 39th Cong., 1st Sess., at xiii (1866) ("Slavery, by building up a ruling and dominant class, has produced a spirit of oligarchy adverse to republican institutions.").

175. CONG. GLOBE, 39th Cong., 1st Sess. 1291 (1866) (Rep. Bingham); *see also id.* at 1094 (Rep. Bingham) (Guarantee protects every person "no matter what his color, no matter beneath what sky he may have been born, . . . no matter how poor, no matter how friendless, no matter how ignorant"); *id.* at 158 (Rep. Bingham) (Amendment requires States to "respect the rights of the humblest citizen"); *see generally* Garrett Epps, *Second Founding: The Story of the Fourteenth Amendment*, 85 OR. L. REV. 895, 905 (2006) (Bingham was driven by the "idea of a republic, which is not governed by an elite, but is radically egalitarian").

176. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard) (Guarantee protects "the humblest, the poorest, the most despised of the race"); *id.* at 832 (Sen. Clark) ("[T]he Government [is] of all men, and for all men and all classes of men. It is its crowning glory that no citizen or person living under it is . . . so low that its protection cannot reach him."); *id.* at 1065 (Rep. Hale) (Guarantee "protect[s] the liberty of the citizen -- the humblest as well as the highest"); *id.* at app. 256 (Rep. Baker) ("Is it not a disgrace to a free country that the poor and the weak members of society should be denied equal justice

3. *The 39th Congress Codified the Principle Against Hereditary Distinctions in Order to Ensure Economic and Social Mobility.*

The Republicans' Free Labor ideology contended that workers could rise through society and become substantial property owners by securing the fruits of their labor. The debates establish that the 39th Congress intended the 1866 Act and the Guarantee to safeguard this economic and social mobility.

a. Free Labor Was a Driving Force in the Republicans' Pre-War Ideology.

Free Labor ideology was premised on the idea of social mobility—that "all Americans, whatever their origins, could achieve social advancement if given equal protection of the law."[177] For Lincoln and the moderate Republicans, economic and social mobility was "the great principle for which this government was really formed."[178] Lincoln's opposition to slavery was an extension of Free Labor ideology applicable to all men: "I want every man to have the chance—and I believe

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and equal protection at the hands of the law?"); *id.* at 3035 (Sen. Henderson) ("It is only where political power is in the hands of a favored few that oppression can be practiced."); Scrapbook on Fourteenth Amendment, *supra* note 141, at 20 (National Anti-Slavery Standard July 22, 1866) (Guarantee prevents States from "maintain[ing] a system of Aristocratic *Caste*") (emphasis in original); *id.* at 61 (Hartford Daily Courant) (Guarantee prohibits an "aristocracy of caste"). The Amendment's adversaries acknowledged this protection. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 3214 (1866) (Rep. Niblack) (Guarantee protects "all human beings, however low in the scale of humanity").

177. FONER, *supra* note 142, at 300; *see also* William E. Forbath, *Caste, Class and Equal Citizenship, in* MORAL PROBLEMS IN AMERICAN LIFE 167, 172 (Karen Haltunnen & Lewis Perry eds., 1998) ("[D]efending white free labor always had loomed large in the Republicans' antislavery outlook."); Stanley N. Katz, *The Strange Birth and Unlikely History of Constitutional Equality,* 75 J. AMER. HIST. 747, 753 (1988) (Republican ideology was based on the meritocratic ideas of "equal opportunity and social mobility"); Lea S. Vandervelde, *The Labor Vision Of the Thirteenth Amendment,* 138 U. PA. L. REV. 437, 459 (1989) ("[F]ree labor meant not just upward mobility of a few workers, but the leveling of class differentials between laborer and employer.").

178. Speech at Cincinnati, Ohio (Sept. 17, 1859), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 85. This was a recurring theme in Lincoln's speeches. *See, e.g.*, Speech at Kalamazoo, Michigan (Aug. 27, 1856), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 380; Address at Milwaukee, Wisconsin (Sept. 30, 1859), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 98; Speech at New Haven, Connecticut, March 6, 1860, *in* SPEECHES AND WRITINGS II, *supra* note 123, at 144; Annual Message to Congress (Dec. 3, 1861), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 297.

a black man is entitled to it—in which he *can* better his condition."[179] Fundamentally, a slave was someone who, on the illegitimate basis of heredity, had been denied the opportunity that labor provides for economic and social advancement.[180]

The southern intelligentsia, of course, rejected the idea that labor should lead to social mobility, asserting that "in all social systems, there must be a class to do the menial duties. . . . It constitutes the very mudsill of society."[181] The more extreme southern newspapers declared that "[t]he principle of Slavery is in itself right, and does not depend on difference of complexion,"[182] and that, "Slavery is the natural and normal condition of the laboring man, whether white or black."[183] These southerners urged the North to return to the safety of hierarchy and status.[184]

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179. Speech at New Haven, Connecticut, March 6, 1860, *in* SPEECHES AND WRITINGS II, *supra* note 123, at 144.

180. FONER, *supra* note 142, at xxvi. The Republicans also believed that the opportunity for social advancement was the essential difference between Northern society and class-stratified Europe. *Id.* at 16.

181. CONG. GLOBE, 35th Cong., 1st Sess. 71 (1858) (Sen. Hammond) (the "Cotton is King" speech).

182. Charles Sumner, The Barbarism of Slavery (June 4, 1860), *in* CONG. GLOBE, 36th Cong., 1st Sess. 2601 (Sen. Sumner) (quoting RICHMOND ENQUIRER, Dec. 15, 1855); *see generally* GENOVESE, *supra* note 127, at 100, 118 ("The paternalism at the core of the slaveholders' ideology . . . extended itself outward to encompass the white lower classes," and "[t]he proslavery argument moved from . . . a focus on racial caste to a focus on social class."). As early as 1856, Lincoln declared that the "sentiment in favor of white slavery now prevailed in all the slave state papers, except those of Kentucky, Tennessee, and Missouri and Maryland." Speech at Bloomington, Illinois (May 29, 1856), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 365; *see also* Portion of Speech at Republican Banquet in Chicago, Illinois (Dec. 10, 1856), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 386 (Democrats' view is "that slavery is right, in the abstract" and they promoted "its extension to all countries and colors"). Lincoln mocked the argument that slavery was an affirmative good, noting that "it is the only good thing which no man ever seeks the good of, *for himself.*" On Pro-Slavery Theology (Oct. 7, 1858), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 686.

183. Sumner, *supra* note 182, at 2601–02 (quoting *Charleston Mercury*). These views caused obvious alarm in the North, where the Republican party printed a pamphlet entitled, "The New 'Democratic' Doctrine. Slavery not to be Confined to the Negro Race, but to be made the Universal Condition of the Laboring Classes of Society." *See* ARIELI, *supra* note 52, at 426 n.58. Representative Bingham warned in 1857 that the southern slaveholders were "not likely to be restrained from inflicting like cruelties and oppressions upon the white race." CONG. GLOBE, 34th Cong., 3d Sess. app. 135–36 (1857) (Rep. Bingham).

184. ARIELI, *supra* note 52, at 305; *see generally* FOX-GENOVESE &

b. Congress Intended to Safeguard Economic and Social Mobility.

Congress's intent to ensure social mobility by protecting free labor is reflected in the substantive rights that the 1866 Act secures. Under Free Labor ideology, the right to contract, sue, give testimony, and inherit property were the legal rights necessary for a worker to accumulate and protect the property that his labor earned.[185] The Republicans were well aware of the southern doctrine that, "Slavery is the natural and normal condition of the laboring man, whether white or black,"[186] and an essential purpose of the 1866 Act was to bury it.[187]

For the Republicans, the freedman belonged not only to an oppressed race but also to "a poor, weak class of laborers."[188] The right to make and enforce contracts would secure for laborers "the means of holding and enjoying the proceeds of their toil."[189] A laborer is entitled "to that which will make him a man—opportunity."[190] And the 1866 Act's protections were needed by white as well as black laborers because "the man who is the enemy of the black laboring man is the enemy of the white laboring man the world over. The same influences that go to keep down and crush down the

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GENOVESE, *supra* note 143, at 704–05 (discussing Fitzhugh's view that "the rejection of the divine right of kings constituted the worst of the political heresies of the Reformation").

185. FONER, *supra* note 142, at 296 (these are the rights necessary "to participate as a free laborer in the marketplace"); CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (Sen. Sherman) ("To say that a man is a freeman and yet is not able to assert and maintain his right, in a court of justice, is a negation of terms.").

186. *See, e.g.*, CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864) (Rep. Wilson); *id.* at 2955 (Rep. Kellog); CONG. GLOBE, 35th Cong., 1st Sess. 1866 (1865) (Rep. Bingham); CONG. GLOBE, 35th Cong., 1st Sess. app. 170 (1858) (Sen. Wilson).

187. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865) (Sen. Sherman) (people are not free without "the right to acquire and hold property, to enjoy the fruits of their own labor"); *id.* at 111 (Sen. Wilson) (practical freedom requires that man "can go where he pleases, work when and for whom he pleases"); *id.* at 1833 (Rep. Lawrence) ("It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor."); Scrapbook on the Civil Rights Bill, *supra* note 141, at 62 (Baltimore American April 3, 1866) ("No king or potentate [builds up society] . . . . [N]o caste in society does it; but *the men and women who toil do it.*") (emphasis in original).

188. CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom).

189. *Id.*

190. *Id.* at 589 (Rep. Donnelly); *see also id.* (purpose of Act was to "offer equal opportunities to all men").

rights of the poor black man bear down and oppress the poor white laboring man."[191]

The same concerns are reflected in the Guarantee. Bingham had rejected nobility based on birth because "the ONLY nobility which our free Constitution tolerates" is that based on "patient, humble toil," the "sturdy arm of intelligent industry," and "that imperial exercise of the intellect which enlarges the measure of knowledge and lessens the evils of life."[192] For Bingham, "[t]he equality of all . . . to work and enjoy the product of their toil, is the rock on which [the] Constitution rests—its sure foundation and defense."[193] Thaddeus Stevens summarized, asserting that the Guarantee ensured that "no distinction would be tolerated in this purified Republic but what arose from merit and conduct."[194]

4. The 39th Congress Codified the Anti-Heredity Principle by Extending the Same Rights to "All Persons."

The debates also show that the Republicans achieved their three-fold goal—to codify and extend the Declaration's principle against hereditary distinctions, suppress southern aristocracy, and promote social mobility—with deceptively simple language. The 1866 Act extended its substantive rights, including the right to make contracts, to "citizens,"

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191. *Id. at* 343 (Sen. Wilson); *see also id.* at 1621 (Rep. Myers) (condemning the "aristocratic and anti-republican laws" of Alabama, which imposed a fine and six months of imprisonment for "any servant or laborer (white or black) who loiters away his time or is stubborn or refractory").

192. CONG. GLOBE, 34th Cong., 3d Sess. app. 140 (1857) (Rep. Bingham) (debate on Lecompton constitution) (emphasis in original).

193. CONG. GLOBE, 35th Cong., 2d Sess. 985 (1859) (Rep. Bingham) (debate on admission of Oregon). Bingham ridiculed the slaveholders' contention that free laborers "were but greasy mechanics and menial operatives, the 'mud-sills' of society, unfit to associate with gentlemen." CONG. GLOBE, 37th Cong., 3d Sess. 266 (1863) (Rep. Bingham); *see also* BEAUREGARD, *supra* note 138, at 75 (Bingham's stump speeches praised "the rough fisted farmer and the greasy mechanic").

194. CONG. GLOBE, 39th Cong., 1st Sess. 3148 (1866) (Rep. Stevens); *see also id.* at app. 58 (Rep. Julian) (southern "pride and sloth" will be doomed when it comes into "conflict with the energy and enterprise of free labor"); *id.* at 2964 (Sen. Poland) (South would be "opened up and expanded by the influence of free labor and free institutions"); *id.* at app. 102 (Sen. Yates) (Guarantee will allow freedmen to use their "own merits and exertions" to "establish for themselves a condition of respect, ability, and prosperity"); *see generally* Forbath, *supra* note 177, at 171 (Guarantee "spoke to the social and economic circumstances not only of former slaves but also of white free laborers").

and provided that "all persons born" in the United States are citizens. Each of these words is packed with meaning.

The significance of becoming a *citizen* of a republic rather than the *subject* of a monarchy is that "none have hereditary rights superior to others."[195] The fundamental premise of the 1866 Act was that, "A true republic rests upon the absolute equality of rights of the whole people, high and low, rich and poor, black and white."[196]

The means of achieving citizenship also reflect a rejection of hereditary privileges. To obtain citizenship and the equal rights that citizenship ensures, a person need not be born into any designated race, class, or family, but merely be born a human being in the United States.[197] This principle of "jus soli" or "birthright citizenship" conformed to a strong strain of egalitarianism within the Republican party that embraced citizenship and civil rights without regard to the accident of birth. Speaking in Faneuil Hall in 1855, Senator Sumner rejected both Know-Nothingism[198] and slavery because they "attaint[ed] men for their religion and also for their birth."[199] A political party that "founds a discrimination on the accident of birth, is not the party for us."[200] America was made strong precisely by "the fusion of all races here."[201]

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195. WOOD, *supra* note 44, at 169; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 665 (1898) ("[T]he term 'citizen' seems to be appropriate to republican freemen."); CONG. GLOBE, 39th Cong., 1st Sess. 1116 (1866) (Rep. Wilson) (birth in the jurisdiction "makes a man a subject in England, and a citizen here").

196. CONG. GLOBE, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom); *see also id.* at 1757 (Sen. Trumbull) ("The equality of rights is the basis of a commonwealth.") (quoting Chancellor Kent).

197. CONG. GLOBE, 39th Cong., 1st Sess. 1837 (1866) (Rep. Lawrence); *see also* CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (Sen. Morrill) ("[T]he genius of republicanism is equality, impartiality of rights and remedies among all the citizens," and "Congress at its last session enacted that every person born in the United States is a citizen thereof, and entitled to protection in his civil rights.").

198. In the 1850s the Know-Nothings sought to reserve public offices to native-born Protestants, restrict immigration from Ireland and Germany, and prevent recent immigrants from voting by implementing a twenty-one-year naturalization period. *See, e.g.*, Michael F. Holt, *The Antimasonic and Know Nothing Parties*, *in* I HISTORY OF U.S. POLITICAL PARTIES 593 (Arthur M. Schlesinger, Jr. ed., 1973); Bruce Levine, *Conservatism, Nativism, and Slavery: Thomas R. Whitney and the Origins of the Know-Nothing Party*, 88 J. AM. HIST. 455, 467–70 (2001).

199. Sumner, The Slave Oligarchy, *supra* note 133, at 12.

200. *Id.* at 13.

201. *Id.* at 12; *see generally* DONALD, SUMNER I, *supra* note 133, at 274–75 (discussing speech). The idea of citizenship without distinction based on birth

Similarly rejecting Know-Nothingism, Lincoln noted that half of all American citizens were not descendants of those who were Americans at the Founding.[202] But when these immigrants read the Declaration, "they feel that that moral sentiment [of equality] taught in that day evidences their relation to those men, that it is the father of all moral principle in them, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration (loud and long continued applause) and so they are."[203]

Professor Epps shows that the capstone of this line of Republican thought was Carl Schurz's 1859 speech, "True Americanism,"[204] which argued that American nationality "did not spring from one family, one tribe, one country, but incorporates the vigorous elements of all civilized nations on earth."[205] America is "the colony of free humanity, whose

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was a crystallization and expansion of an idea that stretched back to the founding. *See* ARIELI, *supra* note 52, at 76. In the new American consciousness, an American is one who "leav[es] behind him all his ancient prejudices and manners," because "[h]ere individuals of all nations are melted into a new race of men." *Id.* (quoting MICHELE-GUILLAUME ST. JOHN DE CREVECOEUR, LETTERS FROM AN AMERICAN FARMER, 41, 51–52 (1957)); *see generally* KARST, *supra* note 1, at 83 (discussing de Crevecoeur's view that in American all people "are melted into a new race").

202. Speech at Chicago, Illinois (July 10, 1858), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 456.

203. *Id.* The 1860 Republican platform rejected Know-Nothingism. FONER, *supra* note 142, at 257. Lincoln asserted that if the African Americans' "exception" from the Declaration were expanded to also except foreign-born Americans and Catholics, he would "prefer emigrating to some country where they make no pretense of loving liberty -- to Russia, for instance, where despotism can be taken pure, and without the base alloy of hypocrisy." Letter to Joshua F. Speed (Aug. 24, 1855), *in* SPEECHES AND WRITINGS I, *supra* note 123, at 363; *see also* Letter to Theodore Canisius (May 17, 1859), *in* SPEECHES AND WRITINGS II, *supra* note 123, at 22.

204. Epps points to the speech as "a startling clear exposition of the belief of an entire generation of Republicans that inspired a constitutional revolution after the Civil War." EPPS, DEMOCRACY REBORN, *supra* note 150, at 35.

205. *Id.* (quoting I CARL SCHURZ, SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 54 (Frederic Bancroft ed., 1913)). Schurz asserted that the country must "choose between two social organizations, one of which is founded upon privilege, and the other upon the doctrine of equal rights." Carl Schurz, True Americanism: A Speech Delivered in Faneuil Hall, Boston (Apr. 18, 1859), *in* AMERICAN SCRIPTURES 241 (C. Van Doren ed., 2007). While "[t]he dignity of the Roman citizen consisted in his exclusive privileges; the dignity of the American citizen consists in holding the natural rights of his neighbor just as sacred as his own." *Id.* The rejection of privilege was announced in the Declaration, and the Founders intended the nation's institutions "to be the living incarnation of this idea." *Id.*

mother-country is the world"; it is "the republic of equal rights, where *the title of manhood is the title to citizenship*."[206]

The alternative to "jus soli" or "birthright citizenship" was "jus sanguinis," or citizenship *based on lineage.* Chief Justice Taney's *Dred Scott* decision invoked jus sanguinis to conclude that the Constitution granted U.S. citizenship-by-birth only to lineal descendants of those who were citizens when the Constitution was adopted.[207] In Taney's view, this denied U.S. citizenship to all African Americans, whether free or slave.[208] Taney's reasoning likewise implied that the American-born children of unnaturalized aliens were also not U.S. citizens.[209] The Democrats in Congress invoked the *Dred Scott* decision to argue that the 1866 Act could not constitutionally confer U.S. citizenship on all persons born in the country.[210]

The Democrats also relied on Justice Curtis's dissent in *Dred Scott,* which concluded that U.S. citizenship (except through naturalization) was determined by one's citizenship in a State.[211] Urging Congress to sustain the President's veto of the 1866 Act, Senator Reverdy Johnson argued that the former slave States defined citizenship by family lineage: "[t]he constitution and laws of the [slave] States . . . declare . .

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206. EPPS, DEMOCRACY REBORN, *supra* note 150, at 35 (quoting Carl Schurz, True Americanism: A Speech Delivered in Faneuil Hall, Boston (Apr. 18, 1859)) (emphasis added).

207. Dred Scott v. Sandford, 60 U.S. 393, 404–05 (1856). Taney's argument had been prefigured by southern contentions that Missouri could refuse to allow free blacks into the State because their race made them ineligible for naturalization and that their American-born children were not citizens because they inherited their parents' status. *See* ANNALS OF CONGRESS, 16th Cong., 2d Sess. 555, 557 (1820) (Rep. Smyth); *id.* at 615–16 (Rep. McLane); *see generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP 1608–1870, 312–14 (1978).

208. Dred Scott v. Sandford, 60 U.S. 393, 407 (1856); *see also* CONG. GLOBE, 39th Cong., 1st Sess. 499 (1866) (Sen. Cowan) (making same argument in debate on 1866 Act); *id.* at 529 (Sen. Johnson) (African Americans at the founding were not citizens, and their children "inherited the disqualification of the ancestor"); *id.* at 525 (Sen. Davis) (making same argument).

209. *See* KETTNER, *supra* note 207, at 322 (the decision "called into question, by the majority's challenge to birthright citizenship, the status of natives born of unnaturalized alien parents"). *Compare* Scrapbook on the Civil Rights Bill, *supra* note 141, at 37 (Rochester [N.Y.] Democrat) (1866 Act "secure[s] to every human being born on American soil the same rights that any other American enjoys by virtue of being an American").

210. *See* CONG. GLOBE, 39th Cong., 1st Sess. 505, 529 (Sen. Johnson); *id.* at 1120 (Rep. Rogers); *see also id.* at 1295 (Rep. Latham).

211. *Dred Scott,* 60 U.S. at 581–82 (Curtis, J., dissenting).

. that no descendant of a colored mother, whether she was free or not, was to be considered a citizen by virtue of birth."[212] Unstated by Johnson, but nonetheless the fact, those States also determined whether the mother was "colored" for these purposes by examining her family lineage—anyone with less than one-eighth of "negro blood" was deemed to be "white."[213] Johnson complained that, contrary to the southern citizenship-by-lineage statutes, the 1866 Act provided that every person born in the United States "is to be considered a citizen by reason of the [mere] fact of his being born."[214]

The Republicans rejected both of these arguments for determining citizenship by lineage. They rejected Taney's reading of the Constitution,[215] the contention that they lacked constitutional authority to grant citizenship based on place of birth,[216] and the southern citizenship-by-lineage statutes.[217] They instead reaffirmed that, "the bill proposes to make a citizen of every person born in the United States," including "even the infant child of a foreigner born in this land."[218]

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212. CONG. GLOBE, 39th Cong., 1st Sess. 1776–77 (1866) (Sen. Johnson); *see also* Mark A. Graber, *Desperately Ducking Slavery: Dred Scott And Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 281–82 (1997) (Taney's *Dred Scott* opinion reflected prevailing view of both U.S. and State citizenship); Ariela Gross, *"Of Portuguese Origin:" Litigating Identity And Citizenship Among the "Little Races" In Nineteenth Century America*, 25 LAW & HIST. REV. 467, 486 (2007) (describing Tennessee jury charge regarding lineage). As early as the debates on the Missouri Compromise, southerners had denied that free blacks were citizens. *See* KETTNER, *supra* note 207, at 312–14.

213. *See* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 161–62 n.39 (1974).

214. CONG. GLOBE, 39th Cong., 1st Sess. 1776 (1866) (Sen. Johnson).

215. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (Rep. Wilson); *id.* at 1124 (Rep. Cook); *id.* at 1152 (Rep. Thayer); *id.* at 1266 (Rep. Raymond); *id.* at 1291 (Rep. Bingham); *id.* at 1756 (Sen. Trumbull); *id.* at 1832 (Rep. Lawrence); *id.* at 1160 (Rep. Shellabarger); *id.* at 1263 (Rep. Broomall).

216. *See, e.g.*, *id.* at 2226–27 (Rep. Wilson); *id.* at 1124 (Rep. Cook).

217. *Id.* at 1757 (Sen. Trumbull); *see generally* Gerald L. Newman, *Back to Dred Scott?*, 24 SAN DIEGO L. REV. 485, 491–92 (1987) (Republicans "refused the invitation to create a hereditary caste of voteless denizens, vulnerable to expulsion and exploitation").

218. CONG. GLOBE, 39th Cong., 1st Sess. 1757 (1866) (Sen. Trumbull); *see also id.* at 498 (Sen. Trumbull) (Act rejects distinctions between children born in U.S. to German aliens rather than Chinese aliens); *id.* at 1832 (Rep. Lawrence) ("Children born here are citizens without any regard to the political condition or allegiance of their parents.") (quoting Standford's Ch. R. 583). Citizenship by lineage was then the prevailing rule in continental Europe. *See* United States v. Wong Kim Ark, 169 U.S. 649, 667 (1898). The 1866 Act and, later, the Fourteenth Amendment, rejected that principle "in the most explicit and

In rejecting lineage as the basis for citizenship, Congress confirmed its rejection of lineage as a basis for discrimination in the Act's citizenship-based substantive rights.[219] An

comprehensive terms," in favor of "the fundamental principle of citizenship by birth within the jurisdiction." *Id.* at 675. The grant of citizenship "was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men." *Id.* at 678. The Act determines citizenship "by the place of nativity, irrespective of parentage." *Id.* at 690. Of course, it is possible to argue that the principle of birthright citizenship itself discriminates based on lineage—that citizenship is granted to or withheld from a child based on whether her mother was present in the United States at the time of the child's birth. *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 125 (2006) (noting, but not necessarily endorsing, this view). Birthright citizenship does not discriminate based on lineage. By statute in 1866, Act of Feb. 10, 1855, ch. 71, 10 Stat. 604, as well as today, 8 U.S.C. § 1401 (2000), birthright citizenship is supplemented with a grant of U.S. citizenship to the foreign-born children of U.S. citizens. So the only children discriminated against are foreign-born children of non-U.S. citizens. Accordingly, birthright citizenship, as supplemented, is the most egalitarian rule that is consistent with the existence of nation-states. And even without the supplementation, the basic rule of birthright citizenship is more accurately described as being based on the location of the child, rather than the child's mother, at the child's birth. Republicans of the 39th Congress certainly viewed birthright citizenship that way. *See, e.g.*, 10 Op. Att'y. Gen. 382 (1862) (birthright citizenship "is as original in the child as it was in his parents," and "[i]t never 'passes by descent' "); CONG. GLOBE, 39th Cong., 1st Sess. 1116 (1866) (Rep. Wilson) (describing the foregoing Attorney General opinion as the "ablest and most exhaustive opinion ever given on the subject of negro citizenship").

219. Senator Trumbull made clear that the 1866 Act codified the Republicans' idea of birthright citizenship, and, correspondingly, a rejection of discrimination based on lineage. The Act secured the "equal rights of every human being in the land, no matter from what quarter of the globe he or his ancestors may have come, or what color may have been stamped upon his face by a European or an African line." Kaczorowski, *supra* note 129, at 897 n.153 (quoting Trumbull's speech as reported in an unidentified newspaper article); *see also* CONG. GLOBE, 39th Cong., 1st Sess. app. 102 (1866) (Sen. Yates) ("I am for the black man, not as a black man; I am for the white man, not as a white man, but I am for man irrespective of race or color; I am for God's humanity."). In the words of Professor Karst, under the Act "[c]itizenship and equality were melded into a single policy." Karst, *supra* note 13, at 14; *see also* Farber & Muench, *supra* note 122, at 264 (noting that Republicans closely tied the Act's substantive rights to the concept of national citizenship); *id.* at 277 (as result of Act and Guarantee, "American Citizenship would be linked to the possession of fundamental rights"). Advancing Karst's work, Professor Liu has argued that the Fourteenth Amendment's Citizenship Clause requires the federal government to ensure a minimum level (and a limited degree of inequality) in those goods, including education, necessary to ensure the dignity and full participation of all citizens. *See* Goodwin Liu, *Education, Equality, and National Citizenship,* 116 YALE L. J. 330 (2006). Our research and analysis here support that claim, especially in that we show the close connection between the citizenship clause and the substantive rights secured by the 1866 Act. Our claim is far more modest, however, in that we show only that, whatever the substantive rights to which citizens are entitled, they cannot

important reason for conferring national citizenship on a person was to ensure that he would enjoy the Act's substantive rights without discrimination.[220] The eminent jurist, Representative William Lawrence of Ohio, explained: "[i]t is citizenship . . . that gives the title to these rights to all citizens," and those rights are not "accorded only to citizens of 'some class,' or 'some race,' or 'of the least favored class,' or 'of the most favored class,' or of a particular complexion for these distinctions were never contemplated or recognized as possible in fundamental civil rights, which are alike necessary and important to all citizens, and to make inequities in which is rank injustice."[221]

Congress rejected lineage discrimination with respect to not only African Americans, but *all persons* born in the United States. Early versions of the bill that became the 1866 Act defined citizenship for and extended protection only to "persons of African descent."[222] TenBroek shows that the

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lawfully depend on one's lineage.

220. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1152 (Rep. Thayer) (Act protects "the fundamental rights of citizenship"); *id.* at 1266 (Rep. Raymond) ("Make the colored man a citizen . . . and he has every right which you or I have as citizens."); *id.* at 1124 (Rep. Clark) ("[A]s between citizens . . . there shall be no discrimination in civil rights."); *id.* at 1760 (Sen. Trumbull) (Act "declares that in civil rights there should be an equality among all classes of citizens"); *id.* at 1833 (Rep. Lawrence) (Act "protect[s] every citizen, including the millions of people of foreign birth who will flock to our shores"); *accord id.* at 1292 (Rep. Bingham) (by not extending rights to aliens, Act permitted discrimination against them). Reviewing the legislative history of the Citizenship Clause, the Department of Justice recently concluded that Congress should not attempt to restrict birthright citizenship because, "[i]n America, a country that rejected monarchy, each person is born equal, with no curse of infirmity, and no exalted status, arising from the circumstances of his or her parentage." *Citizen Reform Act of 1995: Hearing on H.R. 1363 Before the H. Comm. On the Judiciary*, 104th Cong. 4 (1995) (statement of Assistant Attorney General Walter Dellinger), *available at* http://www.usdoj.gov/olc/deny.tes.31.htm.

221. CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (Rep. Lawrence). Congress created an express exception from the Act's substantive protections for some distinctions, such as those based on gender, age, and mental competence, that are not a basis for the denial of citizenship. *See infra* note 307. The need for this express exception confirms the general rule that a distinction that cannot deny citizenship—and certainly a distinction that Congress expressly rejected as a basis for citizenship—cannot be the basis for discrimination in the Act's substantive provisions. The inseparable link between citizenship and a bar on discrimination is also reflected in southern antebellum arguments that the fact of pervasive discrimination against free blacks proved that they were not citizens. *See* KETTNER, *supra* note 207, at 320–21.

222. *See* Frank & Munro, *supra* note 158, at 139 (describing introduction by Senator Wilson of S. 9 and S. 55). Trumbull likewise originally proposed to define citizenship only for African Americans. *See* CONG. GLOBE, 39th Cong., 1st

Republicans rejected these measures as "too narrowly conceived . . . the great need and opportunity was to make the protection permanent, *to cast it in universal form* (though immediately and primarily the boon of the freedman), [and] to make it applicable to the whole country."[223] In amending the bill to provide that "all persons born" in the United States are citizens, Congress rejected descent as a legally cognizable basis for discrimination against *any* citizen.[224] Other statements in the debates confirm that the Act secures the rights of every person "of whatever caste or lineage they be,"[225] and protects "the children of all parentage whatever."[226] The Act was thus "scarcely less to the people of this country than Magna Charta was to the people of England."[227]

The Fourteenth Amendment made birthright citizenship part of the organic law of the land.[228] It also extended the

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Sess. 474 (1866) (Sen. Trumbull).

223. TENBROEK, *supra* note 120, at 177 (emphasis added). Trumbull explained that the provision defining citizenship only for African Americans "was not acceptable to the Senate in that form, and it had to be withdrawn the next day and a substitute offered." Scrapbook on the Civil Rights Bill, *supra* note 141, at 132 (speech quoted in unidentified newspaper).

224. *See* Epps, *supra* note 175, at 910 (Republicans required that membership in society "is not based on race or blood or country of origin, but on simple shared humanity").

225. CONG. GLOBE, 39th Cong., 1st Sess. 1262 (1866) (Rep. Broomall).

226. CONG. GLOBE, 39th Cong., 1st Sess. 2891 (1866) (Sen. Conness). An earlier bill proposed by Senator Sumner prohibited the southern States from discriminating in civil rights on the basis of "color, race, or descent," CONG. GLOBE, 39th Cong., 1st Sess. 41 (1865) (Sen. Sherman) (quoting bill), as did Senator Wilson's S.9 and S.55. *See id.* at 39 (Sen. Wilson). Representative Bromwell likewise drafted a resolution prohibiting discrimination based on "color or descent." *See* NELSON, *supra* note 57, at 77–78; *see generally* Scrapbook on Fourteenth Amendment, *supra* note 141, at 20 (National Anti-Slavery Standard, July 22, 1866) (urging adoption of an amendment to prohibit States from discriminating on grounds of "race, color, or descent"). Statements in the debates make clear that the legislators made no bright-line distinction between "race," "descent," "lineage," "blood," or "parentage." *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull); *id.* at 497 (Sen. VanWinkle); *id.* at 504 (Sen. Johnson); *id.* at 1679 (Pres. Johnson's veto message); *id.* at 3213 (Rep. Niblack); *id.* at 40 (Sen. Morrill); *id.* at 2891 (Sen. Cowan); *id.* (Sen. Conness); *id.* at 3038 (Sen. McDougall).

227. CONG. GLOBE, 39th Cong., 1st Sess. 1832 (1866) (Rep. Lawrence); *see also id.* at 570 (Sen. Morrill) (1866 Act was "revolutionary" but it was justified because "we [are] in the midst of revolution"); Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 550 (1989) (1866 Act "was itself revolutionary because it would require a radical reordering of southern society").

228. Congress included birthright citizenship in the Fourteenth Amendment

guarantee of equal protection beyond all "citizens" to all "persons." Bingham successfully argued that the 1866 Act's restriction of rights to only "citizens" did not go far enough in rejecting the status-based, feudal ideas of the Old World. The 1866 Act "commit[ed] the terrible enormity of distinguishing here in the laws in respect to life, liberty, and property between the citizen and the stranger."[229] States should not be permitted to classify on that basis:

> The great men who made [the Fifth Amendment] . . . abolished the narrow and limited phrase of the old Magna Charta of five hundred years ago, which gave the protection of the laws only to 'free men' and inserted in its stead the more comprehensive words, 'no person,' . . . Thus, in respect to life and liberty and property, the people by their Constitution declared the equality of all men.[230]

Congress of course accepted Bingham's proposal, and the

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in order to remove any doubt as to the constitutionality of the grant of that citizenship in the 1866 Act. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2768 (1866) (Sen. Wade); *id.* at 3031 (Sen. Henderson); *id.* at 2890 (Sen. Howard). The Democrats again urged that citizenship be reserved for descendants of the original citizens. *See id.* at 2938 (Sen. Hendricks). The Republicans again denied that such was ever the law. *See, e.g.*, *id.* at 2890 (Sen. Howard); *id.* at 3031 (Sen. Henderson).

229. *Id.* at 1292 (Rep. Bingham).

230. *Id.; see also id.* at 1090 (1866) (Rep. Bingham) (Guarantee meant to protect "all persons, whether citizens or strangers"). Bingham had routinely contrasted the Magna Charta, which applied to "freemen," and therefore "secured no privileges to vassals or slaves," to the Fifth Amendment, which protected "all persons" and was therefore "a new gospel to mankind." CONG. GLOBE, 37th Cong., 2d Sess. 1638 (1862) (Rep. Bingham) (Constitution protects all persons "[n]o matter upon what spot on the earth's surface they were born; no matter whether an Asiatic or African, a European or an American sun first burned upon them; no matter whether citizens or strangers; no matter whether rich or poor"); *see also* CONG. GLOBE, 36th Cong., 2d Sess. 83 (1861) (Rep. Bingham) ("The Constitution has the same care for the rights of the stranger within your gates as for the rights of the citizen."); CONG. GLOBE, 37th Cong., 3d Sess. 266 (1863) (Rep. Bingham) (Constitution "is no respecter of persons [and] declares that the poor and the rich, the citizen and the stranger within your gates, are alike sacred before the sublime majesty of its laws"); BEAUREGARD, *supra* note 138, at 97 ("Natural law must protect the privileges and immunities of all the citizens as well as aliens in the Republic.") (quoting letter from Bingham to Andrew F. Ross (Jan. 10, 1866)). Bingham heaped scorn on the Lecompton constitution's idea that all *freemen* are equal *when they form a social compact;* instead, the Declaration provides that *all* men are equal, and there is "no inferior class of human beings" outside the social compact. CONG. GLOBE, 35th Cong., 1st Sess. 402 (1858) (Rep. Bingham). Natural rights were "as imperishable as the human soul, and as universal as the human race." CONG. GLOBE, 34th Cong., 3d Sess. app. 136 (1857) (Rep. Bingham).

Guarantee extends to all persons. Bingham subsequently sponsored[231] the Enforcement Act of 1870, which, among other things, re-enacted the 1866 Act *in toto* and, in a separate section, reiterated the ban on discrimination in the making or enforcement of contracts but extended the protection to "all persons."[232]

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The Republicans self-consciously reached back to the Founders' principle against hereditary distinctions and enacted it into positive law in order to reaffirm and extend to African Americans the "white man's charter of freedom," suppress southern aristocracy, and promote the social mobility promised by Free Labor ideology. They did so by securing the rights of all *citizens* (not *subjects*), defined as all (not some) persons (not just African Americans) born (merely born, not born into a favored race, class, or family) in the United States. And even that protection was too status-based, so the Guarantee extended its security to all persons regardless of citizenship, and then the 1866 Act was modified likewise. Congress thus "put aside the creed of the despot, the monarchist, the aristocrat," and required that "race or color, inferiority or superiority" shall cease to be "terms of exclusion."[233] Inherited privileges had been outlawed:

> All attempts in this country to keep alive the old idea of orders of men, distinctions of class, noble and ignoble,

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231. The relevant provisions originated in the Senate bill sponsored by Senator Stewart, CONG. GLOBE, 41st Cong., 2d Sess. 1536 (1870) (Sen. Stewart) (S. 365), and were concurred in by the conference committee which included Bingham, to whose legislation regarding voting rights (H.R. 1293) those provisions were added as an amendment. *See id.* at 3871 (Rep. Bingham).

232. Section 1 of the 1866 Act was reenacted by section 18 of the Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140. And Section 16 of the 1870 Act extended the right to make and enforce contracts to "all persons." *Id.*; *see* CONG. GLOBE, 41st Cong., 2d Sess. 3871 (1870) (Rep. Bingham) (1870 Act extends equal protection to immigrants); *id.* at 1536 (Sen. Stewart) (1870 Act "extends [protection] to aliens, so that all persons who are in the United States shall have the equal protection of our laws"); *id.* at app. 4275 (1870) (Rep. Sargeant) (1870 Act extends protection to "every person whatever within our border . . . to everything wearing the form of humanity"); *see generally* Comment, *Developments In the Law—Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29, 58–59 (discussing 1870 Act).

233. CONG. GLOBE, 39th Cong., 2d Sess. 40 (1866) (Sen. Morrill) (debate on African American suffrage in the District of Columbia).

> superior and inferior, antagonism of races, are so many efforts at resurrection and anarchy. In a nation of professed freemen whose political axioms are those of universal liberty and human rights, no public tranquility is possible while these rights are denied to portions of the American people.[234]

Given that neither the proponents nor opponents of legacy preferences in college admissions have consulted the legislative history of the 1866 Act or the Guarantee, we thought it useful to do so in detail here. But we cannot improve on the succinct conclusion reached by Justice Stewart nearly 30 years ago: "[T]he Framers of our Constitution lived at a time when the Old World still operated in the shadow of ancient feudal traditions. As products of the Age of Enlightenment, they set out to establish a society that recognized no distinctions among white men on account of their birth." [235] The Guarantee "promised to carry to its necessary conclusion a fundamental principle upon which this Nation had been founded—that the law would honor no preference based on lineage."[236]

B. Case Law Confirms That Legacy Preferences in Public Universities Are Subject to Strict Scrutiny.

The conclusion derived from the legislative history is confirmed by the Equal Protection case law. The Supreme Court has consistently said that discrimination based on "lineage" or "ancestry" (apart from any additional or concurrent discrimination based on racial group) is inherently suspect.[237] More broadly, the Court has repeatedly held, in a variety of contexts, that heightened scrutiny applies to

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234. *Id.* at 41.

235. Fullilove v. Klutznick, 448 U.S. 448, 531 n.13 (1980) (Stewart, J., dissenting).

236. *Id.* at 531; *see also* Reinstein, *supra* note 118, at 403 ("According to the Republicans [of the 39th Congress], the principle of equal treatment that they then constitutionalized had originated in the founding. The Founders had rejected the doctrine that the right to rule could be vested in families and dynasties; and, to the Republicans, it was a short step to prohibit caste distinctions and class legislation based on the inheritance of race."); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1412 (1992) ("Trumbull derived his ban on race discrimination [in the 1866 Act] from the more general principle of the equality of citizens.").

237. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 629 (1996); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 n.4 (1976); Lindsey v. Normet, 405 U.S. 56, 73 & n.22 (1972).

discrimination based on "the accident of birth."[238]

We examine below three sets of such cases. The first directly addresses lineage/ancestry discrimination. The second establishes that the prohibition against lineage discrimination decisively informs the ban on race discrimination—that race discrimination is unlawful in significant part because it is lineage discrimination writ large. The third set of cases, concerning children born to unmarried parents, confirms that discrimination against children based on the status of their parents elicits heightened scrutiny.

1. Cases on Ancestry / Lineage

The Court in *Hirabayashi v. United States* famously held that, "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[239] In *Oyama v. California*[240] the Court made clear that the prohibited "ancestry" distinctions include those based on individual family lineage—on the identity or status of one's parents—in addition to those based on racial or

238. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42, 59 (1992); Ristaino v. Ross, 424 U.S. 589, 596 n.8 (1976); Frontiero v. Richardson, 411 U.S. 677, 686 (1973). Two areas for further research are prohibitions on lineage discrimination under State law (*see supra* note 114), and under international law; *see, e.g.*, International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171 (prohibiting discrimination based on "birth"). For example, the constitutions of the following countries prohibit discrimination on the basis of "origin": Constitution of the Republic of Bulgaria art. 6(2); Constitution of the Republic of Estonia art. 12; Constitution of Finland art. 6(2); Constitution of the French Republic art. 2(1); Constitution of the Republic of Lithuania art. 29(2); Federal Constitution of Swiss Confederation art. 8(2); Constitution of Japan art. 14(1); these on the basis of "descent:" Constitution of the Kingdom of Denmark art. 70; Constitution of the Republic of Slovakia art. 12(2); and these on the basis of "birth," "parentage," or "ancestry:" Federal Constitutional Laws of the Republic of Austria art. 7(1); Basic Law of the Federal Republic of Germany art. 3(3); Constitution of the Republic of Hungary art. 70/A(1); Constitution of the Portuguese Republic art. 13(2); Constitution of the Kingdom of Spain art. 14; and Human Rights Act 1998 (U.K.) art. 14. *See* ROBERT L. MADDEX, CONSTITUTIONS OF THE WORLD (2008). Oxford and Cambridge Universities have terminated their legacy preferences. *See* GOLDEN, *supra* note 12, at 125, 291.

239. Hirabayashi v. United States, 320 U.S. 81, 100 (1943). The Court there upheld restrictions against citizens of Japanese descent, but only as an exception—based on the exigency of war—to the general rule against discrimination based on ancestry. *Id.*

240. Oyama v. California, 332 U.S. 633 (1948).

ethnic group.

The California statute in *Oyama* prohibited aliens who were ineligible for American citizenship from owning agricultural land, and any property that they transferred with the intent to evade the statute escheated to the State. Such intent was presumed whenever an ineligible alien paid the consideration for a transfer to a citizen or an eligible alien.[241] Generally applicable California law presumed that a parent conveying property to his child intended a gift, but the statute presumed, in effect, that an ineligible alien conveying to his child intended a trust in which the child held the title, unlawfully, for the benefit of the parent.[242]

Plaintiff Fred Oyama was an American citizen whose father, a Japanese national ineligible for citizenship, transferred real estate to him. In striking down the statute, the Court in several instances referred to the statute's racial animus,[243] but made clear that the prohibited discrimination was based not on racial group, but "is based solely on [the plaintiff child's] parents' country of origin,"[244] that is, on his "different lineage."[245]

The Court distinguished, rather than overruled, its prior decision in *Cockrill v. California,* which had held that the same statute did not unlawfully discriminate against Japanese donors based on their racial or ethnic group.[246] *Oyama* thus made clear that it was the differential treatment of children based on the status of their parents—not the treatment of the children or their parents based on their

241. *Id.* at 636.

242. *Id.* at 641–42.

243. *Id.* at 644, 646.

244. *Id.* at 640.

245. *Id.* at 641; *see also id.* (discrimination based on whether "parents can[ ] be naturalized"); *id.* at 642 (discrimination based on "the father's nationality" and on whether "the father is ineligible for citizenship"); *id.* at 647 (discrimination "because of his father's country of origin"); *id.* at 641 ("[T]he California law points in one direction for citizens . . . whose parents cannot be naturalized, and in another for all other children."); *id.* at 644 ("[T]he father's deeds were visited on the son."). The dissent confirmed that the discrimination found unlawful by the majority was that "against sons of persons ineligible for citizenship." *Id.* at 685 (Reed, J., dissenting); *see also id.* at 686.

246. Cockrill v. California, 268 U.S. 258, 262 (1925). Later in the same Term, the Court found unlawful a California statute that discriminated against resident aliens of Japanese descent. *See* Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 422 (1948) (Guarantee prohibits State from withholding commercial fishing license from resident aliens).

racial or ethnic group—that made the discrimination unlawful.[247]

Oyama is a key decision establishing that discrimination based on heredity or lineage—apart from any concurrent or additional discrimination based on racial or ethnic group or national origin[248]—is unlawful under the Guarantee. And the Court subsequently has consistently cited *Oyama* for the proposition that discrimination based on ancestry or lineage is subject to strict scrutiny.[249]

This prohibition on discrimination based on heredity or lineage was applied and extended by the Court in *Plyler v. Doe*.[250] The State of Texas denied a free public education to children who could not prove that they had been lawfully admitted into the United States. In one sense, the State could be viewed as having denied the benefit to the children based on their own status as undocumented aliens. As minors, however, the children were not themselves

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247. Oyama v. California, 332 U.S. 633, 645, 660 n.27 (1948); *see also id.* at 686 (Reed, J., dissenting) ("[T]he Court's decision is that the presumption denies Fred Oyama [the child] the equal protection of the laws because grantees are treated differently if they are sons of ineligible aliens than if they are the sons of others."). The dissenters in *Korematsu v. United States*, 323 U.S. 214 (1945), had earlier made clear that the proscription on discrimination based on "ancestry" is not confined to racial or ethnic groups. Justice Jackson concluded that Korematsu was entitled to be judged on his own merits rather than on who his parents were or what they might have done:

> Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.' Article 3, s 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.

Id. at 243 (Jackson, J., dissenting); *see also id.* at 242 (Murphy, J., dissenting) ("All residents of this nation are kin in some way by blood or culture to a foreign land . . .[But] [t]hey must . . . be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.").

248. The discrimination in *Oyama* has sometimes loosely been referred to as having been based on "national origin." *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 780 (1977); Mathews v. Lucas, 427 U.S. 495, 504 n.10 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 105 n.64 (1973) (Marshall, J., concurring and dissenting). But plaintiff Fred Oyama's nation of origin was the United States. The discrimination against him was based not on *his*, but his *father's*, nation of origin. It was based on his lineage—on the status or conduct of his parents.

249. *See supra* note 237.

250. Plyler v. Doe, 457 U.S. 202 (1982).

responsible for having entered the country unlawfully—their parents were.

Writing for the Court, Justice Brennan held that, "legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests a kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."[251] While undocumented aliens cannot properly be a "suspect class" because their status is the product of voluntary action, "these arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants."[252] Heightened scrutiny applied because "the children who are plaintiffs in these cases 'can affect neither their parents' conduct nor their own status,'"[253] and "no child is responsible for his birth."[254] Although the children were themselves unlawfully present in the country, denying a free education to them "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[255]

Justice Breyer, writing for himself and Justices Souter

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251. *Id.* at 216 n.14.

252. *Id.* at 219–20 (emphasis in original). Justice Powell's concurring opinion reached the same conclusion, for the same reasons. *See id.* at 238.

253. *Id.* at 220 (quoting *Trimble,* 430 U.S. at 770); *see also id.* at 223 (legislation affected "a discrete class of children not accountable for their disabling status").

254. *Id.* (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

255. *Id.* at 221–22. In a concurring opinion in *Zobel v. Williams,* 457 U.S. 55 (1982), Justice Brennan noted that "equality of citizenship is of the essence in our Republic," and that, "the American aversion to aristocracy developed long before the Fourteenth Amendment and is, of course, reflected elsewhere in the Constitution." *Id.* at 69 n.3 (citing prohibition on titles of nobility). Rather than paying homage to ancestry or lineage, the Constitution "requires attention to individual merit, to individual need." *Id.* at 70. In *Hooper v. Bernalillo County Assessor,* 472 U.S. 612, 623 n.14 (1985), the Court quoted Justice Brennan's opinion in *Zobel* for the proposition that, "the Citizenship Clause of the Fourteenth Amendment 'does not provide for and does not allow for, degrees of citizenship based on length of residence. And the Equal Protection Clause would not tolerate such distinctions.' " *See generally* Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics,* 88 MICH. L. REV. 1366, 1394 (1990) ("[A]rbitrariness lies in classifying persons in accordance with their birthrights (slave status) or other characteristics (race) over which they have little or no control; a reasonable classification takes into account their wills, the things they are able to choose to do or not do within the limits of their capabilities and the social order.").

and Ginsburg in *Miller v. Albright*, confirmed that, "this Court, I assume, would use heightened scrutiny to review discriminatory laws based upon ancestry, say, laws that denied voting rights or educational opportunity based upon the religion, or the racial makeup, of a parent or grandparent."[256] Given that a child need not have the same religion as her parent or grandparent, Justice Breyer clearly intends that distinctions based on ancestry or lineage itself, not (only) on religion or race, elicits heightened scrutiny.[257]

2. Cases on Race

The case law also recognizes that strict scrutiny applies to race discrimination in part because it is a form of discrimination based on lineage or ancestry. Justice Powell's opinion in *Regents of the University of California v. Bakke* held that race discrimination is subject to strict scrutiny because the Guarantee protects "every person regardless of his background,"[258] and "a State's distribution of benefits or imposition of burden [cannot] hinge[] on ancestry or the color of a person's skin."[259] Justice Brennan's opinion agreed that, "human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated."[260]

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256. Miller v. Albright, 523 U.S. 420, 476 (1998) (Breyer, J., dissenting). None of the other opinions of a badly fractured Court reached this issue. Nor did any of the opinions in a subsequent case that addressed the same statute. *See* Nguyen v. INS, 533 U.S. 53 (2001).

257. *See also* Nordlinger v. Hahn, 505 U.S. 1, 30 (1992) (Stevens, J., dissenting) (State tax exemption for children of homeowner parents denies equal protection because it "establishes a privilege of a medieval character" by "treat[ing] [children] differently solely because of their different heritage"). The majority upheld the statute in *Nordlinger* because only the rational basis test applies to State tax statutes, and review of exemptions to such statutes is especially deferential. *Id.* at 11 (majority opinion). Moreover, the plaintiff did not assert that the heredity discrimination required heightened scrutiny. *See id.* at 10–11.

258. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978) (plurality opinion). In his famous dissent in *Plessy v. Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), Justice Harlan wrote that race discrimination is unlawful because: "The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.*

259. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

260. *Id.* at 355 (Brennan, J., concurring in part and dissenting in part); *see*

In *Rice v. Cayetano*[261] the Court held that the State of Hawaii violated the Fifteenth Amendment's ban on race-based voting qualifications by limiting the franchise to persons with "native Hawaiian" ancestry. Racial discrimination is unlawful in large part because it is a type of discrimination based on ancestry or lineage:

> *One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.* An 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.[262]

3. Cases on Parents' Marital Status

The prohibition on hereditary distinctions has likewise animated the Court's jurisprudence applying heightened scrutiny to discrimination against children born out of wedlock. In *Weber v. Aetna Casualty & Surety Co.*, the Court

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also id. at 360–61 (requiring strict scrutiny when State decision is based on "an immutable characteristic which its possessors are powerless to escape or set aside").

261. Rice v. Cayetano, 528 U.S. 495 (2000).

262. *Id.* at 517 (emphasis added); *see also* Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2767 (2007) (quoting this passage from *Rice*); Fullilove v. Klutznick, 448 U.S. 448, 531, 541 n.13 (1980) (Stewart, J., dissenting) (discussed *supra* text accompanying notes 235–36). Similarly, Justice Scalia's opinion in *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment), noted that a classification based on race "is alien to the Constitution's focus upon the individual, . . . and its rejection of dispositions . . . based on blood, *see* U.S. CONST. art. III § 3 ('[N]o Attainder of Treason shall work Corruption of Blood'); U.S. CONST. art. I, § 9, cl. 8 ('No Title of Nobility shall be granted by the United States')." *See also* Hills, *supra* note 44, at 1601 ("[R]acial classifications violate a deep principle against hereditary status reflected in the Constitution's 'Title of Nobility' and 'Corruption of Blood' Clauses."). That proscriptions against racial discrimination were extensions of the principle against hereditary distinctions does not require or even suggest that preferences in favor of historically oppressed racial groups should be subject to strict scrutiny under the Equal Protection Guarantee. It would be perfectly reasonable, both logically and in light of history, to conclude that preferences to any person based on heredity or lineage are *generally* subject to strict scrutiny, but that an exception applies when government grants a preference in order to ameliorate the effects of past societal discrimination. The history of the Fourteenth Amendment suggests that such preferences in favor of historically oppressed racial groups are clearly permissible, if not required. *See, e.g.*, Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment,* 71 VA. L. REV. 753 (1985).

held that a State could not lawfully prevent such children from recovering workers' compensation death benefits.[263] Discrimination against children based on their parents' status elicits heightened scrutiny because "legal burdens should bear some relationship to individual responsibility or wrongdoing," and "no child is responsible for his birth."[264] The Guarantee "enable[s] us to strike down discriminatory laws relating to status of birth."[265]

Similarly, in *Mathews v. Lucas*[266] the Court applied heightened scrutiny to a federal statute that required out-of-wedlock children to meet additional proof requirements in order to obtain survivor insurance benefits, because the statute used "a characteristic determined by causes not within the control of the . . . [child], and it bears no relation to the individual's ability to participate in and contribute to society."[267] Agreeing that heightened scrutiny was required, but disagreeing that the statute survived such scrutiny, Justice Stevens dissented because the government must be "especially sensitive to discrimination on grounds of birth."[268] Citing the Declaration and the prohibition on titles of nobility, he noted that the Constitution "equally would prohibit the United States from attaching any badge of ignobility to a citizen at birth."[269]

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Against all of these consistent cases stands a single authority, the five to four decision in *Kotch v. Board of Riverport Pilot Commissioners for Port of New Orleans,*

263. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

264. *Id.* at 175.

265. *Id.* at 176.

266. Mathews v. Lucas, 427 U.S. 495 (1976).

267. *Id.* at 505; *see also* Trimble v. Gordon, 430 U.S. 762, 770 (1977) (heightened scrutiny required because out-of-wedlock children "can affect neither their parents' conduct nor their own status").

268. *Mathews,* 427 U.S. at 520 n.3 (Stevens, J., dissenting).

269. *Id.*; *see also* Eskra v. Morten, 524 F.2d 9, 13 (7th Cir. 1975) (Stevens, J.) (proscription on titles of nobility prevents out-of-wedlock child from "being treated by her government as a second-class person"). Discrimination against out-of-wedlock children has been subjected to heightened scrutiny, rather than strict scrutiny, only because that status is often entangled with the State's interest in ensuring proof of paternity. *See, e.g.*, Clark v. Jeter, 486 U.S. 456, 461 (1988); Reed v. Campbell, 476 U.S. 852, 855 (1986); Mills v. Habluetzel, 456 U.S. 91, 97 (1982).

upholding a Louisiana statute that gave incumbent State riverboat pilots discretion to select only their friends and relatives as apprentices.[270] Writing for four dissenters, Justice Rutledge asserted that discrimination based on lineage is unlawful under the Guarantee:

> [The statute as applied] makes admission to the ranks of pilots turn finally on consanguinity. Blood is, in effect, made the crux of selection. That, in my opinion, is forbidden by the Fourteenth Amendment's guarantee against denial of the equal protection of the laws. The door is thereby closed to all not having blood relationship to presently licensed pilots. . . . [I]t is beyond legislative power to make entrance to [employment as a pilot] turn upon such a criterion.[271]

The majority upheld the statute because permitting incumbent pilots to select their apprentices was "[not] unrelated" to the State's goal of securing a safe and efficient pilotage system.[272] Professor Torke has demonstrated that the majority decision is best understood as a reaction against the then-recently passed era of substantive due process attacks on economic regulation.[273] Throughout the litigation, plaintiffs had cast their challenge to the statute in the language of substantive due process, with "only a sideways glance" at the discrimination based on lineage.[274]

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270. Kotch v. Bd. of River Port Pilot Com'rs for Port of New Orleans, 330 U.S. 552 (1947).

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

272. *Id.* at 564. The majority justified its decision by asserting that pilotage is "a highly personalized calling," *id.* at 558, selection of apprentices from a localized area would ensure that they had specialized knowledge of the weather and water hazards, *id.* at 559, open competition for apprentice positions would adversely affect the public interest, *id.* at 561, and the statute affected a "unique institution of pilotage in the light of its history in Louisiana," *id.* at 564.

273. *See* Torke, *supra* note 44, at 563.

274. *Id.*; *see also id.* at 588–92; Larson, *supra* note 4, at 1412. The *Kotch* majority opinion is in significant tension with the judicial opinions that were faithful to Congress's intent in the immediate aftermath of the Civil War. *See, e.g.*, Slaughterhouse Cases, 83 U.S. 36, 113 (1872) (Bradley, J., dissenting) (Fourteenth Amendment prohibits States from "pass[ing] a law of caste, making all trades and professions, or certain enumerated trades and professions, hereditary"); *id.* at 105, 109 (Field, J., dissenting) (Guarantee was "intended to give practical effect to the Declaration of 1776," and therefore "all grants of exclusive privileges, in contravention of this equality, are against common right, and void"); *In re* Ah Fong, 1 Fed. Cas. 213, 218 (C.D. Cal. 1874) (Field, J.) (Guarantee prohibits "[d]iscriminating and partial legislation, favoring particular persons").

The Court today likely would not follow the *Kotch* majority. The Court consistently cites *Oyama,* decided the year after *Kotch,* for the proposition that ancestry discrimination is subject to strict scrutiny.[275] And Justice Brennan's opinion in *Bakke* cites the *Kotch* dissent for the proposition that "advancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at the least on factors within the control of an individual."[276]

On the current Court, Justice Stevens has strongly and consistently condemned discrimination based on family lineage.[277] Justice Kennedy's individualistic approach to the Guarantee is especially compatible with the approach that we suggest.[278] Justice Breyer, joined by Justices Souter and Ginsburg, asserted in *Miller v. Albright* that heightened scrutiny applies to family lineage discrimination.[279] Chief Justice Roberts's and Justice Alito's "color-blind" approach to the Guarantee,[280] and Chief Justice Roberts's assertion that the prohibition on race discrimination is an extension of the fundamental prohibition on being "judged by ancestry instead of by [one's] own merit and essential qualities,"[281] also reveal a disposition to prohibit lineage discrimination. Justice Scalia has forcefully asserted that the Constitution prohibits

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275. *See supra* note 237.

276. Regents of Univ. of Cal. v. Bakke, 438 U.S. 264, 361 (1978) (Brennan, J., concurring in part and dissenting in part). *But see* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 682 n.3 (1966) (Harlan, J., dissenting) (citing *Kotch* for proposition that Court has rejected Equal Protection claim based on "consanguinity"); Goesaert v. Cleary, 335 U.S. 464, 465–66 (1948) (upholding statute prohibiting all women except wives or daughters of bar owners from being bartenders, on ground that State could lawfully preclude all women from being bartenders and therefore can preclude less than all).

277. Justice Stevens joined Justice Brennan's opinion in *Plyler v. Doe*, 457 U.S. 202 247 (1982); discerned lineage discrimination in *Nordlinger v. Hahn*, 505 U.S. 1, 30 (1992); and authored the dissent in *Mathews v. Lucas,* 427 U.S. 495, 520 n.3 (1976) (Stevens, J., dissenting), asserting that the government must be "especially sensitive to discrimination on grounds of birth."

278. *See supra* text accompanying notes 261–62 and *infra* note 322. He also authored the Court's opinions in *Rice v. Cayetano,* 528 U.S. 495 (2000), and *Romer v. Evans,* 517 U.S. 620 (1996), which pointedly cited *Oyama v. California,* 332 U.S. 633 (1948), for the proposition that ancestry discrimination is subject to heightened scrutiny.

279. *See supra* text accompanying notes 256–57.

280. *See* Parents Involved In Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2782 (2007); *see generally* ANDREW KULL, THE COLOR BLIND CONSTITUTION (1992).

281. *See supra* note 262.

"dispositions . . . based on blood."[282] These opinions, together with the legislative history and case law addressed above, provide solid grounds for courts to subject legacy preferences in public universities to strict scrutiny.

C. Case Law Confirms the Unlawfulness of Legacy Preferences in Private Universities under the 1866 Act.

Relevant case law under the 1866 Act is less plentiful than that under the Guarantee, but the proscription of discrimination based on heredity is equally clear. The Supreme Court has indicated that the "race" discrimination barred by the Act is broadly defined to include family descent. We show below that the Act can prohibit racial-group discrimination against whites (and even, in 1866, against blacks) only if the Act also proscribes discrimination based on family lineage. Additional legislative history confirms that this is the correct reading of the Act.

1. Al-Khazraji *Holds That the Act Protects Families from Ancestry Discrimination.*

In *Runyon v. McCrary*, the Supreme Court held that the 1866 Act prohibits racial discrimination in the admissions decisions of private schools.[283] In *St. Francis College v. Al-Khazraji*[284] the Court indicated that the "racial" discrimination prohibited by the Act includes discrimination based on family lineage.[285] In *Al-Khazraji* the Court held that an American born in Iraq could state a claim of unlawful race discrimination to the extent that he alleged that he was "subjected to intentional discrimination based on the fact that he was born an Arab, rather than solely on the place or nation of his origin, or his religion."[286] Holding that the Act bars "race" discrimination, the Court observed that

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282. *See supra* note 262. But he also joined Justice Thomas's dictum that legacy preferences are lawful. *See supra* note 3.

283. Runyon v. McCrary, 427 U.S. 160 (1976).

284. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

285. Plaintiff, a United States citizen born in Iraq, was a professor who was denied tenure by the defendant college. *Id.* at 606. He sued on the ground that the denial of tenure was based on "national origin, religion, and/or race." *Id.* The district court had entered summary judgment against plaintiff on the ground that discrimination based on Arabian ancestry is not "race" discrimination actionable under the Act. *Id.*

286. *Id.* at 613.

dictionaries in the mid-nineteenth century defined race very broadly to include, for example:

> a "continued series of descendants from a parent who is called the *stock*," . . . "[t]he lineage of a family," . . . or "descendants of a common ancestor," . . . . The 1887 edition of Webster's expanded the definition somewhat: "The descendants of a common ancestor; a family, tribe, people or nation, believed or presumed to belong to the same stock."[287]

The Court noted that, even today, dictionaries still define race as including "a family, tribe, people, or nation belonging to the same stock."[288] Encyclopedias in the nineteenth century, and legislators during the debates, also described various ethnic groups, such as Finns, Basques, Germans, Mongolians, Hungarians, Jews, etc. as constituting "races."[289] It was "not until the 20th century that dictionaries began referring . . . to race as involving divisions of mankind based upon different physical characteristics."[290]

The Court accordingly held that "Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry *or* ethnic characteristics. Such discrimination is racial discrimination that Congress intended [the Act] to forbid whether or not it would be classified as racial in terms of modern scientific or social theory."[291] "Ancestry" being an improper classification, Al-Khazraji was required to show only that he was discriminated against because he "was born an Arab,"[292] not because he had "a distinctive physiognomy."[293]

Discrimination based on family lineage fits comfortably

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287. *Id.* at 610–11 (citations omitted).

288. *Id.* at 611–12 (citations omitted).

289. *Id.*

290. Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 611 (1987) (citations omitted).

291. *Id.* at 613 (emphasis added). In his dissent in the *Slaughterhouse Cases*, Justice Field asserted that the special monopoly granted there violated the 1866 Act because it was "similar in principle and as odious in character as the restrictions imposed in the last century upon the peasantry in some parts of France." Slaughterhouse Cases, 83 U.S. 36, 92 (1872) (Field, J., dissenting). The special privileges in France were hereditary, "vest[ing] in the Lords of the vicinage." *Id.* at 93.

292. *Al-Khazraji*, 481 U.S. at 613.

293. *Id.*

within *Al-Khazraji's* broad definition of "race" discrimination. In the Court's language, legacy preferences discriminate on the basis of ancestry, and they do so against "identifiable classes of persons"—classes consisting of the children of non-alumni.[294]

This reading is confirmed by multiple aspects of *Al-Khazraji.* The Court repeatedly referred to "race" as including "the lineage of *a family*,"[295] and similarly equated race with "stock," i.e., lineal descent.[296] And the Court held that race included "ancestry,"[297] which in both common usage and Supreme Court usage includes family lineage within only two generations. [298] Indeed, *Al-Khazraji* cites *Oyama* as an example of discrimination based on "ancestry."[299]

The Court explicitly separated race and ancestry from any connection to group physiognomy or ethnicity.[300] The requirement that Al-Khazraji show that he was discriminated against because he was "born an Arab" thus meant no more than that he was born to a parent who had some measure of "Arab blood," without any requirement that his parents have "Arab" physiognomy, characteristics, or culture. The touchstone is discrimination based on *birth*, i.e., descent, or family lineage. Indeed, the Act also protects "whites,"[301] so Al-Khazraji could have also satisfied the requirement by

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294. The Court did not require that the class identifier be physical or ethnic characteristics. *Id.* ("[A] distinctive physiognomy is not essential to qualify for . . . protection."). So an identifier based on family lineage, such as a listing in the Social Register or Burke's Peerage & Gentry, should suffice. In the case of discrimination against the children of non-alumni, the class is identified by consulting the applicant's answer to the family lineage question asked on the application form.

295. *Id.* at 611 (emphasis added).

296. *Id.* at 611–12.

297. *Id.* at 613.

298. *See, e.g.*, Dictionary.com, http://dictionary.reference.com/ (last visited August 26, 2008) ("ancestry" defined as "1. family or ancestral descent, lineage"); Rice v. Cayetano, 528 U.S. 495, 517 (2000) (inquiry into "ancestral lines" demeans dignity of individuals); Miller v. Albright, 523 U.S. 420, 471 (1998) (Breyer, J., dissenting) ("ancestry" discrimination includes that based on identity of parent or grandparent). The Court in *Cayetano* noted that a statute granting a benefit based on having only one sixty-fourth of a particular type of ancestry, or having ancestors who resided in a particular location—regardless of their racial group—may well be "racial" legislation. *Rice*, 528 U.S. at 514 ("it is far from clear" that this "would not be a race-based qualification").

299. *Al-Khazraji*, 481 U.S. at 613 n. 5.

300. *Id.* at 613.

301. *See infra* text accompanying notes 314–17.

showing, if it was true, that he was discriminated against because he "was born a white"—i.e., born to a parent who had some "white blood."[302]

Lastly, in defining the scope of prohibited "race" discrimination, *Al-Khazraji* looked to the 1866 debates as well as dictionaries. As we showed in detail above, those debates reveal that Congress expressly incorporated the Declaration's proscription on hereditary distinctions among white men; prohibited the lineage-based pretensions of southern aristocracy; ensured each citizen's ability to rise or fall based on individual merit; and rejected citizenship based on family lineage. And Congress knew from the South's citizenship-by-lineage and race-definition statutes that "race" inevitably collapses into family lineage.[303] Congress proscribed discrimination based on inherited race by codifying and expanding the more fundamental proscription on inherited distinctions. The legislative history thus compels a literal reading of *Al-Khazraji's* statement that the prohibited "race" discrimination includes discrimination based on "the lineage of a family."[304]

2. *The "White Citizens" Phrase Does Not Permit Lineage Discrimination.*

Supporters of legacy preferences may argue for a narrower interpretation of the Act based on the statutory phrase "as is enjoyed by white citizens." As originally proposed, and as initially passed by the Senate, the bill provided that all citizens "shall have the same right" to make and enforce contracts.[305] The bill was then amended in the House to provide that all citizens shall have the same right to make and enforce contracts "as is enjoyed by white citizens."[306] Legacy-preference supporters may argue that the additional phrase was intended to limit the Act's prohibition

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302. *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 609–10 (1987) (Court is "quite sure" that the Act prohibits "discrimination by one Caucasian against another").

303. *See supra* text accompanying notes 212–13.

304. Subsequent legislative history also argues against a too-narrow reading of the 1866 Act. *See* CIVIL RIGHTS ACT OF 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071 (statutorily overruling Court's narrow reading in *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989)).

305. CONG. GLOBE, 39th Cong., 1st Sess. 211 (1866) (Sen. Trumbull).

306. *Id.* at 1115 (Rep. Wilson).

to "race" discrimination narrowly defined, i.e., defined in a way to exclude family lineage.[307] That argument is defeated

307. A contention that the 1866 Act prohibits discrimination other than that based on race would be contrary to the language, but not the holding, in several Supreme Court cases. In *Georgia v. Rachel,* 384 U.S. 780 (1966), the Court considered whether an African American could remove to federal court a State prosecution against him arising from a sit-in at an Atlanta restaurant. He invoked 28 U.S.C. § 1443(1), which provides for removal to federal court of claims involving "equal civil rights," on the ground that the prosecution violated Section 201(a) of the Civil Rights Act of 1964. In the course of holding that the 1866 Act provided the paradigm of a statute providing for "equal civil rights" under Section 1443(1), the Court stated that the phrase "as is enjoyed by white citizens" was "added in committee in the House, *apparently* to emphasize the racial character of the rights being protected." *Id.* at 791 (emphasis added). The Court provided no analysis and no citation of authority for the assertion that this language "apparently" had this particular meaning.

The Court also noted that the 1866 Act's legislative history indicated "that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Id.* The balance of the Court's opinion makes clear, however, that these are two separate criteria, i.e., that the 1866 Act protected a limited category of rights (i.e., the rights to make contracts, inherit property, etc.), and that the rights were protected against discrimination including *but not necessarily limited to* discrimination based on race. *Id.* at 792. Indeed, the Court's holding was that Section 201(a) of the 1964 Act fit the paradigm of the 1866 Act, and that removal was therefore proper. *Id.* Section 201(a) is *not* limited to race discrimination, but protects against "discrimination or segregation on the ground of race, color, religion, or national origin." *Id.* at 793 n.20. Nevertheless, based on *Rachel,* subsequent dicta in various opinions imply that the 1866 Act reaches only "racial" discrimination. *See, e.g.*, Gen. Bldg. Contr. Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 384 (1982); McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273, 287 (1976); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968). *But see* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459 (1975) (Act "relates *primarily* to racial discrimination") (emphasis added).

The legislative history undermines the notion that the 1866 Act protects against only race discrimination. Under the natural-law theory that informs the Act, the rights of white citizens are subject to reasonable regulation by the State. The phrase "as is enjoyed by white citizens" simply means that the rights of all citizens, like those of white citizens, are subject to such reasonable regulation. As originally proposed, and as originally passed by the Senate, the bill provided that all citizens shall have the same right to contract. Opponents noted that a literal interpretation of the bill would preclude the States from imposing any limits on the enumerated rights based on gender, age, or mental capacity. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1781–82 (1866) (Sen. Cowan). Representative Wilson offered the phrase "as is enjoyed by white citizens" as an amendment, and "the reason for offering it was this: it was thought by some persons that unless these qualifying words were incorporated in the bill, those rights might be extended to all citizens, whether male or female, majors or minors. So that the words are intended to operate as a limitation and not as an extension." *Id.* at 157 (1866) (Rep. Wilson); *see also id.* at 1294 (Rep. Wilson) (denying that the bill "invades the States to enforce equality of rights in respect to those things which properly and rightfully depend on State regulations and laws").

by two aspects of the Court's decision in *McDonald v. Santa Fe Trail Transportation Company*, where the Court held that the "white citizens" phrase is "without substantive effect" and that the Act protects white persons against racial discrimination.[308]

a. The Phrase Is Superfluous.

The Act's legislative history led the *McDonald* Court to conclude that the "white citizens" phrase is meaningless.[309] Senate Bill No. 61 as originally passed by the Senate provided that all citizens shall have the "same right" to make and enforce contracts—language that would clearly prohibit discrimination based on family lineage. The qualifying phrase "as is enjoyed by white citizens" was added in the House at the request of Representative Wilson, solely in order to "perfect" the bill.[310]

When the bill, with the additional language, was

In his speech after the veto, Representative Lawrence explained that the extension of apparently absolute rights to all citizens does not preclude the State from making reasonable regulations. He quoted Chancellor Kent to the effect that citizens "are entitled to the privileges that persons of the same description are entitled to." *Id.* at 1835 (Rep. Lawrence). Lawrence then stated that this principle is applicable to the Act: "That is, distinctions created by nature of sex, age, insanity, &c., are recognized as modifying conditions and privileges, but mere race or color, as among citizens, never can." *Id.*

Thus, the relevant legislative history shows that the disputed language was intended simply to make clear that States may make reasonable regulations, including those based on age, gender, and capacity. Nothing in the language was intended to limit the bill to proscribing only race discrimination. *See* Robert J. Kaczorowski, *To Begin The Nation Anew: Congress, Citizenship, and Civil Rights After the Civil War*, 92 AM. HIST. REV. 45, 56 (1987).

In short, the phrase "as is enjoyed by white citizens" was added only in order to make clear that the rights of all citizens, like those of white citizens, are subject to reasonable State regulations—an obvious caveat under then-prevailing natural law theory. Under this reading, discrimination based on family lineage would clearly be prohibited—the Revolution and its elaboration in the North had made clear that discrimination on that ground was not reasonable. And while the members of the 39th Congress believed that discrimination based on gender was reasonable, and expressly said so, the natural-law theory that undergirds this reading of the 1866 Act—a natural law whose meaning and content are understood differently over time—would require a Court to conclude that the Act proscribes such discrimination today.

308. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 291, 295–96 (1976).

309. *Id.* at 291.

310. CONG. GLOBE, 39th Cong., 1st Sess. 1115 (1866) (Rep. Wilson). Wilson made the motion on his own initiative, and not at the request of the Judiciary Committee, which he chaired. *Id.*

returned to the Senate, Senator VanWinkle asserted that, "these words are superfluous. The idea is that the rights of all persons shall be equal; and I think leaving out these words would attain that object."[311] Agreeing that the addition was "superfluous," the bill's author, Senator Trumbull, asserted that, "in the opinion of the [Senate Judiciary] committee which examined this matter [the added phrase] did not alter the meaning of the bill."[312] The Committee "did not think it worth-while to send the bill back just because those words were inserted by the House."[313]

The disputed phrase would hardly have been deemed superfluous—not even worth a discussion—if the effect was to limit the scope of the bill to protecting only racial groups narrowly defined. Before the addition, the Republicans had already: (1) rejected citizenship based on family lineage, (2) characterized the protected rights as belonging to individuals, (3) expressly invoked the no-hereditary-privilege principles of the Declaration and Constitution, (4) demonstrated an intent to suppress southern aristocracy, and (5) committed themselves to safeguarding the social mobility promised by Free Labor ideology. Congress clearly did not believe that the addition of the phrase "as is enjoyed by white citizens" had the effect of limiting these repeatedly articulated objectives.

b. The Act Protects Whites Only as Families or Individuals.

McDonald also undermines legacy proponents' reliance on the "white citizens" phrase by holding that the Act protects whites against racial discrimination.[314] The Act can protect whites against discrimination based on their racial group only if the phrase "same right . . . as is enjoyed by white citizens" includes the right to contract without regard to one's family lineage. Under the Act, each person, including *each white person*, is entitled to the same rights as are enjoyed by white citizens. To suggest that the 1866 Act protects individuals only against discrimination based on membership in a racial

311. *Id.* at 1413 (Sen. VanWinkle).
312. *Id.* (Sen. Trumbull).
313. *Id.*
314. The Court's holding was based on extensive legislative history establishing that Congress intended to protect whites. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295–96 (1976).

group is to suggest, contrary to *McDonald,* that the Act does not protect whites.

By definition, whites as members of a racial group enjoy the same rights as white citizens, so the Act would never provide any protection to them if it protected against only racial-group discrimination. The Act protects individual whites by ensuring that they enjoy the same rights as all *other* white citizens—by protecting against discrimination based on family lineage. Congress's use of the phrase "same right . . . as is enjoyed by white citizens" posits a unitary group of whites, all of whom enjoy the same rights without distinction.

Moreover, it was necessary for the 1866 Act to prohibit discrimination based on family lineage in order for it to prohibit *racial-group discrimination against African Americans.* Recall that at the outbreak of the Civil War, only 10,000 families were in control of the political and economic life of the South.[315] If the 1866 Act had not prohibited discrimination based on family lineage, the southern aristocrats could have enacted legislation to the effect that only the descendants of those 10,000 families would enjoy the substantive rights enumerated in the 1866 Act.[316] Many blacks would have been left unprotected because they would have enjoyed the same right as whites—the right to make contracts, inherit, testify, etc., only if they were descended from one of the favored families.[317]

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315. *See supra* text accompanying note 147.

316. This is no mere hypothetical. Blacks as well as "poor whites of the South" were in real jeopardy because "State governments are already in the hands of those hostile, through prejudice or interest, to their improvement or amelioration." CONG. GLOBE, 39th Cong., 1st Sess. 3035 (1866) (Sen. Henderson); *see also* CONG. GLOBE, 40th Cong., 1st Sess. 69 (1867) (Sen. Morton). In fact, the planter oligarchs enacted legislation providing that *any* laborer—*black or white*—without gainful employment could be arrested and then sold into servitude. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. app. 112 (1866) (Sen. Henderson); EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES DURING RECONSTRUCTION (FROM APRIL 15, 1865 TO JULY 15, 1870) 30, 39 (1969). Congress clearly understood that such legislation was prohibited by the 1866 Act.

317. The Southern oligarchs ultimately regained political control of the South by, among other methods, disenfranchising not only blacks but also poor whites. *See* Forbath, *supra* note 177, at 179. Poor whites were duped into supporting restrictions on voting rights by the inclusion of "grandfather clauses" that appeared to exempt them from poll taxes and literary tests, but that in fact often had "sunset" provisions. *See* Burton D. Wechsler, *Black and White Disenfranchisement: Populism, Race, and Class*, 52 AM. U. L. REV. 23, 48–49

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The legislative history overwhelmingly supports the *Al-Khazraji* Court's indication that the Act prohibits discrimination based on family lineage. That conclusion has the additional salutary effect of not requiring federal courts to categorize persons according to racial group. The Court has required plaintiffs under the Act to prove that they belong to the "kind of group that Congress intended to protect."[318] As shown above, the types of groups that Congress intended to protect include groups defined by their lineage.

Courts therefore need not determine whether a plaintiff is a member of any particular racial group. Nor need courts limit the Act's protections to "races" that were specifically mentioned during the 1866 debates, thereby absurdly leaving unprotected, for example, Norwegian-Americans and Hispanic-Americans, who by happenstance were not mentioned in those debates.[319]

More than 110 years ago in *Plessy v. Ferguson,*[320] Homer Plessy, who was one-eighth black, was discriminated against by whites because they viewed him as belonging to a different

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(2002) (quoting opponents who argued that grandfather clauses created "an hereditary right or privilege" that violated "the spirit that has animated the people of this country from the Declaration of Independence down to this time," and were "counterrevolutionary" because the Revolution had been "a struggle to abolish heredity"). Although the Supreme Court ultimately found these grandfather clauses to be unlawful under the 15th Amendment, *Guinn v. United States,* 238 U.S. 347 (1915), by then the use of poll taxes, literary tests, and property requirements had disenfranchised most southern blacks and thousands of poor southern whites. Wechsler, *supra* at 56.

318. Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617 (1987). The Court was responding to a particular difficulty–is discrimination against Jews based on religion (which is not covered by the Act), or on ancestry or ethnicity, which is covered? The Court held that, whatever may be thought to be the case today, the 39th Congress considered Jews to be a distinct racial group and therefore discrimination against them to be prohibited by the statute. *Id.* at 617–18. In short, they were "the kind of group that Congress intended to protect" because they were a group, as the 39th Congress understood it, defined by race/lineage rather than religion.

319. *See* Mary J. Woodhead, *Ethnic Origin Discrimination as Race Discrimination Under § 1981 and § 1982,* 1989 UTAH L. REV. 741, 755–58 (1989) (noting that lower courts after *Al-Khazraji* have tried to decide whether Norwegian-Americans and Hispanic-Americans constitute "races," and urging that courts should get out of the business, "once and for all . . . of categorizing humans in racial categories").

320. Plessy v. Ferguson, 163 U.S. 537 (1896).

race. In just the last forty years, the number of interracial marriages in the United States has increased more than one hundred-fold.[321] So assume that the Plessy-like plaintiff of today is a person descended in equal parts from ancestors Norwegian, Latvian, Russian, English, Chinese, Japanese, Columbian, Peruvian, Brazilian, Australian, Canadian, French, Turkish, Saudi, Indonesian, and one ancestor descended from Sally Hemings. When the defendant discriminates against plaintiff on the ground that she is not "Aryan," should the courts engage in their own brand of racial categorizing by trying to decide whether plaintiff is "Chinese" or "African American"—her antecedents that are mentioned in the 1866 debates? [322] It is far better for courts to do what Congress intended and what *Al-Khazraji* permits—to conclude that defendant has discriminated against plaintiff on the prohibited basis of lineage, and to leave only the defendant to ponder about plaintiff's "race."[323]

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321. *See* SCHMIDT, *supra* note 2, at 85.

322. Justice Kennedy has addressed the fundamentally arbitrary and dangerous use of racial classifications by courts. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring) ("To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."); Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) ("[T]he very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.") (quoting Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting)); *see also* Ortiz v. Bank of America, 547 F. Supp. 550, 565 (E.D. Cal. 1982) ("The notion of race is a taxonomic device and, as with all such constructs, it exists in the human mind not as a division in the objective universe."); LaFore v. Emblem Tape & Label Co., 448 F. Supp. 824, 826 (D. Colo. 1978) ("The use of racial classifications or distinctions in political or judicial functions is fraught with peril.").

323. The 1866 Act's prohibitions on lineage-based discrimination by private actors do not, as some may suggest, render the Act over-broad. Nothing in the Act requires the conclusion that parents, when acting in their capacity as parents, are prohibited from preferring their own children. The language and history of the Act reveal no intention to pierce intra-family transactions. Nor does the Act prohibit government or other social entities from helping parents to prefer their own children. For example, government may appropriately enact intestacy laws that mimic and implement the decision that appropriately belongs to a parent to prefer his or her own child. Government may likewise appropriately help parents fulfill their obligations by providing financial assistance or benefits to children. Regardless of whether the "race" discrimination proscribed by the Act is defined broadly or narrowly, courts must draw private/public boundaries around it. *See* Runyon v. McCrary, 427 U.S. 160, 187–88 (1976) (Powell, J., concurring); *see also* Larson, *supra* note 4, at 1413–16 (discussing ways to limit reach of nobility clauses). Courts can draw the line more or less narrowly depending on whether the discriminatory animus

III. LEGACY PREFERENCES DO NOT NARROWLY SERVE A COMPELLING INTEREST

Without attempting to develop a full "strict scrutiny" analysis of legacy preferences, we briefly address the principal justifications that the universities are likely to offer.[324] We show that: (1) in contrast to the affirmative action plan in *Grutter,* legacy preferences do not promote student-body diversity; (2) the universities' interest in alumni donations is not a cognizable justification; and (3) factually, the universities likely could not prove that legacy preferences positively affect private donations or are narrowly tailored to achieve a legitimate objective.

A. Legacy Preferences Disserve the Goal of Student Body Diversity.

The universities may argue that legacy preferences survive strict scrutiny because legacy status is only one of numerous factors in an individualized review of each application, just as was approved in *Grutter.*[325] This

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is based on racial group or family lineage. Given the disparate histories of these two types of race discrimination in America, competing constitutional values may tolerate them to differing degrees. In any event, these constitutional concerns are not implicated by admissions policies at private schools. *Runyon,* 427 U.S. at 175–78 (majority opinion); *see also* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) ("[T]here is no constitutional right . . . to discriminate in the selection of who may attend a private school."). The private universities here appeal to the public at large for customers, are purportedly open in principle to all objectively qualified applicants, are "private" only in the sense that they are owned and managed by private persons, and receive tens or hundreds of millions of dollars annually in public funds. *See Runyon,* 427 U.S. at 172 n.10 (1976); *see also Developments in the Law—Section 1981, supra* note 232, at 119 ("[T]he larger the pool of contractual partners the defendant solicits, the less plausible the claim that the personal identity of the parties is important to the contractual relation. A defendant who serves the public generally or who advertises would fail the test."). Whatever the outer constitutional boundaries of the Act, the conduct at issue here is well within them.

324. It is not clear whether the analytic framework under the Guarantee—strict scrutiny, compelling interest, narrow tailoring—is also directly applicable under the 1866 Act. *See, e.g.*, Doe v. Kamehameha Schools, 470 F.3d 827, 837 (9th Cir. 2006) (en banc) (applying burden-shifting framework similar to that under Title VII). Regardless of the precise framework used, private universities, like their public counterparts, will bear a substantial burden to justify legacy preferences.

325. Grutter v. Bollinger, 539 U.S. 306 (2003). In *Grutter*, the Court upheld the University of Michigan Law School's race-conscious admissions policy. *Id.* The Court held that the policy was subject to strict scrutiny under the Equal Protection Guarantee, that the school had a compelling interest in obtaining a

argument fails because it bypasses the critical, initial step of identifying the university's interest. In *Grutter*, the preference in favor of otherwise-under-represented racial minorities served the school's interest in achieving student body diversity.[326] And the preference was appropriately narrow because it was only one of numerous factors in a holistic evaluation of each application.[327] Legacy preferences, in stark contrast, do not serve the goal of student body diversity, so they are not redeemed by being only one factor in an individualized review.

Grutter asserts that "nothing less than the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[328] Accordingly, "attaining a diverse student body is at the heart of the [university's] proper institutional mission."[329] Student-body diversity also promotes good citizenship and stabilizes society by ensuring that access to higher education is "visibly open" to all: "*all members* of our heterogeneous society *must have confidence in the openness and integrity* of the educational institutions that provide this training."[330]

Legacy preferences undermine this essential diversity. The vast majority of students at elite universities come from the narrow bands of the highest socioeconomic strata. At the 146 most selective schools, seventy-four percent of the students come from the top quartile of socioeconomic status, while only three percent come from the bottom quartile, and only ten percent from the bottom half.[331]

Nationwide, thirty-five percent of all families with children under eighteen earn less than the threshold to

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diverse student body, and that the means of achieving that goal were appropriately narrow because race was only one factor in a holistic evaluation of each application. *Id.*

326. *Grutter*, 539 U.S. at 316, 325.

327. *Id.* at 334.

328. *Id.* at 324 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J., concurring)).

329. *Id.* at 329.

330. *Id.* at 332 (emphasis added); *see also* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2818 (2007) (Breyer, J., dissenting) (strict scrutiny is necessary when government uses race "to decide who will receive goods and services that are normally distributed on the basis of merit and which are in short supply").

331. CARNEVALE & ROSE, *supra* note 31, at 11.

receive Pell grants.[332] Yet the weighted average percentages of students receiving those grants at the top twenty-five national universities and top twenty-five liberal arts colleges (as ranked by U.S. News & World Report) in 2001–2002 was 16.1% and 12.7% respectively.[333] To reflect the national mean, a school should receive an average of $824 in Pell grant funds per undergraduate.[334] Yet only three of the seventy-five most elite national universities and two of the seventy-five best liberal arts schools meet that benchmark, [335] with the weighted averages being $445 and $335, respectively.[336] Legacy preferences reinforce this existing class stratification at elite universities.[337]

Nor is this pernicious effect any less if diversity is measured by race rather than class. Given the nation's history, it is no surprise that the beneficiaries of legacy preferences are overwhelmingly white. Nationwide, the percentage of African Americans, Hispanics, and Native Americans in the legacy pool is half that of their percentage of all applicants and a small fraction of their percentage of the overall population.[338]

Data show why African American and Hispanic

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332. *See* DANETTE GERALD & KATIE HAYCOCK, ENGINES OF INEQUALITY: DIMINISHING EQUITY IN THE NATION'S PREMIER PUBLIC UNIVERSITIES 15 (2006); *see also* SACKS, *supra* note 32, at 162.

333. We obtained our data from RICHARD D. KAHLENBERG, AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 160–65 tbl.A.1 (2004).

334. For the 2005–2006 school year, the average Pell Grant per recipient, among all undergraduates nationwide, was $2,354. *See* College Board, *Trends in Student Aid,* TRENDS HIGHER EDUC. SERIES, 2006, at 5. Among families with children under eighteen, thirty-five percent earn less than the grant threshold. GERALD & HAYCOCK, *supra* note 332, at 5. So we calculate an expected average of $824 per undergraduate.

335. The national universities were UC San Diego, UC Davis, and Penn State; the liberal arts schools were Berea College and Spelman College.

336. The data are from 2005–2006 in our database, described *infra* Part IIIC.

337. *See* SCHMIDT, *supra* note 2, at 17 (legacy preferences help the wealthy "tighten[] their grip on most selective colleges"); *see also* CARNEVALE & ROSE, *supra* note 31, at 32 ("[W]e are increasingly clustered into families with both high-parental education and income and families with neither high-parental education nor income.").

338. SCHMIDT, *supra* note 2, at 31; *see also* Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities,* 86 SOC. SCI. Q. 293, 298–301 (2005); Mark Megalli, *So Your Dad Went to Harvard: Now What About the Lower Board Scores of White Legacies?* 7 J. BLACKS HIGHER EDUC. 71, 72 (1995); John K. Wilson, *The Myth of Reverse Discrimination in Higher Education,* 10 J. BLACKS HIGHER EDUC. 83, 91 (1995).

legislators in Texas were outraged when Texas A&M University proposed to continue legacy preferences while eliminating race-based affirmative action. For example, Hispanic students comprised just nine percent of the student population in 2000, but constituted fully thirty-two percent of the population of Texas:

Table 2. Texas A&M Demographics Compared to Texas Population

	Texas A&M Student Population 2000 (%) *	Texas Population 2000 (%) **
White	82	71
Hispanic/Latino	9	32
Black	2	11.5
Asian	3	2.7

* Peter Schmidt, *Pressure Put On Colleges to End Legacies in Admissions,* 50 Chron. Higher Educ. A1 (2004).

** U.S. Census (note that individuals may report more than one race, so the percentages total more than 100%).

Before the Texas legislature ended Texas A&M's legacy preferences in 2004, they were the deciding factor in annually gaining admission for more than 300 white students but fewer than 6 blacks.[339]

Even with affirmative action, racial minorities will be underrepresented in the pool of legacy applicants far into the future. African Americans at the University of Virginia, for example, comprised only three percent of legacy applicants in 2002 while comprising ten percent of the entering student body.[340] Even with a strong affirmative action program, the racial composition of the legacy pool at UVa will not match that of the current student body—let alone that of the Virginia population—until the year 2020.[341]

Thus, the legal analysis never gets to the question of whether use of legacy preference as one factor in a holistic

339. *See* Texas Civil Rights Review, *Legacy Admissions Questioned at Texas A&M,* (Jan. 3, 2004), http://texascivilrightsreview.org/phpnuke/modules.php?name=News&file=article&sid=23.

340. Howell & Turner, *supra* note 12, at 342. Note that the same story is true in reverse at historically black schools that grant legacy preferences. *Id.* at 348 n.5.

341. *Id.* at 326.

evaluation of an application would be narrowly tailored to serve the goal of student body diversity. Legacy preferences undermine, rather than serve, that goal. Put differently, schools could try to justify legacy status as one factor in a holistic evaluation designed to achieve student body diversity only by assigning that status *negative* rather than positive weight.

B. The Universities' Stated Interest in Increasing Revenue by Granting Legacy Preferences Is Not Legally Cognizable.

Unable to rely on an interest in student body diversity, the universities have asserted that legacy preferences are justified because they encourage increased alumni donations.[342] This is just the latest iteration of an argument that has been repeatedly used over the last century to justify unlawful discrimination. In the days of quotas on the admission of Jews, for example, Ivy League administrators denied that they personally wished to discriminate—they merely recognized that other students were bigots and would be driven away if the quotas were not enforced.[343] Harvard expressly linked this "realist" concern to a potential effect on alumni giving.[344] Alumni and other groups predicted similarly dire financial consequences from the admission of women and racial minorities in the 1960s and 70s.[345] Yet today these universities' endowments stand at record levels.

Regardless of the ignominious history of the universities' asserted interest in raising revenue from legacy preferences, that interest simply is not legally cognizable. The law cannot recognize the receipt of revenue from the discrimination's beneficiaries as a *legitimate* interest. To contend that the recipients of a preference are willing to pay for it is simply to restate that the recipients have obtained something of value. The Board of Education of Topeka, Kansas could not have justified its racially segregated schools by asserting that the white parents would have been more amenable to tax

342. *Id.* at 330 (purpose of preferences is "to keep . . . alumni happy -- and donating"). The universities have also asserted other, more "fuzzy" interests, such as fostering alumni goodwill and loyalty. We show that the alleged tangible manifestation of that goodwill and loyalty—increased donations—does not survive analysis, so *a fortiori* neither do the amorphous precursors.

343. KARABEL, *supra* note 2, at 87–88.

344. *Id.* at 174.

345. *See id.* at 459–60; *see also* KAHLENBERG, *supra* note 33, at 235 n.75.

increases if the schools remained all white.[346] The State of California in *Takahashi* could not have justified its denial of fishing permits to those of Japanese ancestry by asserting that the white fishermen would have accepted increased fees on their own licenses in gratefulness for the State's exclusion of the Japanese competitors.[347]

In *Plyler v. Doe*, the State of Texas tried to justify the denial of a free education to undocumented resident children by pointing to the need to preserve scarce funds for the education of lawful residents.[348] The proffered justification was not cognizable: "[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources."[349] To assert that denial of a benefit to the disfavored class will save resources is simply to "justify . . . classification with a concise expression of an intention to discriminate."[350] The dissenters in *Plyler* agreed that "fiscal concerns alone could not justify discrimination against a suspect class or an arbitrary and irrational denial of benefits to a particular group of persons."[351]

C. The Universities Likely Cannot Sustain Their Burden of Proof on the Existence of a Preference Premium.

In any event, the universities likely could not prove that legacy preferences result in greater contributions. The universities contend that some portion of an alumnus's contribution is made for the usual reasons (e.g., gratitude for an education, fondness for the institution or professors, etc.), but that some other portion represents what we call a "Preference Premium"—a voluntary payment for having personally been the beneficiary of a legacy preference or for having one's child or grandchild potentially be the beneficiary. The available evidence indicates that no such

346. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

347. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948); *see supra* note 246.

348. Plyler v. Doe, 457 U.S. 202, 227 (1982). Here, the universities' resources are hardly "limited." In 2004, the endowments of Harvard, Yale, and Princeton stood at $22.6, $12.7, and $9.6 billion, respectively. KARABEL, *supra* note 2, at 151. They are substantially larger today.

349. *Plyler*, 457 U.S. at 227.

350. *Id.*

351. *Id.* at 249 (Burger, C.J., dissenting); *see also* Graham v. Richardson, 403 U.S. 365, 375 (1971).

Preference Premium exists.[352]

The universities have never offered anything other than bald assertions or, at most, anecdotal evidence, to support the existence of a Preference Premium.[353] When directly asked by the Department of Education[354] to provide evidence of a link between legacy preferences and increased alumni contributions, Harvard was unable to do so, asserting that its data on the issue "is not something that would lend itself to statistical analysis."[355]

Moreover, evidence of a correlation between legacy preferences and increased giving *by alumni* would not satisfy

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352. In asserting that a Preference Premium does exist—that a significant purpose of alumni contributions is to obtain the legacy preferences—the universities will have to tread very carefully. If the donor's "primary motive" in making a donation is to receive a personal benefit, the contribution is not tax deductible. *See, e.g.*, Babilonia v. Commissioner, 681 F.2d 678, 679 (9th Cir. 1982). By asserting a link between legacy preferences and alumni contributions, the universities raise an issue as to the deductibility of those contributions, and as to the universities' own liability for failing to advise the donors of the non-deductibility. *See infra* note 375.

353. *See, e.g.*, Kathrin Lassila, *Why Yale Favors Its Own: Interview with Yale University President Rick Levin,* YALE ALUMNI MAG. Nov–Dec 2004, at 28, *available at* http://www.yalealumnimagazine.com/issues/2004_11/q_a.html. The Dean of Admissions at the University of Virginia, for example, has asserted that legacy alumni in one fundraising campaign donated at a significantly higher rate and gave an average of $34,800 each, compared to an average gift of only $4,100 from non-legacy alumni. *See* SCHMIDT, *supra* note 2, at 29. Evidence from one fundraising campaign is not probative, and on its face this anecdotal evidence suggests that a few very large donations skewed the results.

354. *See* Letter and Enclosure: Statement of Findings, Compliance Review 01-88-6009 from Thomas J. Hibino, Acting Reg'l Director of U.S. Dep't of Educ., Office for Civil Rights, to Derek Bok, President of Harvard Univ., *supra* note 20. At the request of an Asian American applicant, the Department's Office for Civil Rights ("OCR") investigated Harvard's legacy preference policy. The OCR found that the policy had the effect of awarding the equivalent of thirty-five additional SAT points (1600-point scale) to legacy applicants, *id.* at 37 (Statement of Findings), and had a significant adverse impact on Asian Americans, who constituted 15.7% of applicants but only 3.5% of legacy applicants, *id.* at 35; *see generally* KARABEL, *supra* note 2, at 506.

355. *See* Scott Jaschik, *Doubts Are Raised About U.S. Inquiry on Harvard Policies*, CHRON. HIGHER EDUC. Feb. 6, 1991, at A1; *see generally* KAHLENBERG, *supra* note 33, at 234 n.75. Despite the findings of disparate impact and the absence of a viable justification, the OCR nevertheless concluded that the preferences were lawful, noting that they were longstanding and not unique to Harvard. Letter and Enclosure: Statement of Findings, Compliance Review 01-88-6009 from Thomas J. Hibino, Acting Reg'l Director of U.S. Dep't of Educ., Office for Civil Rights, to Derek Bok, President of Harvard Univ., *supra* note 20, at 40; *see also* Jasichik, *supra* (OCR spokesman giving explanation); *see generally* KARABEL, *supra* note 2, at 505. "White-wash" is not too strong a term to describe the OCR's performance.

the universities' burden. Alumni donations typically account for only about twenty-eight percent of private giving to universities.[356] Some of the seventy-five percent of Americans who oppose legacy preferences presumably withhold or reduce their donations as a result of the preferences.[357] The universities' onus, therefore, is to prove that elimination of the preferences would cause *overall net* donations, not just donations from alumni, to decrease.

On the broadest view, it seems highly unlikely that legacy preferences have any substantial positive effect on university revenues. A recent study suggests that, to the extent that alumni with children give more than do alumni without children, they do so not because they are grateful for legacy preferences, but because they believe (without any evidence) that the donations themselves will influence the universities to admit their children.[358] Increased donations are temporally clustered around the time of the admissions decision and stop soon after that decision is made.[359]

Other aspects of the study confirm that legacy preferences are unlikely to positively affect private giving. Among alumni contributions, the top one percent of gifts account for approximately seventy percent of the total dollar value.[360] Alumni who make gifts of that magnitude are not dependent on legacy preferences to get special consideration for their children. Thus, only thirty percent of alumni gifts, and only 8.4% of total private gifts, are potentially positively

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

357. *See supra* text accompanying note 28; *see also* Op-Ed., *End Legacy Preference*, HARVARD CRIMSON, Dec. 13, 2006, *available at* http://www.thecrimson.com/article.aspx?ref=516360 (stating that the practice of legacy preferences "is on its face unfair" and urging the University to take the "moral high ground" and end it); Sam Post, *Fix Admissions by Trashing the Legacy Admit*, YALE HERALD, Oct. 13, 2006, *available at* http://www.yaleherald.com/article.php?Article=4921. There is apparently at least one organized effort to withhold contributions as a protest against legacy preferences. *See* GOLDEN, *supra* note 12, at 258.

358. *See* Jonathan Meer & Harvey S. Rosen, *Altruism and the Child-Cycle of Alumni Donations*, 29–30 (CEPS, Working Paper No. 150, 2007). Importantly, there is no reason to believe that this phenomenon would be affected by the elimination of the legacy preference. Alumni parents who believe, without any evidence, that their increased donations will positively affect their child's application can continue harboring that belief after the legacy preferences are eliminated.

359. *Id.*

360. *Id.* at 8.

influenced by legacy preferences. The same study showed that fifty-three percent of the children of alumni applied to their parent's alma mater.[361] Lifetime giving was elevated among the parents of those who applied, with forty-eight percent of their giving attributable to an expected effect on the admittance decision, and fifty-two percent attributable to altruism.[362] Thus, even if the non-altruism portion were attributable to the legacy preference rather than an expected effect on the decision, only 6.1% of alumni giving, and only 1.7% of total private giving, would be potentially positively affected by legacy preferences.[363] Any positive effect would then be netted against any negative effect on giving by non-alumni and by conscientious alumni.

In order to test the conclusion that legacy preferences likely have no substantial positive effect on private giving, we compiled a database of the top seventy-five national universities[364] and top seventy-five liberal arts colleges[365] as ranked in the 2007 edition of U.S. News & World Report. Of these 150 schools, we were able to confirm that 102 grant legacy preferences and seventeen do not; of the latter, eight stopped granting legacy preferences within the past fifteen years. The database includes the alumni giving rates (percentage of alumni who make a contribution of any amount), the amount of revenue received from private gifts and contracts, and a host of other variables, for each year from 1992 to 2006.[366] Data on private gifts was not readily

361. *Id.* at 13.

362. *Id.* at 24.

363. Alumni gifts other than the top one percent equal thirty percent of alumni contributions; approximately eighty percent of the U.S. population ever have children, JANE LAWLER DYE, FERTILITY OF AMERICAN WOMEN: JUNE 2004 tbl.6, *available at* http://www.census.gov/prod/2005pubs/p20-555.pdf. Lifetime contributions are elevated among the fifty-three percent of alumni whose children apply to their alma maters; and forty-eight percent of these contributions are not attributable to altruism. The result is that 6.1% of alumni contributions are potentially positively affected by legacy preferences, and alumni giving typically accounts for twenty-eight percent of total private giving.

364. The database is available at Steve D. Shadowen, et al., *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 53 (2009), http://law.scu.edu/lawreview/legacynationalcolleges.cfm.

365. The database is available at Steve D. Shadowen, et al., *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 53 (2009), http://law.scu.edu/lawreview/legacyliberalarts.cfm.

366. The alumni giving rates were obtained from U.S. News & World Report,

available, so a potential weakness in the database is that it includes private gifts *and contracts* as a single data point.[367]

We used regression analyses to determine whether certain variables were correlated with greater private gifts and contracts or greater alumni giving rates.[368] The data show positive, statistically significant correlations with smaller student body, higher selectivity in admissions (very low acceptance rate), and being a private rather than public university. The data show no statistically significant correlation between legacy preferences and either alumni giving rate or private gifts and contracts:

Table 3. Summary of Regression Results

	Dependent Variable			
	Real Gifts	Real Gifts per Undergrad	Real Gifts per Undergrad (excluding CalTech and MIT)	Alumni Giving Rate
	$R^2 = 0.38$	$R^2 = 0.27$	$R^2 = 0.35$	$R^2 = 0.57$
Intercept	3,089,926	20221.00	8994.97	35.50
	(44,979,401)	(8843)**	(5505)	(6.22)***
Pell grants per undergrad	-1,102	-0.80	-0.94	-0.003**
	(8,398)	(1.65)	(1.02)	(.001)
Number of undergrads	5,259	-0.02	-0.06	-0.0005
	(770)***	(0.15)	(.09)	(.0001)***
Acceptance Rate	-2,262,412	-308.31***	-229.30***	-0.18
	(312,860)***	(61.5)	(38)	(.04)***

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and the data for private gifts and contracts were obtained from the U.S. Department of Education.

367. This is a strength rather than a weakness if legacy preferences have a negative influence on the awarding of grants and contracts.

368. The data show little year-to-year variation in the independent variables. We therefore consolidated the yearly data into a single record per school (except where a school changed its legacy policy, in which case we created pre- and post-change records for the school) in order to avoid biasing the standard errors down and thus yielding artificially large t values. Many schools changed their accounting methods in 2001, so we ran the regressions for the period 1992–2006 and separately for 2001–2006. We found no significant differences in the results. The results shown in Table 3 are for the period 1992–2006.

Table 3. Summary of Regression Results (*continued*)

	Dependent Variable			
	Real Gifts	Real Gifts per Undergrad	Real Gifts per Undergrad (excluding CalTech and MIT)	Alumni Giving Rate
Private / Public	62,546,491 (19,358,149)***	7958.33 (3806)**	7106.09 (2347)***	5.30 (2.68)**
Legacy Preference	19,781,513 (18,016,919)	-7490.28 (3542)**	159.38 (2263)	2.30 (2.49)

NOTES:
N = 141 for all regressions except where Cal Tech and MIT are dropped.
Standard errors in parentheses
* significant at the 0.10 level
** significant at the 0.05 level
*** significant at the 0.01 level

Of the eight universities that have recently terminated legacy preferences, seven did not experience any decline in donations/contracts after terminating the preferences. The average annual private gifts/contracts, before and after termination, are shown here in real (2000) dollars:

Table 4. Average Annual Private Gifts/Contracts Before and After Termination

	Before ($)	After ($)
UC Berkley	99,369,684	134,041,509
UC Davis	46,444,722	48,774,022
UC Irvine	38,003,929	39,378,062
UCLA	130,100,843	217,991,658
UC San Diego	76,138,021	81,531,122
UC Santa Barbara	14,555,300	27,514,500
U. of Georgia	43,563,034	64,975,799
Texas A&M	79,284,555	51,707,215

The only school that experienced a decrease, Texas A&M, started experiencing a decline years before it announced the end of legacy preferences.[369] Other top Texas universities, none of which changed their preference policies during the

369. Texas A&M began experiencing a decline in gifts/contracts in 2001, but did not eliminate legacy preferences until 2003.

relevant time, experienced a similar decline at the same time, apparently all resulting from an economic slow-down.[370]

We also found data showing that alumni of CalTech, which grants no preferences, donated $71 million in 2007, versus $77 million donated in 2006 by alumni of legacy-granting MIT.[371] Given that MIT has more than four times the undergraduate population of CalTech, these figures underscore the absence of any positive correlation between private giving and legacy preferences.

The data that is currently publicly available refutes the received wisdom that the preferences result in increased private giving. Comprehensive and detailed data can be gathered in litigation against the universities. We surmise that these schools will find, as did Harvard, that the data "is not something that would lend itself to statistical analysis" that favors them.

D. Legacy Preferences Are Not Narrowly Tailored to the Goal of Increasing Revenue.

Finally, even if raising revenue from the beneficiaries of preferences were a cognizable justification that was supported by facts, the universities would still have to show that the preferences are a "narrowly tailored" means of raising revenue. This is not a case, like *Grutter,*[372] where individualized decision-making satisfied the requirement of narrow tailoring because the goal was student body diversity. The universities' purported interest here is simply in raising revenue, which they can easily do without discriminating based on lineage. They can obtain additional government funding, use their endowments, increase private fundraising

370. Table 5. Average Private Gifts and Contracts Per Undergraduate

	1991–2000 ($)	2001–2005 ($)
Baylor	3,614	2,627
Rice	25,383	20,345
A&M	2,432	1,371
UT	1,940	2,080
SMU	11,454	6,448

371. *See* MIT Alumni Association, *MIT Reports to the President (2005–2006)*, http://web.mit.edu/annualreports/pres06/24.00.pdf; CalTech, Annual Report (2006–2007), http://www.giving.caltech.edu/CA/documents/2007%20annual%20report.pdf.

372. Grutter v. Bollinger, 539 U.S. 306 (2003).

efforts, and cut administrative expenses. It is exceedingly unlikely that the elite institutions that use legacy preferences face such "direly limited [resources] that some form of 'education triage' might be deemed a reasonable (assuming that it were a permissible) response."[373] Indeed, our regression analyses show that if eliminating legacy preferences caused schools to lose any private gifts, the reduction was offset by an increase in grants and contracts.[374]

The universities can raise revenue through the admissions process itself. A few large contributions account for seventy percent of total alumni donations.[375] The universities can make these few admissions spots generate revenue to account for *100%* (and likely more) of current alumni giving by simply selling the few spots on the open market. By expanding the market to whom the seats are sold, requiring that the purchase price clear the market, and offering guaranteed admission rather than a mere preference, the universities will drastically increase the revenues generated from the seats. All but these few spots can then be filled based on merit.

Selling the seats on the market would also end the intolerable current policy which forces the victims of legacy preferences to pay for them. The universities' argument is that legacy preferences are valuable benefits bestowed on all of their alumni, some of whom will make larger donations in gratitude. The alumni/donors take *tax deductions in the full amount of their donations, without reduction for the value of the Preference Premium.* Thus, the non-legacy applicants, who are also taxpayers, are subsidizing the preferences that are denied to themselves and given to their competitors. Selling admission spots on the open market would have the added virtue of eliminating this tax gambit.[376]

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373. Plyler v. Doe, 457 U.S. 202, 229 n.25 (1982).

374. *See supra* text accompanying note 368.

375. Meer & Rosen, *supra* note 358, at 8.

376. A payment to a university or other tax-exempt organization is deductible under Section 170 of the Tax Code, 26 U.S.C. § 170(b)(1)(A)(iv), if the voluntary transfer is made with no expectation of procuring a financial benefit commensurate with the amount of the transfer. *See* 26 C.F.R. § 1.170A-1(c)(5) (2007). The IRS has ruled that a payment is not deductible when it is made by an applicant's parent to a university that admits a significantly larger percentage of applicants whose parents make contributions. Rev. Rul. 83-104, 1983-2 C.B. 46. The universities purport to avoid this ruling by arguing that the granting of the legacy preference is not tied *directly* to the receipt of the

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Legacy preferences undermine, rather than serve, the "diversity" goal that justifies preferences in favor of racial minorities. The universities are therefore driven to try to justify legacy preferences as a means of raising revenue. But that justification is not legally cognizable, and, if it were, the available data suggests that the schools could not sustain their burden of proving that the preferences result in increased net donations or revenue. And other available means of raising revenue avoid the unlawful discrimination and also avoid the obnoxious feature of forcing the victims of legacy preferences to subsidize them.

CONCLUSION

Legacy preferences offend an American egalitarian tradition that stretches back to the founding. They are unlawful, rather than merely shameful, because the 39th Congress enacted the principle against hereditary distinctions into positive law. That principle had been an essential basis of the Revolution and was reflected in both the Declaration's assertion of the equality of all (white) men and in the egalitarian provisions of the 1787 Constitution, including the guarantee of a republican form of government, the ban on titles of nobility, and the "corruption of blood" clauses. The Republicans of the 39th Congress who were re-founding the nation consciously reached back to this principle, broadened it to encompass a ban on discrimination based on inherited race, and enacted it into positive law. The

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parent's contribution. The preferences are granted to the children of *all* alumni, regardless of whether their parents make contributions; so parents do not make a donation with the "expectation" of receiving preferences—they are already entitled to them.

If a court in future civil rights litigation concludes that legacy preferences would not be lawful absent the increased contributions, then the tax analysis changes substantially. It would then be clear that, regardless of whether *a particular parent* has an expectation that the contribution will result in a preference, all alumni parents would know that their *collective* increased payments in fact are responsible for the preferences. The language of Section 170 is easily broad enough to deny the deductions under these circumstances. The universities would then have an obligation to advise all alumni donors that not all of their contributions are tax deductible. Rev. Rul. 67-246, 1967-2 C.B. 104; *see also* INTERNAL REVENUE SERV., PUB. 526, CHARITABLE CONTRIBUTIONS (2007), *available at* http://www.IRS.gov/pub/irs-pdf/p526.pdf.

ban on discrimination based on heredity is the cornerstone of both the 1866 Act's guarantee of the "same right" to contract and the Fourteenth Amendment's guarantee of the equal protection of the law.

Legacy preferences are presumptively unlawful because they expressly grant and withhold an important benefit based on heredity—on the identity, status, or accomplishments of the applicant's parents. The most frequently invoked justification for the preferences, i.e., that they help generate revenues for the universities, is not legally cognizable. The beneficiaries of all unlawful discrimination presumably are willing to pay for the privilege—the fact that a privilege has value to its recipients tells us nothing about whether it is warranted. And if the asserted justification were cognizable, the universities likely cannot sustain their burden of proving that the granting of legacy preferences results in a net increase in revenue or donations.

Affirmative action in favor of racial minorities in college admissions, designed (depending on one's view) to help compensate for 400 years of oppression, help build and sustain an African American and Hispanic middle class, and expose college students to a diversity of cultures and views, is subject to strict scrutiny under the Fourteenth Amendment. It would be absurd if legacy preferences in college admissions—affirmative action in favor of the nation's elites—were not also subject to strict scrutiny. Unlike preferences in favor of racial minorities, however, legacy preferences cannot survive the strict scrutiny to which they are subject.

Some people may conclude in good faith that the urgent and unquestionable benefits of preferring historically oppressed racial minorities in college admissions are outweighed by the principle against making distinctions based on lineage. It seems impossible, however, for anyone to hold that position in good faith while also supporting legacy preferences. Yet public universities in three States continue to grant legacy preferences even though they do not give preferences to racial minorities.[377] This is where the logical,

377. The schools are the University of Florida, the University of Michigan, and the University of Washington. Public universities in California, Georgia and Texas have eliminated affirmative action for both racial minorities and elites.

legal, and moral disconnect between the treatment of affirmative action for racial minorities and that for elites is most acute.

Consequently, this is where significant, sustained litigation against legacy preferences should begin.[378] To conclude that legacy preferences are lawful, a federal judge would have to ignore substantial Supreme Court precedent, backed by a long and illuminating legislative record. Especially in the context of a shameful State policy of denying inherited preferences to historically oppressed racial minorities while granting those preferences to the elite, why would a judge want to do that?

378. As noted, legacy preferences are unlawful regardless of whether a university has affirmative action for racial minorities. We merely suggest that as a matter of tactics the series of litigations against legacy preferences should begin with a case against a public university that has affirmative action for elites but not for racial minorities.