

## INTRODUCTION

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The use of race-based affirmative action in higher education has given rise to hundreds of books and law review articles, numerous court decisions, and several state initiatives to ban the practice. By contrast, surprisingly little has been said or written or done to challenge a larger, longstanding “affirmative action” program that tends to benefit wealthy whites: legacy preferences for children of alumni.<sup>1</sup> Like racial preferences, preferences for legacies can be criticized for being based on ancestry rather than individual merit, yet they offer none of the countervailing benefits of affirmative action, such as remedying past discrimination or promoting educational diversity. (Nor, it turns out, do they boost college fundraising substantially.)<sup>2</sup> The evidence suggests, in fact, that in the early twentieth century, legacy preferences were born of anti-immigrant and anti-Jewish discriminatory impulses.<sup>3</sup>

Legacy preferences also are widespread. Among elite national institutions, almost three-quarters of research universities and virtually all liberal arts colleges grant legacy preferences.<sup>4</sup> While some colleges and universities try to downplay the impact of legacy preferences, calling them “tie breakers” in very close admission calls, the research suggests that their weight is significant. Princeton scholar Thomas Espenshade and colleagues find that, among applicants to

elite colleges, legacy status is worth the equivalent of scoring 160 points higher on the SAT (on a 400–1600 point scale).<sup>5</sup>

To date, however, there have been no state ballot initiatives, only one lower court case, and not a single book-length treatment of the issue.<sup>6</sup> This volume of essays is an effort to begin to remedy the gap in the scholarly literature. Drawing upon a wide range of academics, journalists, and legal practitioners, this book sketches the origins of legacy preferences, examines the philosophical issues they raise, outlines the extent of their use today, studies their impact on university fund-raising, and reviews their implications for civil rights. In addition, the book outlines two new theories challenging the legality of legacy preferences, examines how a judge might review those claims, and assesses public policy options for curtailing alumni preferences.

## WHY LEGACY PREFERENCES ARE VULNERABLE AND WHY THEY MATTER

One threshold question for a volume such as this is whether a policy that has been around for almost a hundred years—no matter how unfair—is ever going to change. The evidence in this book suggests that legacy preferences are in fact vulnerable. Over the past decade or so, sixteen leading institutions (including Texas A&M; the University of Arizona; the University of California, Berkeley; the University of California, Los Angeles; and the University of Georgia) have abandoned legacy preferences, joining institutions such as the California Institute of Technology (Caltech) and Cooper Union, which never employed them. Moreover, in the past year or so, plans have begun to challenge legacy preferences in federal court.<sup>7</sup> A serious legal challenge based on new claims has a very real possibility of succeeding on the merits, for the reasons outlined in Chapters 7, 8, and 9 of this book. At a minimum, litigation will produce, through the legal discovery process, greater understanding of the workings of legacy preferences, illuminating a practice that already is deeply unpopular with the American public. (One poll found Americans oppose legacy preferences by 75 percent to 23 percent).<sup>8</sup> Opposition to legacy preferences over the years has spanned the political spectrum, from

Senators Ted Kennedy and John Edwards and Representative George Miller on the left, to George W. Bush and Senators Charles Grassley and Bob Dole on the right.<sup>9</sup> A court case shining light on the issue could provide a political catalyst, particularly in a moment of profound populist anger in the country toward practices that unfairly advantage elites.

A parallel set of legal and political developments involving affirmative action further threatens the future of legacy preferences in university admissions. Race-based affirmative action policies are under attack from both popular initiatives and the courts. Justice Anthony Kennedy, who dissented in the Supreme Court's 2003 case, *Grutter v. Bollinger*, which affirmed the use of race in law school admissions at the University of Michigan, is the new swing vote on the Court. A new case challenging racial preferences at the University of Texas very well could provide the U.S. Supreme Court an opportunity to cut back on racial preferences significantly.<sup>10</sup> If this happens, legacy preferences will come under new pressure as well. Recent history suggests that preferences for the children of wealthy alumni are vulnerable in a post-affirmative action environment. After California banned racial preferences by voter referendum, for example, it soon moved to eliminate legacy preferences in the University of California system.<sup>11</sup> The same was true at other institutions. If change comes to affirmative action programs, legacy preferences may well be swept aside too.<sup>12</sup>

Another threshold question is whether legacy preferences matter. Preferences for the children of alumni are concentrated in selective institutions and may determine whether students are accepted at particular institutions, but not whether they will attend college at all. So how much does it matter if a given student goes to a more or less elite school?

The evidence suggests that going to a selective college or university does in fact provide considerable advantages. For one thing, wealthy selective colleges tend to spend a great deal more on students' education. Research finds that the least selective colleges spend about \$12,000 per student, compared with \$92,000 per student at the most selective schools.<sup>13</sup> In addition, wealthy selective institutions provide much greater subsidies for families. At the wealthiest 10 percent of institutions, students pay, on average, just 20 cents in fees for every

dollar the school spends on them, while at the poorest 10 percent of institutions, students pay 78 cents for every dollar spent on them.<sup>14</sup> Furthermore, selective colleges are quite a bit better at retention. If a more-selective school and a less-selective school enroll two equally qualified students, the more-selective institution is much more likely to graduate its student.<sup>15</sup> Moreover, future earnings are, on average, 45 percent higher for students who graduated from more-selective institutions than for those from less-selective ones, and the difference in earnings is widest among low-income students.<sup>16</sup> And according to research by political scientist Thomas Dye, 54 percent of America's top corporate leaders and 42 percent of governmental leaders are graduates of just twelve institutions.<sup>17</sup> For all these reasons, legacy preferences matter.

## THE SHAPE OF LEGACY PREFERENCES IN THE UNITED STATES

This book begins with a philosophical discussion by Michael Lind of the New America Foundation outlining the ways in which legacy preferences are in direct conflict with bedrock principles of the nation's founding as a democratic republic. As Lind notes in Chapter 2, Thomas Jefferson sought to promote a "natural aristocracy" based on "virtue and talent," rather than an "artificial aristocracy" based on wealth.

In particular, Jefferson envisioned a society in which hereditary privileges of the Old World—in politics, the economy, and in education—were abolished in favor of structures that support merit and talent. In the political realm, he outlined plans to set up an elected Senate very different from the hereditary House of Lords. In the economic sphere, he advocated abolishing British practices of primogeniture and entails, which were designed to keep estates intact. And in education, Jefferson called for universal common schools and founded the publicly funded University of Virginia as an institution to draw upon the most talented students from all walks of life.

A system of legacy preferences, Lind writes, "is at odds with the fundamental design of a democratic republic such as the United

States of America.”<sup>18</sup> In politics, legacy preferences artificially aid alumni children of lesser talents, undermining the “natural aristocracy” that Jefferson hoped would lead the nation. Given the importance of higher education in today’s economy, legacy preferences undermine Jefferson’s efforts in the agricultural economy of his day to prevent a “hereditary landed aristocracy.” And in the realm of education, legacy preferences—including at Jefferson’s beloved University of Virginia—directly undercut the meritocracy Jefferson sought to construct. “By reserving places on campus for members of the pseudo-aristocracy of ‘wealth and birth,’” Lind writes, “legacy preferences introduce an aristocratic snake into the democratic republican Garden of Eden.”<sup>19</sup> In a profound sense, by disrupting the ideal that “each generation starts life afresh,” legacy preferences can truly be considered un-American.

This book then turns in Chapter 3 to a history of legacy preferences and privilege written by Peter Schmidt, a veteran reporter at the *Chronicle of Higher Education*. Schmidt, who is also the author of *Color and Money: How Rich White Kids Are Winning the War over College Affirmative Action*, cites the ugly origins of legacy preferences following World War I as a reaction to an influx of immigrant students, particularly Jews, into America’s selective colleges. As Jews often out-competed traditional constituencies on standard meritocratic criteria at selective institutions, universities adopted Jewish quotas. When explicit quotas became hard to defend, universities began to use more indirect means to limit Jewish enrollment, including considerations of “character,” geographic diversity, and legacy status.<sup>20</sup>

Legacy preferences took firmer root during the Great Depression, as universities believed that favoring alumni children might boost revenues.<sup>21</sup> Efforts to favor legacies came under attack in the 1960s and 1970s at places such as Yale University, which were seeking to democratize admissions, opening the doors to women, people of color, and financially needy students. But alumni ire from the likes of conservative writer William F. Buckley, Jr., effectively ended Yale’s efforts to curtail legacy preferences.<sup>22</sup>

The advent of the influential *U.S. News & World Report* university rankings in the 1980s further solidified the place of alumni preferences, Schmidt contends, by considering the share of alumni

who donate as a factor in the rankings.<sup>23</sup> Likewise, reductions in state financial support to public universities may have placed pressure on selective public institutions to adopt alumni preferences in the belief that doing so would raise further revenue.<sup>24</sup>

The biggest threats to legacy preferences, Schmidt argues, have come where affirmative action was banned. “Many minority lawmakers and civil-rights activists who had been willing to tolerate legacy preferences so long as colleges also used affirmative action would become staunchly opposed to legacy preferences where affirmative action was ended,” he notes.<sup>25</sup> Legacy preferences were eliminated, Schmidt observes, following bans on affirmative action not only at the University of California, but also at the University of Georgia and Texas A&M.<sup>26</sup>

In Chapter 4, Daniel Golden, of Bloomberg News, provides an analytic survey of legacy preferences today. Golden won a Pulitzer Prize for his groundbreaking series of *Wall Street Journal* articles on legacy preferences and other advantages provided to privileged college applicants. He later elaborated on those articles in a 2006 book, *The Price of Admission*. Here, Golden extends that research and updates it.

If, as Lind argues, legacy preferences are in some sense un-American, Golden points out that they are also uniquely, and ironically, American. Universities in other nations, for the most part, do not provide legacy preferences in college admissions. Legacy preferences are “virtually unknown in the rest of the world”; they are “an almost exclusively American custom.”<sup>27</sup>

In the United States, Golden finds, legacy preferences are pervasive—used by almost 90 percent of top universities.<sup>28</sup> And they make a real difference in admissions. William Bowen of the Mellon Foundation and colleagues found that, within a given SAT score range, being a legacy increased one’s chances of admission to a selective institution by 19.7 percentage points.<sup>29</sup> That is to say, a given student whose academic record gave her a 40 percent chance of admission would have nearly a 60 percent chance if she were a legacy. Universities are quite open about the advantages provided to legacies. An admissions officer at the University of Miami told Golden, “Everybody gets the red carpet treatment when they come through admissions; for a legacy student, we’ll vacuum the carpet, we’ll get down and pick up the lint.”<sup>30</sup>

The children of alumni generally make up 10 percent to 25 percent of the student body at selective institutions, Golden finds, and the proportion often varies little, suggesting, he says, “an informal quota system.” (By contrast, at Caltech, which lacks legacy preferences, only 1.5 percent of students are children of alumni.)<sup>31</sup> As competition for university admission has increased, the power of legacy preferences has had to increase in order to maintain legacy representation. For example, in 1992, Princeton accepted legacy applicants at 2.8 times the rate of other candidates, but by 2009, 42 percent of legacies were admitted, more than 4.5 times the rate of non-legacies.<sup>32</sup>

Given the break in admissions provided to legacies, it is not surprising that, once on campus, they perform less well than students of similar demographic backgrounds who do not receive preference. Golden reports that a study by Princeton’s Douglas Massey and Margarita Mooney of twenty-eight selective colleges and universities found under-performance by legacy admits was particularly pronounced when the gap between legacy SAT and the institution’s SAT average was wide. The authors also found that “in schools with a stronger commitment to legacy admissions, the children of alumni were more likely to drop out.”<sup>33</sup>

But are legacy preferences justified as a necessary evil to raise financial resources for colleges and universities? As a percentage of private donations, alumni giving is indeed substantial, totaling \$8.7 billion in fiscal year 2008, accounting for 27.5 percent of private giving and coming in just behind foundation giving (of \$9.1 billion).<sup>34</sup> (As a percentage of overall university budgets, by contrast, alumni donations account for just 5.1 percent of total expenditures at leading universities.)<sup>35</sup> While in theory legacy preferences go to all alumni equally, most people assume that giving counts in the weight provided such preferences.<sup>36</sup> One official at a highly selective institution told Golden that the university grants a larger preference to alumni donors. Because the cost of educating a student exceeds tuition, all students can be thought of as “trough drinkers.” He said, “Just because you drank at a trough that others filled does not entitle your child to drink at the same trough. There are trough-fillers and there are just drinkers. Those two people are treated differently.”<sup>37</sup>

Having said that, the research connecting legacy preferences and alumni giving is remarkably thin, and new research in this volume

raises serious questions about the link. Golden begins by noting that several colleges and universities that do not employ legacy preferences nevertheless do well financially. Caltech, for example, raised \$71 million in alumni donations in 2008, almost as much as the Massachusetts Institute of Technology (MIT, \$77 million), even though MIT, which does provide legacy preference, is five times the size and has many more alumni to tap.<sup>38</sup> Berea College, in Kentucky, favors low-income students, not alumni, yet has a larger endowment than Middlebury, Oberlin, Vassar, and Bowdoin colleges. And Cooper Union in New York City does not provide legacy preference, but has an endowment larger than that of Bucknell, Haverford, or Davidson.<sup>39</sup> In terms of school quality, it is intriguing to note that, among the top ten universities in the world in 2008, according to the widely cited Shanghai rankings, are four (Caltech, the University of California at Berkeley, Oxford, and Cambridge) that do not employ legacy preferences.<sup>40</sup>

One interesting study by Jonathan Meer of Stanford and Harvey S. Rosen of Princeton finds that giving at one unnamed private non-profit university increased as children of alumni entered high school, but it also found that alumni giving “fell off a cliff” when a child was rejected.<sup>41</sup> The message sent—that even with a preference, your child was not good enough—may be particularly hard for alumni to take.<sup>42</sup> Indeed, they may be even more angered by rejection than would be the case had they not had their expectations raised by the existence of legacy preferences.<sup>43</sup> Significantly, as universities become increasingly selective, the proportion of alumni children rejected may increase, thereby angering donors. As a result, it is not clear that the net effect of legacy preferences on donations is positive, and Meer and Rosen make no claim that legacy preferences increase overall giving.<sup>44</sup>

To add to all this suggestive research, Chapter 5 includes a new rigorous study by Chad Coffman of Winnemac Consulting, LLC, and his coauthors Tara O’Neil and Brian Starr. They look at alumni giving from 1998 to 2007 at the top one hundred national universities as ranked by *U.S. News & World Report* to examine the relationship between giving and the existence of alumni preferences. Of those schools, roughly three-quarters provide legacy preferences.<sup>45</sup>

Coffman and his colleagues find that schools with preferences for children of alumni did have higher overall giving per alumni

(\$317 versus \$201), but that this advantage resulted because the alumni in schools with alumni preferences tended to be wealthier. Controlling for the wealth of alumni, they find “no evidence that legacy preference policies themselves exert an influence on giving behavior.”<sup>46</sup> After controls, alumni gave only \$15.39 more on average in legacy-granting institutions, but even that slight advantage is from a statistical perspective uncertain.<sup>47</sup> They conclude: “after inclusion of appropriate controls, including wealth, there is no statistically significant evidence of a causal relationship between legacy preference policies and total alumni giving at top universities.”<sup>48</sup>

Coffman and colleagues also examine what happened to giving at seven institutions that dropped legacy preferences during the time period of the study: Georgia Tech, Texas A&M, the University of Georgia, the University of Iowa, the University of Massachusetts at Amherst, the University of Nebraska, and Vanderbilt.<sup>49</sup> They find “no short-term measurable reduction in alumni giving as a result of abolishing legacy preferences.”<sup>50</sup> After Texas A&M eliminated the use of legacy preferences in 2004, for example, donations took a small hit, but then increased substantially from 2005 to 2007.<sup>51</sup>

Of course, eliminating legacy preferences by itself would not guarantee that admission officials would discontinue favoritism of every other kind for the very wealthy. The top 1 percent of gift givers contribute 70 percent of alumni contributions, and the children of those individuals might continue to receive a nod based on wealth rather than legacy status.<sup>52</sup> But, eliminating legacy preferences and limiting favoritism to extremely large donors (whether or not they were alumni) would be an important step in the direction of fairness. Preferences based on raw wealth would be viewed by many as sordid, not something that universities would openly boast about as furthering a commitment to “tradition” and “family ties,” values universities currently appeal to when defending legacy preferences. And the change would drastically decrease the number of casualties among qualified applicants who have the misfortune of being born to non-alumni parents, compared to today’s system in which between 10 percent and 25 percent of slots go to alumni children. (And, as we shall see below, under a more transparent system of donations in exchange for preferential treatment, the tax deductibility of such donations would come into serious question.)

In Chapter 6, John Brittain of the University of the District of Columbia Law School and former chief counsel at the Lawyers' Committee for Civil Rights and attorney Eric Bloom examine the impact of legacy preferences on students of color and the potential impact of curtailing preferences for alumni children on affirmative action policies.

Legacy preferences are an overt form of direct discrimination against "wrong ancestor" students whose parents did not attend the college to which students are applying. But preferring alumni children also has a disparate negative impact on students of color, essentially perpetuating discrimination and inequalities from the past.

As Brittain and Bloom point out, underrepresented minorities make up 12.5 percent of the applicant pool at selective colleges and universities, but only 6.7 percent of the legacy applicant pool.<sup>53</sup> At Texas A&M, 321 of the legacy admits in 2002 were white, while only 3 were black, and 25 Hispanic.<sup>54</sup> At Harvard, only 7.6 percent of legacy admits in 2002 were under-represented minorities, compared with 17.8 percent of all students. Likewise, at the University of Virginia, 91 percent of early decision legacy admits in 2002 were white, 1.6 percent black, and 0.5 percent Hispanic.<sup>55</sup>

After a generation of affirmative action, some civil rights advocates might argue that now is the wrong time to eliminate legacies—just as meaningful numbers of African-American and Latino families are beginning to benefit from the policies. But in fact, blacks and Hispanics continue to be grossly underrepresented at elite colleges, even with affirmative action policies in place. In 2008, African Americans and Latinos made up more than 30 percent of the traditional college-aged population, yet little more than 10 percent of the enrollees at the top fifty national universities in *U.S. News & World Report*.<sup>56</sup> The authors note that "affirmative action does not offset legacy preference: the use of legacy preference, in fact, requires college admissions [officers] to rely more heavily on affirmative action."<sup>57</sup>

Finally, Brittain and Bloom's chapter discusses the connection between legacy preferences and affirmative action. As we have seen, the elimination of affirmative action in places such as the University of California, the University of Georgia, and Texas A&M placed intense pressure on institutions to eliminate legacy preferences, given the "blatant inconsistency."<sup>58</sup> But would the reverse also be true?

Would the elimination of legacy preferences threaten the future of affirmative action?

That prospect is highly unlikely. As the authors point out, affirmative action policies to date have survived strict scrutiny because they enhance educational diversity. (For some members of the Supreme Court, though not a majority, affirmative action also has been justified as a remedy for centuries of brutal discrimination.) Legacy preferences, by contrast, have no such justification. Because they disproportionately benefit whites, they reduce, rather than enhance, racial and ethnic diversity in higher education. And rather than being a remedy for discrimination, legacy preferences were born of discrimination. Brittain and Bloom write: “If affirmative action is aimed at opening the doors to excluded minorities, legacy preferences were designed to slam those doors shut.”<sup>59</sup> Affirmative action engenders enormous controversy because it pits two great principles against one another—the antidiscrimination principle, which says that we should not classify people by ancestry, against the anti-subordination principle, which says that we must make efforts to stamp out illegitimate hierarchies. In the case of legacy preferences, by contrast, the policy advances neither principle: it explicitly classifies individuals by bloodline and does so in a way that compounds existing hierarchy.<sup>60</sup>

## LEGAL AND POLICY OPTIONS ON LEGACY PREFERENCES

While the first portion of the book lays out the empirical evidence on legacy preferences, the second part examines legal and policy options for curtailing them. Remarkably, legacy preferences have been litigated only once in federal court, by an applicant to the University of North Carolina at Chapel Hill named Jane Cheryl Rosenstock. Rosenstock, a New York resident who was rejected, alleged that her constitutional rights were violated by a variety of preferences, including those for in-state applicants, minorities, low-income students, athletes, and legacies.

Rosenstock was not a particularly compelling candidate—her combined SAT score was about 850 on a 1600-point scale, substantially lower than most out-of-state applicants.<sup>61</sup> And if she was a

weak applicant, she was also a weak litigant.<sup>62</sup> She never argued that, because legacy preferences are hereditary, they presented a “suspect” classification that should be judged by the “strict scrutiny” standard under the Equal Protection Clause. The district court judge in the case, *Rosenstock v. University of North Carolina*,<sup>63</sup> held that it was rational to believe that alumni preferences translate into additional revenue to universities, though absolutely no evidence was provided for this contention.<sup>64</sup> The decision was never appealed.

Given this sparse lower court history, legal scholars and practitioners believe the time is ripe for litigation of this question. This volume presents two distinct legal theories under which ancestry-based legacy preferences could be challenged.<sup>65</sup>

In Chapter 7, University of California at Davis School of Law professor Carlton Larson lays out the case that legacy preferences at public universities are not only unfair, but also “grossly unconstitutional.”<sup>66</sup> In particular, he says, a state-sponsored preference based on hereditary status is a violation of a little-litigated constitutional provision—the Nobility Clause, which affects state governments. The clause provides that “No state shall . . . grant any Title of Nobility.”<sup>67</sup>

Examining the early history of the country, Larson makes a compelling case that this prohibition should not be interpreted narrowly as simply prohibiting the naming of individuals as dukes or earls but more broadly to prohibit “government-sponsored hereditary privileges”—including legacy preferences at public universities.<sup>68</sup> In the Revolutionary era, Larson writes, hereditary privileges “were unthinkable.” Indeed, “it is that British world of inherited privilege that the leaders of the American Revolution sought to overthrow forever.”<sup>69</sup>

Larson focuses his chapter on a Revolutionary-era debate over the formation of the Society of the Cincinnati, a private, hereditary organization whose members were limited to officers of the Continental Army and their heirs. Even though the Society granted no formal “titles,” was private in nature, and had no real power, its membership rules based on ancestry were denounced by all the leading figures of the time. Samuel Adams opposed the group’s “odious hereditary distinctions.” John Adams denounced the group as an “inroad upon our first principle, equality.” Benjamin Franklin

said the Society's members were acting "in direct opposition to the solemnly declared sense of their country." Thomas Jefferson labeled himself an "enemy of the institution." And George Washington said he would resign from the Society if it did not eliminate its hereditary succession.<sup>70</sup>

What would the Founders have thought of legacy preferences at state universities? "Selective college admissions were unknown in the eighteenth century," Larson notes, "but we do know what the Revolutionary generation thought about hereditary privilege." He argues: "Legacy preferences at exclusive public universities were precisely the type of hereditary privilege that the Revolutionary generation sought to destroy forever."<sup>71</sup> The Founders, Larson writes, would have resisted the idea of state-funded university admissions based even in part on ancestry "with every fiber of their being."<sup>72</sup>

Some might argue that legacy preferences are constitutional because they give just a boost, not guaranteed admission, to legacies. Larson asks, what if a state were to add points on a civil service exam to individuals who were the children of state employees? Such an arrangement would be considered bizarre and unconstitutional. He notes that "university admissions policies are perhaps the only area in modern public life where such practices persist."<sup>73</sup> Some might object that the Nobility Clause limits hereditary distinctions only in government positions, but that cannot be right, Larson says, or it would be constitutional to create hereditary exemptions from such obligations as paying income tax. Finally, he notes, the monetary justification—that legacy preferences help public universities raise money—cannot be a constitutional rationale, even if it were empirically valid. The Constitution often requires the government to do things that cost money: the Eighth Amendment prohibits housing convicts in dog cages, for example, even though it would be less expensive to do so.<sup>74</sup> Legacy preferences violate the Constitution's prohibition of state-sponsored hereditary privilege, Larson says, and none of the defenses suffices.

In Chapter 8, attorneys Steve Shadowen and Sozi Tulante outline another legal challenge to legacy preferences as a violation of both the Equal Protection Clause of the Constitution and the Civil Rights Act of 1866. Shadowen and Tulante concur with Larson's notion that the Founders were opposed to hereditary privilege and note

that the essential purpose of the Fourteenth Amendment, adopted in 1868, was to codify within the Constitution the original promise of the Declaration of Independence that “all [white] men are created equal”—and extend it to black people.

Coming on the heels of the Civil War, passage of the Fourteenth Amendment, including its prohibition against state denial of “the equal protection of the laws,” was fundamentally aimed at extending full citizenship to black Americans. But the wording and purpose of the Equal Protection Clause was also broader than that, as Shadowen and Tulante point out. The framers of the amendment, such as Charles Sumner and John Bingham, were seeking to prohibit all lineage discrimination, of which racial discrimination is a particularly noxious subset. As Justice Potter Stewart noted years later, the Equal Protection Clause applied to African Americans “a fundamental principle upon which this Nation had been founded—that the law would honor no preference based on lineage.”<sup>75</sup>

Subsequent case law interpreting the Fourteenth Amendment bears out this reading, the authors contend. Courts have held that racial discrimination is forbidden in part because “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.”<sup>76</sup> The prohibition of discrimination based on ancestry helps explain why the Court has interpreted the Fourteenth Amendment to go beyond race, and to apply heightened scrutiny to laws that punish children born out of wedlock, or whose parents came to this country illegally.<sup>77</sup>

If legacy preferences should be subject to strict scrutiny, as the authors suggest, can supporters of the policy show they have a compelling state interest, and that the policy is narrowly tailored to further that goal? Increasing donations is not a cognizable, much less a compelling, interest, Shadowen and Tulante argue. Suppose that, in *Brown v. Board of Education*, defenders of segregation could have proven that white taxpayers would be more likely to provide financial support to segregated public schools. Just because the beneficiaries of discrimination are willing to pay for it does not make the defense permissible.<sup>78</sup>

Nor are the means narrowly tailored, they say. Because the top 1 percent of alumni contributors provide 70 percent of the total donations, they argue, it would be far more efficient—and less

discriminatory—to hold an open auction for a small number of university slots to go to the highest bidder than to discriminate against a broad swath of people who have the wrong set of ancestors.<sup>79</sup> Unlike affirmative action, the authors say, legacy preferences cannot survive strict scrutiny.

Shadowen and Tulante argue that legacy preferences at private universities are also illegal under the Civil Rights Act of 1866. Unlike Title VI of the 1964 Civil Rights Act, which outlaws discrimination only on the basis of “race, color or national origin,” the 1866 Civil Rights Act prohibits discrimination on the basis of both “race” and “ancestry.” The heavy use of legacy preferences at private universities, therefore, is also vulnerable to legal challenge.

How would a judge likely react to these new legal theories? In Chapter 9, the Honorable Boyce F. Martin, Jr., of the Sixth Circuit Court of Appeals in an article written with Donya Khalili, outlines the ways in which a judge will weigh the issues. Martin, who authored the Sixth Circuit’s majority opinion supporting affirmative action at the University of Michigan Law School in *Grutter v. Bollinger*, writes that “legacy admissions are problematic legally.”<sup>80</sup> He notes that the 1976 district court opinion upholding legacy preferences in *Rosenstock* addressed the issue “in a scant five sentences” and is “neither binding nor persuasive to future courts.”<sup>81</sup>

Martin says he will “not hazard to guess” what level of scrutiny a court will apply to legacy preferences, but he does note that the argument for applying strict scrutiny, given that legacy preferences are based on “bloodline” is advanced “eloquently” by Shadowen and Tulante. He also notes that it is possible that a court will apply heightened scrutiny on the principle that “to penalize a child’s ability to get into a school based on whether his parent was able to get in . . . would be unjust to the child because [he has] no control over this status.” The third alternative is a “rational basis” test.<sup>82</sup>

If strict scrutiny were applied, Martin writes, defenders of legacy preferences could not point to the diversity justification used for affirmative action, given that legacy admits are “overwhelmingly white” and are likely to enjoy a “socioeconomic status that matches the historically dominant groups on campus.”<sup>83</sup> Instead, legacy preferences are likely to be defended as a financial necessity, an argument, he says, that “evidence may not support.” Even if evidence were produced,

Martin notes, a judge might find that a school “could increase donations by alumni by other means that do not require discrimination.” An appeal to maintaining “a sense of tradition and community” appears to Martin to be “a fairly weak argument.”<sup>84</sup>

The volume concludes with Chapter 10, a public policy analysis written by journalist Peter Sacks, author of *Tearing Down the Gates: Confronting the Class Divide in American Education*. Various sporadic attempts have been made over the years to curtail legacy preferences, without success. In the early 1990s, Senator Bob Dole asked the U.S. Department of Education’s Office for Civil Rights to investigate the legality of legacy preferences, but the department never followed up on the request.<sup>85</sup> Likewise, in 2004, Senator Ted Kennedy proposed amending the Higher Education Act to require colleges to report the share of each entering class that were legacies, but he eventually backed down under pressure from higher education lobbyists.<sup>86</sup>

But the most powerful lever for attacking legacy preferences may lie elsewhere. Sacks asks the intriguing question: Suppose that supporters of legacy preferences are correct, and such policies are critical to fund-raising because donors would not give but for the expectation that doing so will help their offspring’s chances of getting in? If that were true, then the donors are receiving something of real value—increased admission chances for their children—in return for their donations. Under IRS regulations, however, when donors receive a substantial benefit, the full measure of the donation is not tax deductible.

Sacks begins his chapter by noting the special tax provisions that apply to the nonprofit higher education sector, in contrast to for-profit higher education institutions. Because nonprofit colleges and universities serve the public interest, they are not required to pay taxes as corporations or individuals are.<sup>87</sup> As Senator Charles Grassley has noted, “John Doe pays taxes. John Deere pays taxes. But Johns Hopkins does not.”<sup>88</sup> This tax exempt status costs the federal government some \$18 billion annually, according to one analysis. Moreover, donations to nonprofit educational institutions are tax deductible to donors, a provision that cost the federal government \$5.9 billion in 2007.<sup>89</sup> The philosophical rationale for making charitable donations tax deductible is that “unlike other uses of income, it does not enrich the disburser.”<sup>90</sup>

So how do alumni donations aimed at increasing an offspring's chances of admissions fit into this framework? IRS publication 526 provides "If you receive or expect to receive a financial or economic benefit as a result of making a contribution to a qualified organization, you cannot deduct the part of the contribution that represents the value of the benefit you receive."<sup>91</sup>

As Sacks notes, the value of a legacy preference is quite substantial. Citing research, he estimates the lifetime benefit of attending a selective college compared to a less-selective college at \$315,000. If legacy preferences increase one's chance of admission by 20 percentage points, the value is considerable.<sup>92</sup> If universities and colleges are conferring a monetary benefit in exchange for donations—as institutions themselves imply when they say legacy preferences are necessary for their financial health—then, says Sacks, "the arrangement shatters the first principle underlying the charitable deduction, that donations to nonprofit organizations not 'enrich the giver.'"<sup>93</sup> As Senator Grassley has argued, "We need to think whether these reserved spaces at our top colleges is a public policy that should be subsidized by the tax code—as is currently the case."<sup>94</sup> What is particularly outrageous is that under existing law, non-legacy taxpayers essentially are required to subsidize a practice that discriminates against their children.<sup>95</sup>

If Sacks's argument is right, universities and colleges are trapped in a logical box. Either donations are not linked to legacy preferences, in which case the fundamental rationale for ancestry discrimination is flawed; or giving is linked to legacy preferences, in which case donations should not be tax deductible, and the entire business model "may come crashing down."<sup>96</sup>

## CONCLUSION

The chapters in this volume suggest that legacy preferences are an unfair and illegal anachronism. On one level, they are a uniquely American phenomenon, underlining the point that the rest of the world's universities somehow manage to survive without them. At

the same time, they are fundamentally anti-American, at odds with the very founding of this nation. They were invented in a dark moment of early twentieth-century American history, even though they would have appalled the eighteenth-century founders of this nation.

For the most part, American higher education has sought to democratize, opening its doors to women, to people of color, and to the financially needy. Legacy preferences are an outlier in this trend, a relic that has no place in American society. In a fundamental sense, this nation's first two great wars—the Revolution and the Civil War—were fought to defeat different forms of aristocracy.<sup>97</sup> That this remnant of ancestry-based discrimination still survives—in American higher education of all places—is truly breathtaking.