NATIONAL REVIEW

Conservatives Should Reject Unconstitutional Legacy Preferences

Thomas A. Berry

July 11, 2023

LATE last month, the Supreme Court held that the race-based admissions criteria used by the University of North Carolina violated the 14th Amendment. Those who view affirmative action as unconstitutional discrimination based on immutable traits will celebrate this decision as a victory for meritocracy.

But even after this decision, many public universities will continue to bestow preferential admissions treatment based on a different type of immutable trait. At public universities that use "legacy preferences," an applicant's admission can hinge on whether that applicant happened to be born to an alumnus of the school. Conservatives, libertarians, and originalists should not turn a blind eye to this ongoing and unconstitutional discrimination.

Legacy preferences at public universities violate the 14th Amendment for a simple reason: They discriminate between applicants on the basis of an "accident of birth," namely the identity and alumni status of the applicant's parents. The history of the 14th Amendment shows that it was understood to put an end to this type of state discrimination based on parentage at the time of its adoption.

Representative John Bingham was the primary drafter of Section 1 of the amendment, which guarantees both "the equal protection of the laws" and respect for the "privileges or immunities" of citizens. Bingham had previously praised the Constitution's ban on any "Title of Nobility" as signaling that "all are equal under the Constitution" and that "no distinctions should be tolerated, except those which merit originates." Bingham also noted that the Fifth Amendment furthered this republican value by guaranteeing "Due Process" of the law to all persons, with "no distinction either on account of complexion or birth." One of Bingham's core motivations for drafting the 14th Amendment was to extend these principles to state governments and ensure that state laws would "be no respecter of persons."

Senator Charles Sumner, another key proponent of the 14th Amendment, had cited the Constitution's guarantee of a "Republican Form of Government" as support for a Senate resolution banning any "Oligarchy, Aristocracy, Caste, or Monopoly." Sumner had also condemned discrimination against foreigners, because it was based on "the accident of birth." After the 14th Amendment was enacted, Sumner considered these principles of equality

enforceable against the states. He convincingly argued that the amendment granted Congress the power to ensure that all citizens were "entitled without any discrimination to the equal enjoyment of all institutions . . . created by law."

The 14th Amendment was thus understood to prohibit state discrimination on the basis of birth. And the Supreme Court has recognized this principle in several contexts. A plurality opinion summing up the Court's precedents noted a common theme of many unconstitutional distinctions: They were each based on "an immutable characteristic determined solely by the accident of birth."

In perhaps the most analogous cases, the Court has struck down multiple laws treating children born in wedlock more favorably than children born out of wedlock. In one case, the Court noted that "no child is responsible for his birth" and that the law at issue was "contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing." In another case, the Court reaffirmed that such laws are unfair and unconstitutional because children "can affect neither their parents' conduct nor their own status."

More broadly, the Court has invalidated several laws that discriminated on the basis of parentage and heritage because they assigned legal rights based on a *parent*'s status. Striking down a Hawaii law that limited the franchise in certain elections to those with Native Hawaiian heritage, the Court affirmed 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." The Court similarly invalidated a California law that treated property transfers from a parent to a child with more suspicion if the parent happened to be ineligible for U.S. citizenship. The Court held that "the rights of a citizen may not be subordinated merely because of his father's country of origin."

In legal scholarship, the arguments against legacy preferences have received surprisingly little attention, outside of a thorough and convincing article by legal scholars Steve Shadowen, Sozi Tulante, and Shara Alpern. Hardly any legal challenges had been brought until one filed just last week. Conservative silence on legacy admissions has earned charges of hypocrisy. Even Justice Clarence Thomas once wrote that the equal-protection clause does not prohibit "unseemly legacy preferences."

In fact, the constitutional case against legacy admissions is strong. Conservatives and libertarians who are truly committed to fair admissions should call out legacy admissions for their inherent unfairness, as has my colleague Ilya Somin — and originalists should support constitutional challenges to the practice. Being judged based on a parent's accomplishments rather than one's own is incompatible with the republican values of equality that the 14th Amendment enshrined.

Thomas A. Berry is a research fellow at the Cato Institute's Robert A. Levy Center for Constitutional Studies and the editor in chief of the Cato Supreme Court Review.