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Legacy Preferences, Citizenship, Migration, and the Implications of a Constitutional Ban on Hereditary Privilege

Ilya Somin

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In my last post about legacy preferences in higher education, I argued for their abolition, but expressed skepticism about claims that they are illegal under current civil rights laws. I still think they are likely legal under current precedent. But it's worth noting that scholars and legal commentators such as Indiana University law professor Gerard Magliocca and my Cato Institute colleague Thomas Berry have put forward strong arguments that legacy preferences at public institutions are banned by the Fourteenth Amendment. They key idea is that state-created hereditary privileges are at least presumptively forbidden.

I have previously mentioned Prof. Carlton Larson's 2006 article arguing that legacy preferences violate the Constitution's prohibition on titles of nobility.

I am not fully convinced these arguments are right. But if they are, the principle has potentially radical implications for other policies, particularly the hereditary aristocracy of citizenship, under which the rights to live and work in the United States are largely reserved for children of US citizens and those who had the good fortune to be born on US soil.

Here's Berry:

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."

Berry cites additional original-meaning evidence, as well. And there is much more in this 2009 law journal article by Steve Shadowen, Sozi Tulante, and Shara Alpern, on which Berry in part relies.

Magliocca's Prawfsblawg post focuses on the Supreme Court's 1947 decision in *Kotch v. Board of River Port Pilot Commissioners*, which narrowly upheld a Louisiana law that had the effect of restricting some types of pilot licenses to relatives of current pilots. But the Court suggested other state-granted hereditary privileges might well be unconstitutional:

Louisiana required that ships entering New Orleans port and the Mississippi have a local licensed pilot to avoid shallow water and underwater obstacles. (This is a longstanding rule for maritime commerce.) State law provided neutral criteria for getting a pilot license that included an apprenticeship, but in practice pilots would almost always take only their relatives as pilot apprentices. Some wannabe pilots who could not get a license challenged this practice on equal protection grounds.

The Supreme Court (in 1947) rejected this claim by a 5-4 vote. Justice Black wrote for the Court and leaned heavily on the idea that pilot regulation was a traditional state function and that pilotage was "a unique institution and must be judged as such." Basically, he said that a pilot needed local knowledge and that this need for personalized knowledge was (or could be) rationally related to picking mainly relatives of existing pilots. The Court went out of its way, though, to say that this deference might not apply to other professions or business that used family ties to make selections.

Justice Rutledge dissented and said: "The result of the decision therefore is to approve as constitutional state regulation which 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 guaranty against denial of the equal protection of the laws. The door is thereby closed to all not having blood relationship to presently licensed pilots." He added: "The discrimination here is not shown to be consciously racial in character. But I am unable to differentiate in effects one founded on blood relationship."

If any of these arguments is valid, it obviously can't be limited to legacy preferences, but must also apply to other state-created hereditary privileges. By far the most significant of these is what I have called the hereditary aristocracy of citizenship. Under this longstanding legal regime—which most of us take for granted—only those lucky enough to have a US-citizen parent or be

born on American soil have a presumptive right to live and work in the United States. For almost everyone else, that right is only available if the federal government chooses to grant it. And, for the vast majority of would-be immigrants, there is little or no chance of ever getting it (especially those who lack close family ties to current US citizens).

Of course a small percentage of would-be immigrants attain citizenship or permanent resident status through pathways made available at the discretion of the federal government. But that no more eliminates the hereditary privilege of citizenship than traditional hereditary aristocracy was eliminated by virtue of the fact that kings would occasionally elevate a commoner to the nobility. The same point applies to arguments that immigration restrictions aren't really based on heredity, because people can sometimes overcome them meeting occupational requirements and the like. So long as similar requirements aren't imposed on the native-born, hereditary privilege is still very much present. Moreover, such work visas are extremely difficult or impossible to get, even for most who meet the relevant qualifications.

The aristocracy of citizenship is a form of hereditary privilege with far more dire consequences than being disadvantaged in admissions to selective universities. Many of those excluded by the hereditary privilege of citizenship are thereby consigned to a lifetime of oppression and poverty in their countries of origin. And they end up in this situation largely because of "accident of birth," as Charles Sumner put it in a speech quoted in Berry's article. There are also severe consequences for current US citizens, who are denied the economic and social benefits of interacting with migrants.

If the Constitution categorically—or even presumptively—bans state-imposed hereditary privileges, than the privileges associated with citizenship cannot be excluded. Indeed, they are a vastly more egregious case than legacy preferences at state universities.

One possible response to this argument is that birthright citizenship is itself required by the Constitution, in Section 1 of the Fourteenth Amendment, which grants citizenship to all persons "born … in the United States and subject to the jurisdiction thereof." This provision was, of course, enacted in response to the notorious passages in the 1857 *Dred Scott* ruling, which held that blacks could not be citizens of the United States.

But, while the Citizenship Clause requires the government to grant citizenship to people born in the United States, it does *not* require *denying* it to would-be immigrants. Still less does it require denying the latter the right to live and work in the United States. These rights could potentially be decoupled from citizenship and presumptively granted to anyone willing to come and exercise them, subject to nondiscriminatory constraints (e.g.—restrictions on espionage, terrorism, and the like). Access to citizenship could also be liberalized in a variety of ways.

Moreover, current law goes beyond birthright citizenship (granting citizenship to all born on US soil) by also granting citizenship to all children of US citizens, regardless of place of birth. But even if the grant was limited to those born on US soil, it still makes vital rights dependent on an arbitrary "accident of birth," one in most cases only attainable by being born to a US citizen.

Another possible justification for treating citizenship rules differently from other hereditary privileges is that the relevant text of the Fourteenth Amendment applies only to state governments, while citizenship and immigration law is largely federal. However, the Supreme Court has long held that the Equal Protection Clause's nondiscrimination requirements apply to the federal government, as well – a principle established in the Court's famous 1954 ruling in *Bolling v. Sharpe*, which struck down racial segregation in public schools in the District of Columbia, despite the fact that DC is a federal territory, not a state. While *Bolling* has been criticized by some originalists, few are willing to advocate its reversal and thereby give the federal government a blank check to engage in racial and ethnic discrimination.

If, as Carlton Larson argues, the constitutional case against legacy preferences rests on the Titles of Nobility Clause rather than the 14th Amendment, then it indisputably applies to the federal government—and thus to immigration and citizenship law. Larson suggests, in his article, that there are special justifications for granting citizenship to children of US citizens born abroad because it "would be absurd to suggest that the United States could not grant citizenship to this narrow category without also granting it to every other inhabitant of the globe." But it's far from absurd to suggest that people not lucky enough to be born in the US or children of US citizens, should not be presumptively barred from living and working here, if they wish. Similarly, it's not absurd to suggest that they be allowed a path to citizenship that isn't virtually unattainable for the vast majority of those who might want it. There is a major difference between automatically granting citizenship to vast numbers of foreign-born people who, in most cases, don't even want it (which would indeed be absurd), and eliminating heredity-based bans on living and working in the United States for those who very much do want it.

It could also be argued that the ban on hereditary privilege only applies to people who are already members of the society, which immigrants (by assumption) are not. But nothing in the text of the Titles of Nobility Clause or the relevant provisions of the Fourteenth Amendment (most obviously, the Equal Protection Clause, which protects all "persons") is limited to current members of society or to current US citizens. It's also not clear why "membership" can justly be restricted based on heredity, while other legal rights cannot.

If the ban on hereditary privilege is merely presumptive (subject to something like the "strict scrutiny" applied to racial and ethnic discrimination), rather than absolute, then perhaps some immigration restrictions could be preserved in situations where they are the only way to prevent great harm. I discuss possible scenarios of this type (and various strategies for addressing them) in Chapter 6 of my book *Free to Move: Foot Voting, Migration, and Political Freedom*.

But even if some heredity-based migration restrictions could pass strict scrutiny in extreme situations, the vast majority likely cannot. At the very least, the federal government would have to meet a heavy burden of proof to justify them.

The hereditary aristocracy of citizenship isn't going to be eliminated anytime soon. But if we truly believe state-mandated hereditary privilege is unconstitutional and unjust, we cannot give a pass to what is by far the most significant example of such privilege in modern America. I summarized some of what can be done to mitigate its impact here. Broadly speaking, we should

pursue a combination of expanding access to citizenship and reducing the the extent to which citizen status determines where people are allowed live and work.

If nothing else, when we consider the issue of state-created hereditary privilege in our society, we should stop turning a blind eye to what is by far the biggest example of it.

UPDATE: For those interested, elsewhere I have addressed the related, but distinct issue of whether governments may restrict immigration because nations are analogous to private houses or clubs. I cover this in greater detail in Chapter 5 of my book *Free to Move*.

Ilya Somin is a law professor at George Mason University, B. Kenneth Simon Chair in Constitutional Studies at the Cato Institute, a blogger for the Volokh Conspiracy, and a former co-editor of the Supreme Court Economic Review.