

SCRUTINIZING LEGACY ADMISSIONS: APPLYING TIERS OF SCRUTINY TO LEGACY PREFERENCE POLICIES IN UNIVERSITY ADMISSIONS

*T. Liam Murphy**

INTRODUCTION

Children of alumni, or legacy applicants, are as much as five times more likely to be admitted into prestigious universities than non-legacy applicants.¹ Legacy applicants receive an admissions advantage at 85% of the 150 most prestigious universities in the United States.² These policies differ by university, but at the highest-ranked universities, legacy applicants receive a 45% admissions advantage over non-legacy applicants.³

This is a problem because legacy advantage policies decrease diversity and deny equality of opportunity. In contrast to race-based advantage policies, the beneficiaries of legacy advantage policies are disproportionately

* Thomas “Liam” Murphy is a third-year law student at the University of Pennsylvania Law School. As a first generation professional, Liam understands the importance of educational opportunity on economic mobility. This understanding inspired this Comment. Special thanks to Delaney Bates, Joy Morgan, Michael Murphy, Graham Murphy, Caleb Mason, the Murphy family, the Lindsteadt family, and all those who support him.

¹ See Delano R. Franklin & Samuel W. Zwickel, *Legacy Admit Rate Five Times That of Non-Legacies*, *Court Docs Show*, HARV. CRIMSON, June 20, 2018, <https://www.thecrimson.com/article/2018/6/20/admissions-docs-legacy/> (“The admission rate of legacy applicants is over five times that of non-legacy students . . .”).

² See Steve D. Shadowen, Sozi P. Tulante & Shara L. Alpern, *No Distinctions Except Those Which Merit Originates: The Unlawfulness of Legacy Preferences in Public and Private Universities*, 49 SANTA CLARA L. REV. 51, 129 (2009) (“Of [] 150 [top] schools, we were able to confirm that 102 grant legacy preferences . . .”); Keith Powers, *Legacy Admissions and Basic Fairness: The Wrong Way to Boost Students’ College Admissions Chances*, N.Y. DAILY NEWS (Sept. 6, 2018, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-legacy-admissions-vs-fairness-20180904-story.html> (“Roughly 75% of the country’s top 100 universities in the U.S. News and World Report use legacy preference when admitting students, as do nearly all of the top 100 liberal arts schools.”).

³ See Yoni Blumberg, *Harvard’s Incoming Freshman Class Is One-Third Legacy—Here’s Why That’s a Problem*, CNBC (Sept. 6, 2017, 2:23 PM), <https://www.cnbc.com/2017/09/06/harvards-incoming-class-is-one-third-legacy.html> (noting that at the top thirty universities, legacy applicants receive a 45% advantage in admissions chances over non-legacy applicants).

wealthy and white.⁴ These demographics are already over-represented at prestigious universities,⁵ where students from families in the top 1% of wealth outnumber students from the entire bottom 60% of wealth.⁶

Legacy advantage policies deny equality of opportunity by delegitimizing universities as a vehicle for social and economic mobility.⁷ Equal access to higher education plays a vital role in sustaining the legitimacy of equality of opportunity.⁸ Legacy advantage policies deter the advancement of children from low-income, low-education families, while simultaneously granting a benefit to children from high-income, high-education families.⁹ Until

⁴ See *id.* (“Legacy students tend to be wealthy and white, students who, as a group, are already disproportionately represented at college.”).

⁵ *Id.*; Daniella Silva, *Study on Harvard Finds 43 Percent of White Students are Legacy, Athletes, Related to Donors or Staff*, NBC NEWS (Sept. 30, 2019, 1:04 PM), <https://www.nbcnews.com/news/us-news/study-harvard-finds-43-percent-white-students-are-legacy-athletes-n1060361>.

⁶ See Yoni Blumberg, *Harvard’s Incoming Freshman Class Is One-Third Legacy—Here’s Why That’s a Problem*, CNBC (Sept. 6, 2017, 2:23 PM), <https://www.cnbc.com/2017/09/06/harvards-incoming-class-is-one-third-legacy.html> (“The New York Times found that, at five Ivy League schools, Dartmouth, Princeton, Yale, Penn and Brown, as well as 33 other colleges, there are more students from families in the top one percent than from the entire bottom 60 percent.”).

⁷ See Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA’S UNTAPPED RESOURCES 101, 117 (Richard D. Kahlenberg ed., 2004) (“Higher education is the ‘great equalizer’ and must promote social and economic mobility.”).

⁸ 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.”). See generally John K. Wilson, *The Myth of Reverse Discrimination in Higher Education*, 10 J. BLACKS HIGHER EDUC. 88, 93 (1995–96) (“[E]lite 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.”).

⁹ One study found that more than 5,000 high schools nationwide had students that graduated with qualifications sufficient for admission to Harvard but did not have a single student apply there. Further, “[m]any of these 5,000 high schools with highly qualified students have a limited history of sending graduates to Harvard, and most have large numbers of economically disadvantaged students.” *Large Numbers of Highly Qualified, Low-Income Students Are Not Applying to Harvard and Other Highly Selective Schools*, J. BLACKS HIGHER EDUC. (2006), www.jbhe.com/news_views/52_low-income-students.html (explaining the results of a study that found academically strong students from low-income families are reluctant to apply to prestigious colleges like Harvard).

universities “re-examine their legacy policies and make substantive changes, diversity on a large scale will continue to be hindered.”¹⁰

Recently, legacy advantage policies have received headlines resulting from a high-profile affirmative action case, *Students for Fair Admissions v. Harvard*.¹¹ The legal question of this lawsuit was whether Harvard unlawfully discriminated against Asian-Americans in undergraduate admissions.¹² Richard Kahlenberg, author of the seminal book on legacy admissions, *Affirmative Action for the Rich*,¹³ testified for the Plaintiffs.¹⁴ Kahlenberg claimed that “socioeconomic diversity at Harvard is deeply lacking,” asserting that “there are up to 23 times as many rich students at Harvard as poor ones.”¹⁵ The complaint alleged that legacy advantages “operate to the disadvantage of minority applicants.”¹⁶ The Harvard case was successful at highlighting the unfairness of legacy admissions. However, the legal claims are limited to Harvard’s race-based preference policies and does not implicate legacy admissions.¹⁷

Unlike race-based preference policies, the constitutionality of legacy preferences in university admissions has never been addressed by the Supreme Court. But this may change. Author of the Sixth Circuit’s landmark affirmative action opinion *Grutter v. Bollinger*,¹⁸ Judge Boyce Martin, Jr., recently said that “legacy admissions are problematic legally,” and that he “expect[s] legal challenges to the practice of legacy preferences, especially

10 Marybeth Gasman & Julie Vultaggio, *Perspectives: A “Legacy” of Racial Injustice in American Higher Education*, DIVERSE ISSUES HIGHER EDUC., Jan. 22, 2008, <https://diverseeducation.com/article/10519/>.

11 *Students for Fair Admissions v. Harvard*, No. 1:14-cv-14176-DJC (D. Mass. filed Nov. 17, 2014).

12 See Janelle Lawrence & Patricia Hurtado, *Your Kid’s Legacy Admission May Be One Casualty of Harvard Trial*, BLOOMBERG (Oct. 23, 2018, 3:56 PM), <https://www.bloomberg.com/news/articles/2018-10-23/one-casualty-of-harvard-trial-may-be-your-kid-s-legacy-admission> (discussing a lawsuit against Harvard that alleges that the college discriminates against Asian-Americans during undergraduate admissions).

13 RICHARD D. KAHLBERG ET AL., *AFFIRMATIVE ACTION FOR THE RICH, LEGACY PREFERENCES IN COLLEGE ADMISSIONS* 201 (Richard D. Kahlenberg ed., 2010).

14 Lawrence & Hurtado, *supra* note 12 (noting that Richard Kahlenberg testified for the plaintiff in the lawsuit against Harvard which alleged that it discriminated against Asian-Americans during undergraduate admissions).

15 *Id.* (internal quotation marks omitted).

16 Eric Hoover, *Wait, Will Anyone Investigate Legacy Admissions?*, CHRON. HIGHER EDUC., Aug. 3, 2017, <https://www.chronicle.com/article/Wait-Will-Anyone-Investigate/240850>.

17 See *id.* (explaining that *Students for Fair Admissions v. Harvard* challenged “racial preferences,” not “legacy preferences”).

18 288 F.3d 732 (6th Cir. 2002) (en banc), *aff’d*, 539 U.S. 306 (2003).

at public universities such as the University of Virginia, to begin in the near future.”¹⁹

Judge Martin, Jr. and other legal scholars have assumed that a legal challenge against legacy preference policies would arise under the Equal Protection Clause.²⁰ The Supreme Court’s precedent on race-based preference policies makes clear that admissions decisions at public universities are subject to the Equal Protection Clause.²¹ The Civil Rights Act of 1866²² extends this right to cover admissions decisions at private universities.²³ When the constitutionality of a law is challenged under the Equal Protection Clause, courts will apply one of three levels of judicial scrutiny.

This Comment analyzes legacy preference policies under the three levels of judicial scrutiny: strict, intermediate, and rational-basis review. This Comment does not take a stance on which level of scrutiny a judge would apply when analyzing a challenge of a legacy preference policy. Rather, this Comment takes an impartial stance on that question, and instead, explores

¹⁹ RICHARD D. KAHLBERG ET AL., *supra* note 13, at 201.

²⁰ See Shadowen, Tulante & Alpern, *supra* note 2, at 52–53 (noting that legal commentators have generally believed that legacy admissions schemes are not prohibited under the Equal Protection Clause). Legal scholars have also argued that legacy preferences in public universities violate the Constitution’s prohibition on granting titles of nobility. See, e.g., 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, 1383 (2006) (arguing that legacy preference schemes violate the Constitution’s Nobility Clauses).

²¹ See *Gratz v. Bollinger*, 539 U.S. 244, 270, 275–76 (2003) (striking down undergraduate admissions policy that gave an advantage to racial minorities solely because of race as violative of the Equal Protection Clause); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit the [University of Michigan] Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”).

²² 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). 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 (2010).

²³ The Supreme Court has held that, given their common origins and purposes, the Civil Rights Act of 1866 and the Equal Protection Clause should be construed in harmony with respect to discrimination based on race or ancestry. See *Hurd v. Hodge*, 334 U.S. 24, 32 (1948) (“[I]n many significant respects the [Civil Rights Act of 1866] and the [Fourteenth] Amendment were expressions of the same general congressional policy.”); *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 389–90 (1992) (“In light of the close connection between [the Civil Rights Act of 1866 and the Enforcement Act of 1870] and the [Fourteenth] Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.”).

the strongest legal arguments for each standard of review applying to a case challenging the constitutionality of a legacy preference policy.

I. APPLYING STRICT SCRUTINY TO LEGACY POLICIES

Policies frequently involve making classifications that either advantage or disadvantage one group of persons, but not another. For example, states allow twenty-year-olds to drive, but do not allow twelve-year-olds to.²⁴ Impoverished “single parents receive government financial aid that is denied to millionaires.”²⁵ The Equal Protection Clause does not require policies to treat all persons exactly the same.²⁶ Rather, a governmental policy is only obligated to treat people the same if they are similarly circumstanced.²⁷ Equal Protection Clause jurisprudence has developed a three-tiered approach to analyze whether a policy violates the Equal Protection Clause.

Policies that involve suspect classifications or classifications that burden fundamental rights are subject to strict scrutiny.²⁸ Strict scrutiny applies to cases of potential discrimination on the basis of suspect classifications like race,²⁹ national origin,³⁰ and ancestry,³¹ and to cases that impair fundamental

²⁴ *Levels of Scrutiny Under the Equal Protection Clause*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/epscrutiny.htm> (last visited Nov. 7, 2019).

²⁵ *Id.*

²⁶ See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

²⁷ The concept of “similarly situated” developed in doctrinal contexts other than equal protection and then entered the U.S. Supreme Court’s equal protection jurisprudence in 1884. See *Yick Wo v. Hopkins*, 118 U.S. 356, 367–68 (1886) (explaining that the Equal Protection Clause requires those who are “similarly situated” not be treated differently for an arbitrary reason).

²⁸ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”).

²⁹ See *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (explaining that racial classifications are subject to “the most exacting scrutiny”).

³⁰ *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (noting that racial classifications are “subject . . . to the most rigid scrutiny”), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2432 (2018).

³¹ *Romer v. Evans*, 517 U.S. 620, 629 (1996) (citing *Oyama v. California*, 332 U.S. 633 (1948)) (noting that the Court has given heightened scrutiny to ancestry classification); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630–31 (1991) (implying that the use of “classifications based on ancestry or skin color,” as they relate to the use of peremptory strikes in a civil suit, are presumptively unlawful); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (“[A] State’s distribution of benefits or imposition of burdens [cannot] hinge[] . . . on ancestry or the color of a person’s skin”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312 & n.4 (1976) (citing *Oyama*

rights.³² Under strict scrutiny, a policy will be sustained only if it involves a compelling objective and the classification is necessary to serve that objective.³³

Legacy preference policies make classifications between people based on whether an applicant's parents attended that university. A judge deciding to apply strict scrutiny to a legacy preference policy would likely face arguments that two different suspect classifications applied. First, they could determine that legacy preference policies discriminate against applicants based on ancestry. Second, they could determine that these policies discriminate against applicants based on race. This Part explores both suspect classifications and identifies Supreme Court precedent that would be instructive to a judge deciding whether to analyze legacy preference policies under strict scrutiny.

A. *The Ancestry Classification*

1. *Policies that discriminate on the basis of ancestry are subject to strict scrutiny*

The Supreme Court has long held that discrimination on the basis of “ancestry” is subject to strict scrutiny.³⁴ This rule was first articulated over

v. California, 332 U.S. 633 (1948)) (noting that ancestry is a suspect classification); *Lindsey v. Normet*, 405 U.S. 56, 73 (1972) (noting that “certain classifications based on unalterable traits such as race and lineage are inherently suspect”) (footnotes omitted); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.”).

³² See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (applying strict scrutiny to a policy that discriminated on the basis of the fundamental right to vote); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1867) (applying strict scrutiny to a policy that discriminated on the basis of the fundamental right to travel freely).

³³ See, e.g., *Adarand*, 515 U.S. at 227 (“In other words, [racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

³⁴ See *Romer*, 517 U.S. at 629 (citing *Oyama v. California*, 332 U.S. 633 (1948)) (noting that the Court has given heightened scrutiny to ancestry classification); *Edmonson*, 500 U.S. at 630–31 (implying that the use of “classifications based on ancestry or skin color,” as they relate to the use of peremptory strikes in a civil suit, are presumptively unlawful); *Bakke*, 438 U.S. at 320 (“[A] State’s distribution of benefits or imposition of burden [cannot] hinge[] . . . on ancestry or the color of a person’s skin”); *Murgia*, 427 U.S. at 312 & n.4 (citing *Oyama v. California*, 332 U.S. 633 (1948)) (noting that ancestry is a suspect classification); *Lindsey*, 405 U.S. at 73 (noting that “certain classifications based on unalterable traits such as race and lineage are inherently suspect”) (footnotes omitted); *Hernandez*, 347 U.S. at 479 (holding that discrimination based on ancestry or national origin, as it relates to jury selection, is prohibited by the Fourteenth Amendment).

seventy-five years ago in *Hirabayashi v. United States*.³⁵ The Court explained that “[d]istinctions 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.”³⁶ The Court’s language in *Hirabayashi* has been consistently quoted for the rule that a policy that discriminates on the basis of ancestry is subject to strict scrutiny.³⁷

A decade after *Hirabayashi*, the Court firmly articulated that discrimination on the basis of ancestry is prohibited by the Equal Protection Clause.³⁸ In *Hernandez v. Texas*, the Texas system for selecting jurors by the use of jury commissions was found to be fair on its face but capable of being utilized for discrimination.³⁹ The plaintiff in *Hernandez* was a person of Mexican descent, and he challenged his state conviction on the grounds that persons of similar Mexican *ancestry* had been purposely discriminated against in the selection of jurors in the county he was convicted.⁴⁰ The Court held that the exclusion of eligible jurors on the basis of their *ancestry* was discrimination prohibited by the Equal Protection Clause.⁴¹ In doing so, the

³⁵ 320 U.S. 81, 100 (1943) (“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.”).

³⁶ *Id.*; see also *id.* at 110 (Murphy, J., concurring) (“Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals.”).

³⁷ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007) (recognizing the holding established in *Hirabayashi*); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (quoting the language from *Hirabayashi* directly); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (“Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (noting the general rule that discrimination based on ancestry has been “consistently repudiated”); *Oyama v. California*, 332 U.S. 633, 646 (1948) (recognizing the general rule that discrimination on the basis of ancestry is “odious”).

³⁸ See *Hernandez*, 347 U.S. at 479 (“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.”).

³⁹ *Id.* at 478–79 (“[T]he Texas system of selecting grand and petit jurors by the use of jury commissions is fair on its face and capable of being utilized without discrimination. But as this Court has held, the system is susceptible to abuse and can be employed in a discriminatory manner.”) (footnote omitted).

⁴⁰ *Id.* at 476–77 (“[Petitioner] alleged that persons of Mexican descent were systematically excluded from service as jury commissioners, grand jurors, and petit jurors, although there were such persons fully qualified to serve residing in [the county where petitioner was convicted].”) (footnote omitted).

⁴¹ *Id.* at 479 (“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.”).

Court cited *Hirabayashi's* famous words and confirmed that strict scrutiny applies to policies that discriminate on the basis of ancestry.⁴²

The ancestry classification also applies to a case of private discrimination. The Civil Rights Act of 1866, now codified as amended at 42 U.S.C. § 1981,⁴³ prohibits discrimination based on ancestry.⁴⁴ In *Runyon v. McCrary*, the Supreme Court held that the 1866 Act's proscriptions apply to admissions discrimination in both public and private schools.⁴⁵ The Court has also held that, given their common origins, the 1866 Act and the Equal Protection Clause should be construed in harmony with respect to discrimination based on race or ancestry.⁴⁶

The Supreme Court has held that the 1866 Act prohibits discrimination on the basis of ancestry.⁴⁷ In *Saint Francis College v. Al-Khazraji*, the Court held that an American born in Iraq could claim that he was unlawfully

⁴² *Id.* at 478 n.4 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

⁴³ 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). 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 (2010).

⁴⁴ See *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (“Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry”); *Runyon v. McCrary*, 427 U.S. 160, 172–73 (1976) (holding that § 1981 prohibits racially discriminatory admissions procedures at private schools).

⁴⁵ *Runyon*, 427 U.S. at 176–77 (holding that the 1866 Act's proscriptions apply to the admission decisions of private schools); see also 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); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989) (acknowledging that the proscriptions set forth in the 1866 Act apply to state actors by way of the Fourteenth Amendment); *Al-Khazraji*, 481 U.S. at 613 (implying that the proscriptions of the 1866 Act can apply to private schools by way of § 1981); see, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (concluding that a law school's narrowly tailored use of race in admissions decisions did not violate the Equal Protection Clause); *Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 856–57 (9th Cir. 2006) (en banc) (holding that racial preferences in admissions criteria for private school did not violate § 1981).

⁴⁶ See *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S., 375, 389–90 (1982) (“In light of the close connection between [the 1866 Act and the 1870 Act] and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.”) (footnote omitted); *Hurd v. Hodge*, 334 U.S. 24, 32 (1948) (“[I]n many significant respects the [1866 Act] and the Amendment were expressions of the same general congressional policy.”).

⁴⁷ *Al-Khazraji*, 481 U.S. at 613. In *Al-Khazraji*, plaintiff, a United States citizen born in Iraq, was a professor who was denied tenure by 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.*

discriminated against if 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.”⁴⁸ The Court did not require that the class identifier be physical or ethnic characteristics, like race,⁴⁹ but rather confirmed that discrimination on the basis of ancestry violates both the 1866 Act and the Equal Protection Clause.⁵⁰

Since *Hirabayashi*, the Court has confirmed that both private and public policies that discriminate on the basis of ancestry violate the 1866 Act and the Equal Protection Clause, unless they are able to withstand strict scrutiny.⁵¹ Following precedent, a judge will find that policies that discriminate on the basis of ancestry are subject to strict scrutiny. In the context of legacy preference policies, the open question will involve the scope of the ancestry classification and whether discrimination on the basis of family lineage, as opposed to ethnic lineage, is within the scope of the ancestry classification. The following section explores this question.

2. *Whether discrimination on the basis of family lineage is within the scope of the ancestry classification.*

The scope of the ancestry classification has not been fully resolved. A judge could plausibly read the Supreme Court’s ancestry precedent as only encompassing discrimination on the basis of racial or ethnic groups. However, some legal scholars have argued that the reasoning of the Court’s ancestry precedent suggests that discrimination on the basis of family lineage falls within the ancestry classification.⁵² Specifically, some legal scholars argue that the Court’s decision in *Oyama v. California*⁵³ “made clear that the prohibited ‘ancestry’ distinctions include those based on individual family

⁴⁸ *Id.* at 613.

⁴⁹ *Id.* (“[A] distinctive physiognomy is not essential to qualify for . . . protection.”). Thus, 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.

⁵⁰ *Id.* at 613 & n.5 (noting that discrimination based on ancestry violates § 1981 and the Equal Protection Clause of the Fourteenth Amendment).

⁵¹ *See supra* Part I.A.

⁵² Shadowen, Tulante & Alpern, *supra* note 2, at 102–03.

⁵³ *See Oyama v. California*, 332 U.S. 633, 647 (1948) (holding that certain provisions of the Alien Land Laws cannot abridge the rights of citizens merely because of their ancestry).

lineage—on the identity or status of one’s parents—in addition to those based on racial or ethnic group.”⁵⁴

The Court’s decision in *Oyama* can be plausibly read to include discrimination on the basis of family lineage as included in the suspect ancestry classification. In *Oyama*, the statute at issue prohibited illegal immigrants, who were ineligible for American citizenship, from transferring land.⁵⁵ The father bought agricultural land for his son, Fred Oyama, who was a minor and an American citizen.⁵⁶ The statute prevented the father from transferring land to his son, because he was an illegal immigrant and ineligible for American citizenship.⁵⁷

The Supreme Court held that the statute violated the Equal Protection Clause, because it discriminated against an American minor whose parents could not be naturalized.⁵⁸ Under the statute, an American minor whose parents were either American citizens or eligible for naturalization would not be barred from the ability to receive land.⁵⁹ As the Court stated, “the father’s deeds were visited on the sons.”⁶⁰ This disparate treatment to minor citizens whose parents could not be naturalized, deprived the son, Fred Oyama, equal protection of the law.⁶¹

The discrimination against Fred Oyama has been described as being based on “national origin,” but some legal scholars argue that the holding should be read to prohibit a broader form of discrimination based on “family lineage.”⁶² Those scholars argue that type of discrimination Fred Oyama faced was not based on national origin, because his nation of origin was the United States.⁶³ The discrimination was not based on Fred Oyama’s nation of origin, but rather, it was based on his father’s nation of origin. Therefore, these scholars argue that the discrimination was based on family lineage—the status or conduct of his parents.⁶⁴

⁵⁴ Shadowen, Tulante & Alpern, *supra* note 2, at 102–03.

⁵⁵ *Oyama*, 332 U.S. at 635–36.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 639 n.16.

⁵⁹ *Id.* at 643, 646–47.

⁶⁰ *Id.* at 643.

⁶¹ *Id.* at 641, 647.

⁶² Shadowen, Tulante & Alpern, *supra* note 2, at 103–04.

⁶³ *Id.*

⁶⁴ *Id.*

In the same year as *Oyama*, the Court articulated the scope of the ancestry classification to arguably cover family lineage in the context of education. In *Plyler v. Doe*, the Court found that a Texas law, which denied free public education to children who could not prove that they had been lawfully admitted into the United States, was subject to heightened scrutiny.⁶⁵ The classification was applicable because “the children who are plaintiffs in these cases ‘can affect neither their parents’ conduct nor their own status,’”⁶⁶ and, “no child is responsible for his [or her] birth.”⁶⁷ 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.”⁶⁸

The Court’s dicta in a variety of cases could also be instructive in determining the scope of the ancestry classification. In *Fullilove v. Klutznick*, Justice Stewart, in dissent, stated that the Equal Protection Clause “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.”⁶⁹ In *San Antonio Independent School District v. Rodriguez*, Justice Thurgood Marshall, in dissent, stated that “[s]tatus of birth, like the color of

⁶⁵ 457 U.S. 202, 223–24 (1982) (finding that a state law that required children to prove lawful admission into the United States to receive free public education was subject to heightened scrutiny).

⁶⁶ *Id.* at 220 (quoting *Trimble v. Gordon*, 430 U.S. 762, 770 (1977)); *see also id.* at 223 (legislation affected “a discrete class of children not accountable for their disabling status”).

⁶⁷ *Id.* at 220 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

⁶⁸ *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,” *Id.* at 70, and that, “[t]he 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 the Nobility Clause). 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 Cty. Assessor*, 472 U.S. 612 (1985), the Court quoted Justice Brennan’s concurrence 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.’” *Id.* at 623 n.14 (quoting *Zobel v. Williams*, 457 U.S. 55, 69 (1982)). *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) (“Arbitrariness 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 capacities and the social order.”) (footnote omitted).

⁶⁹ 448 U.S. 448, 531 (1980) (Stewart, J., dissenting) (footnote omitted).

one's skin, is something which the individual cannot control, and should generally be irrelevant in legislative considerations Hence, discrimination on the basis of birth—particularly when it affects innocent children—warrants special judicial consideration.”⁷⁰ Justices Breyer, Souter, and Ginsburg, writing for themselves, in *Miller v. Albright*, confirmed that “[t]his Court, I assume, would use heightened scrutiny were it 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.”⁷¹ Given that a child need not have the same religion as her parent or grandparent, Justice Breyer’s language could be read to include discrimination on the basis of family lineage as eliciting strict scrutiny.⁷²

3. *Legacy preference policies discriminate on the basis of family lineage.*

If a judge finds that discrimination on the basis of family lineage is within the scope of the suspect ancestry classification, then it is likely that legacy preference policies would be subject to strict scrutiny. Like the discrimination in *Oyama*, the discrimination of legacy preference policies is

⁷⁰ 411 U.S. 1, 109 (1973) (Marshall, J., dissenting); *see also* *Miller v. Albright*, 523 U.S. 420, 476 (1998) (Breyer, J., dissenting) (“This Court, I assume, would use heightened scrutiny were it 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.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“That concept [race based classification] is alien to the Constitution’s focus upon the individual and its rejection of disposition based on race or based on blood.”) (citations omitted); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 355 (1978) (Brennan, J., concurring in part and dissenting in part) (“[H]uman 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.”). The dissenter in *Korematsu v. United States* had earlier made clear that the proscription on discrimination based on “ancestry” is not confined to racial or ethnic groups. 323 U.S. 214, 243 (1944) (Jackson, J., dissenting), *overruled by* *Trump v. Hawaii*, 138 S. Ct. 2392, 2432 (2018). 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. *Id.*

⁷¹ *Miller*, 523 U.S. at 476 (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, e.g.*, *Nguyen v. Immigration & Naturalization Serv.*, 533 U.S. 53 (2001).

⁷² *See also* *Nordlinger v. Hahn*, 505 U.S. 1, 30 (1992) (Stevens, J., dissenting) (stating that state tax exemption for children of homeowner parents denies equal protection because it “establishes a privilege of a medieval character” by “treat[ing] [families] 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 11–12. Moreover, the plaintiff did not assert that the heredity discrimination required heightened scrutiny. *See id.* at 10–11.

based on the status and conduct of the applicant's parents. An applicant whose parents did not attend any university would be discriminated against at all universities based on his or her parent's status. Further, even if an applicant's parents did attend college in the United States, the applicant would still be discriminated against at every other university to which they apply if there is a legacy preference policy in place.

In the alternative, it is entirely possible that legacy preference policies could be found unconstitutional even under the national origin test if the case comes under certain facts. An applicant whose parents did not attend college in the United States, because they were born in another part of the world, would be discriminated against based on his or her parent's nation of origin. Because the applicant's parents did not attend a school in the United States due to their national origin, there would be no university that the applicant would receive an admissions advantage at. Thus, it is likely that under the right set of facts, a judge could find that legacy policies discriminate based on ancestry, and accordingly, are subject to strict scrutiny.

B. The Race Classification

1. Policies that discriminate on the basis of race are subject to strict scrutiny.

Policies that discriminate on the basis of race are subject to strict scrutiny.⁷³ When a statute does not explicitly make racial distinctions, a judge must find that the policy is motivated by a discriminatory purpose.⁷⁴ Although it is without question that legacy policies were initially implemented to purposefully discriminate.⁷⁵ Today, it is unlikely that a judge would find that legacy policies purposefully discriminate on the basis of race.

⁷³ The Supreme Court held that all race-based classifications must be subjected to strict scrutiny in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which had briefly allowed the use of intermediate scrutiny to analyze the Equal Protection implications of race-based classifications in the narrow category of affirmative-action programs established by the Federal Government in the broadcasting field.

⁷⁴ *Washington v. Davis*, 426 U.S. 229 (1976) (finding that laws that have a racially discriminatory effect but were not adopted to advance a racially discriminatory purpose are valid under the U.S. Constitution).

⁷⁵ See *infra* notes 82–88 and accompanying text.

However, legal scholars have argued that legacy policies have a disparate racial impact on non-white university applicants.⁷⁶

Additionally, the Court's reasoning in its race discrimination jurisprudence could be extended to encompass discrimination based on birth-status. If a judge did find this to be the case, the race and ancestry discrimination cases would be instructive in analyzing legacy preference policies under strict scrutiny. Justice Powell, writing for the Court in *Regents of University of California v. Bakke*, held that race discrimination is subject to strict scrutiny because the Equal Protection Clause protects "every person regardless of his background,"⁷⁷ and "a State's distribution of benefits or imposition of burdens [cannot] hinge[] on ancestry or the color of a person's skin."⁷⁸ Justice Brennan's separate 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."⁷⁹

Additionally, in *Rice v. Cayetano*⁸⁰ 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

⁷⁶ Steve D. Shadowen, *Personal Dignity, Equal Opportunity, and the Elimination of Legacy Preferences*, 21 CIV. RTS. L.J. 31, 61 n.148 (2010).

⁷⁷ *Bakke*, 438 U.S. at 299 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) and *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938)). In his famous dissent in *Plessy v. Ferguson*, Justice Harlan wrote that race discrimination is unlawful because "[t]he 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." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁷⁸ *Bakke*, 438 U.S. at 320.

⁷⁹ *Id.* at 355 (Brennan, J., concurring in part and dissenting in part). *See also id.* at 360-61 (requiring strict scrutiny when a State decision is based on "an immutable characteristic which its possessors are powerless to escape or set aside").

⁸⁰ *Rice v. Cayetano*, 528 U.S. 495 (2000).

each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.⁸¹

The Court's language in both *Bakke* and *Cayetano* could be interpreted by a judge to argue that racial discrimination based on birth-status is subject to strict scrutiny. If this were the case, a judge then must determine whether legacy preference policies had a discriminatory effect on non-white races based on birth-status. An explanation of the history of legacy preferences and the current racial makeup of legacy students is instructive in answering this question.

2. *Historically, legacy policies were founded on racial discrimination.*

Legacy policies originated in the 1920s at the most prestigious East Coast universities. During this era, many universities increased their selectivity due to increasing enrollments following World War I.⁸² This era also coincided with an increase in nationalism, which resulted in anti-immigrant and anti-Jewish sentiments.⁸³ The East Coast universities were concerned about their increased Jewish enrollments, and they addressed the concerns of over-enrollment by implementing mechanisms—like legacy preference policies—to exclude Jewish applicants.⁸⁴

The anti-Jewish sentiment of these legacy preference policies was explicit during this decade. Harvard's President Lowell was determined to limit the

⁸¹ *Id.* at 517; *see also* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (quoting this passage from *Rice*); *Fullilove v. Klutznick*, 448 U.S. 448, 531 & n.13 (1980) (Stewart, J., dissenting) (The Constitution's Equal Protection Clause "set out to establish a society that recognized no distinctions among white men on account of their birth" and "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.").

⁸² *See* MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900–1970*, at 154 (1979) (discussing the relationship between anti-Jewish sentiment and admissions restrictions at Yale and, more generally, other elite universities); *see also* *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (holding that, under 42 U.S.C. § 1982, plaintiffs cannot solely show the defendant perceived them to be a separate race, but must in fact be one of the racial classifications Congress intended to protect under the statute); DAN A. OREN, *JOINING THE CLUB: A HISTORY OF JEWS AND YALE* 40 (2d ed. 2000) (analyzing how restrictions on Jewish enrollment may be considered racial discrimination, if Jews were considered a separate race at the time the policy was implemented).

⁸³ SYNNOTT, *supra* note 82, at 154.

⁸⁴ *Id.*; *see also* Kathryn Ladewski, Note, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577, 580 (2010) (describing the ways East Coast universities developed mechanisms in the 1920s to exclude Jewish applicants).

number of Jewish students, either through a quota or explicitly higher academic standards for Jewish Students.⁸⁵ In 1925, President Lowell explained that the purpose of legacy policies was “to prevent a dangerous increase in the proportion of Jews.”⁸⁶ Although other prestigious universities were not as explicit, Yale’s plan to address its increasing enrollment of Jewish students resulted in the nation’s first legacy admissions preference in 1925.⁸⁷ Soon after implementing this policy, Yale decreased its percentage of Jewish students and doubled the percentage of legacy students.⁸⁸

In the 1960s, legacy acceptance rates were further increased, potentially as a tool to discriminate against Black applicants.⁸⁹

[A]s pressure toward racial integration intensified, acceptance rates rapidly increased for children of alumni—in some cases, to as much as three times higher than that of the past. Given resistance on the part of historically White institutions to enrolling Black students during the civil rights era, legacy policies may have furnished an excuse to reject racial minorities without resorting to the quotas that had been used exclude Jews and Catholics earlier in the century.⁹⁰

Although the nation’s first legacy preference policies were racially motivated, universities today justify their legacy preferences based on nondiscriminatory reasons, such as maintaining alumni donations. However, legacy preference policies still have a racially discriminatory effect that a judge could find is analogous to that of Yale and Harvard’s original, intentionally discriminatory legacy policies. This racially discriminatory effect is explored in the following sub-section.

⁸⁵ See JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 86–109 (2005) (describing the lengths these universities went to exclude Jewish applicants); see also OREN, *supra* note 82, at 49–52.

⁸⁶ See *id.*; see also ROBERT K. FULLINWIDER & JUDITH LICHTENBERG, *LEVELING THE PLAYING FIELD: JUSTICE, POLITICS, AND COLLEGE ADMISSIONS* 83–84 (Rowman & Littlefield Publishers 2004) (discussing the introduction of legacy preferences at Dartmouth in 1922).

⁸⁷ OREN, *supra* note 82 (explaining that the preference ensured that the “limitation on numbers shall not operate to exclude any son of a Yale graduate who has satisfied all the requirements for admission.”); FULLINWIDER, *supra* note 86, at 84.

⁸⁸ See OREN, *supra* note 82, at 116.

⁸⁹ Marybeth Gasman & Julie Vultaggio, *Perspectives: A “Legacy” of Racial Injustice in American Higher Education*, *DIVERSE ISSUES HIGHER EDUC.*, Jan. 22, 2008, <https://diverseeducation.com/article/10519/>.

⁹⁰ *Id.*

3. *The racial impact of legacy preferences.*

White students disproportionately benefit from legacy preferences.⁹¹ For example, at Harvard, the new incoming class is about one-third legacy, and of that third, approximately 98% are white.⁹² Legacy preferences at most universities have been described by legal scholars as “near-perfect prox[ies] for being white.”⁹³

The disproportionate benefit of legacy preference for white applicants not only grants a benefit on them, but also perpetuates this benefit onto future white applicants. Legacy policies improve admissions prospects for predominately white alumni children. This leads to their white children receiving a benefit from these policies. Because legacy preferences benefit children of alumni, “[t]he racial and ethnic composition of the pool of potential legacy students necessarily resembles the composition of past student generations.”⁹⁴ Therefore, not only do legacy preference policies disproportionately benefit white students today, these policies also perpetuate this cycle of giving an admissions advantage to white children of alumni.

II. APPLYING INTERMEDIATE SCRUTINY TO LEGACY POLICIES AS CLASSIFICATIONS BY PARENTAL STATUS

The Supreme Court also applies a middle-tier intermediate scrutiny to discriminatory classifications that do not rise to the level of strict scrutiny. Under intermediate scrutiny, a policy will be sustained if it involves an important objective and the classification is substantially related to that objective.⁹⁵ Intermediate scrutiny applies to cases of potential discrimination

⁹¹ *See id.* (“Because legacy admits are typically wealthy, White, fourth-generation college students, they offer little to colleges and universities in terms of racial and ethnic diversity. In fact, according to multiple sources, over 90 percent of legacy admits are White Protestants. Thus, legacy admits systematically reproduce a culture of racial and economic privilege.”).

⁹² Ginger O’Donnell, *Challenging Legacy Admissions*, INSIGHT INTO DIVERSITY (June 27, 2018), <https://www.insightintodiversity.com/challenging-legacy-admissions/>.

⁹³ *Id.*

⁹⁴ Cameron Howell & Sarah E. Turner, *Legacies in Black and White: The Racial Composition of the Legacy Pool*, 45 RES. HIGHER EDUC. 325, 346 (2004).

⁹⁵ *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.”).

on the basis of gender⁹⁶ or illegitimacy.⁹⁷ The intermediate scrutiny test has been applied unpredictably, and some scholars believe that the result of applying this test can depend on the values and perspectives of the judges applying it.⁹⁸

A judge could find that legacy admissions should be reviewed under intermediate scrutiny because, as is the case with children born to unmarried parents, “no child is responsible for his birth.”⁹⁹ Thus, to penalize a child’s ability to get into a school based on whether their parent was able to get in, especially if that parent was unable to get in because of previous discrimination on the basis of race or religion, would be unjust to the child because they have no control over this status.¹⁰⁰

In *Weber v. Aetna Casualty & Surety Co.*, the Court held that a state could not lawfully prevent such children from recovering workers’ compensation death benefits.¹⁰¹ 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.”¹⁰² The Equal Protection Clause “enable[s] us to strike down discriminatory laws relating to status of birth.”¹⁰³

Similarly, in *Mathews v. Lucas*¹⁰⁴ 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

⁹⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976) (“[S]tatutory classifications that distinguish between males and females are ‘subject to scrutiny under the Equal Protection Clause.’”).

⁹⁷ *Clark*, 486 U.S. at 461 (“[I]ntermediate scrutiny . . . has been applied to discriminatory classifications based on sex or illegitimacy.”).

⁹⁸ In *Craig v. Boren*, the Court invalidated a law that banned the sale of 3.2% beer to eighteen to twenty-year-old males while allowing purchase by females of the same age. 429 U.S. 190 (1976). The same test resulted in a decision in 1981 upholding a California law that allowed males, but not females, to be charged with statutory rape. *Michael M. v. Superior Court*, 450 U.S. 464 (1981). Taken together, the two cases suggest the unpredictability of the intermediate scrutiny test used by the Court.

⁹⁹ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

¹⁰⁰ RICHARD D. KAHLBERG ET AL., *AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS* 201 (2010) (explaining how the demographics of the alumni applicants will take several generations to change).

¹⁰¹ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

¹⁰² *Id.* at 175.

¹⁰³ *Id.* at 176.

¹⁰⁴ *Mathews v. Lucas*, 427 U.S. 495 (1976).

of the . . . [child], and it bears no relation to the individual's ability to participate in and contribute to society."¹⁰⁵

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."¹⁰⁶ He noted that the Declaration of Independence and the Constitution's prohibition on titles of nobility "equally would prohibit the United States from attaching any badge of ignobility to a citizen at birth."¹⁰⁷

However, to be a quasi-suspect classification, the judge would have to find that there was a history of discrimination against persons of that legal status, however the judge defines it. A "badge of identification" is not required, like that which makes obvious a person's race or gender.¹⁰⁸

III. APPLYING RATIONAL BASIS TO LEGACY POLICIES

If the legacy preference policy is found to not fall within the ancestry, race, or parental status classifications, then it will be analyzed under rational basis review. Rational basis scrutiny applies to all cases that do not receive intermediate or strict scrutiny. Under rational basis scrutiny, a policy will be sustained if it involves a legitimate government objective, and the classification is reasonably related to achieving that objective.¹⁰⁹ Courts have

¹⁰⁵ *Id.* at 505; *see also* *Trimble v. Gordon*, 430 U.S. 762, 770 (1977) (explaining that heightened scrutiny is required because out-of-wedlock children "can affect neither their parents' conduct nor their own status").

¹⁰⁶ *Mathews*, 427 U.S. at 520 n.3 (Stevens, J., dissenting).

¹⁰⁷ *Id.*; *see also* *Eskra v. Morton*, 524 F.2d 9, 13 (7th Cir. 1975) (explaining that 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).

¹⁰⁸ *Id.*

¹⁰⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) ("[S]cheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.").

found that rational basis review applies to cases of age¹¹⁰ and disability¹¹¹ discrimination.

The rational basis test is very deferential and nearly all policies analyzed under this standard are found to be constitutional. In *FCC v. Beach*,¹¹² the Court went so far as to say that economic regulations satisfy the equal protection requirement if “there is *any* conceivable” fact pattern that could provide a rational basis for the classification. Justice Stevens, concurring, objected to the Court’s test, arguing that it is “tantamount to no review at all.”¹¹³

The only federal court that has addressed what level of review applies to legacy preferences held that rational basis review was the applicable test.¹¹⁴ In *Rosenstock v. Board of Governors of University of North Carolina*, Judge Hiram Ward of the United States District Court for the Middle District of North Carolina applied the rational basis test, because the Supreme Court had found that the right to a university education was not a fundamental interest, and he found that children of alumni are not a suspect criteria.¹¹⁵ The issue in *Rosenstock* was whether the university’s policy of preferential treatment of out-of-state applicants who are the sons or daughters of alumni constitute a denial of plaintiff’s right to equal protection of the laws. Applying rational review, Judge Ward held that the University of North Carolina’s legacy preference policy survived rational review because “defendants showed that alumni provide monetary support for the University and that out-of-state alumni contribute close to one-half of the total given.”¹¹⁶ The court further said, “[t]o grant children of this latter group a preference then is a reasonable basis and is not constitutionally defective.”¹¹⁷

Decided in 1976, *Rosenstock* is non-binding, non-persuasive, and will likely not be followed. First, this case is not binding on any court, because it was

¹¹⁰ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000) (applying the rational basis test to age discrimination because there is not a “history of purposeful unequal treatment” based on age and “old age does not define a discrete and insular minority” because all persons experience all ages if they live out their normal lifespans).

¹¹¹ *Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) (holding that if special accommodations are to be required for the disabled, then they must come from positive law, not from the Fourteenth Amendment).

¹¹² *FCC v. Beach*, 508 U.S. 307, 309 (1993) (emphasis added).

¹¹³ *Id.* at 323.

¹¹⁴ *Rosenstock v. Bd. of Governors of Univ. of N.C.*, 423 F. Supp. 1321, 1326 (M.D.N.C. 1976).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

decided by a federal district court. Second, it is not persuasive, because it does not provide any reasoning that will be instructive to future courts. Judge Ward concludes that strict scrutiny does not apply to legacy policies in a mere five sentences, but in doing so, the court never explains its reasoning for why various classifications do not apply. Additionally, the facts in *Rosenstock* were not ideal for a challenge to legacy policies. The plaintiff was a white student, whose ancestors were from America, and she likely did not have the credentials for the university she applied to. Finally, this case will likely not be followed, because it was decided over forty years ago. In the last four decades, the Court's Equal Protection Clause jurisprudence has drastically changed, including the clear articulation of the three standards of review. For these reasons, *Rosenstock* will likely not factor into a court's decision on what standard of review to apply.

Potentially more important is Justice Clarence Thomas's partial dissent in *Grutter v. Bollinger*.¹¹⁸ In his partial dissent to this landmark affirmative action case, Justice Thomas stated that the Constitution's Equal Protection Clause did not prohibit "unseemly legacy preferences," because they did not directly involve race.¹¹⁹ He further stated that "legacy preferences can stand under the Constitution."¹²⁰ In a footnote, Justice Thomas further weighed in on legacy preferences and said, "[w]ere this court to have the courage to forbid the use of racial discrimination in admissions legacy preferences (and similar practices) might quickly become less popular—a possibility not lost, I am certain, on the elites (both individual and institutional) supporting the Law School in this case."¹²¹

Like Judge Ward's decision in *Rosenstock*, Justice Thomas's partial dissent is neither binding nor persuasive for a judge determining which standard of review to analyze a legacy policy under. Justice Thomas's partial dissent does, however, shed light on his perspective of this issue. As the only Supreme Court justice to weigh in on this question, rational basis review very well might be the standard of review that will be applied. Thus, it is likely that Justice Thomas would agree with the Judge Ward's opinion, and he would likewise apply rational review because legacy preferences do not directly involve race.

¹¹⁸ 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part and dissenting in part).

¹¹⁹ *Id.* at 369; see also Adam Liptak, *A Hereditary Perk the Founding Fathers Failed to Anticipate*, N.Y. TIMES (Jan. 15, 2008), <https://www.nytimes.com/2008/01/15/us/15bar.html>.

¹²⁰ *Grutter*, 539 U.S. at 369.

¹²¹ *Id.* at 368 n.10.

IV. THE GOVERNMENTAL INTEREST

After determining what level of scrutiny a challenged legacy policy would be evaluated under, a judge would then weigh the governmental interest furthered by the legacy preference policies. This section discusses three governmental interest that a judge would use to evaluate whether the legacy policy survives review. First, there is a compelling governmental interest in maintaining student-body diversity at prestigious universities. In the Court's affirmative action jurisprudence, the issue of student-body diversity was a compelling enough interest to sustain some amount of race-based affirmative action. Evidence strongly supports the contention that legacy policies harm the racial diversity of universities' student bodies.¹²²

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*.¹²³ This argument fails, because it bypasses the first 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.¹²⁴

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."¹²⁵ Accordingly, "attaining a diverse student body is at the heart of the [university's] proper institutional mission."¹²⁶ Student-body diversity also promotes good citizenship and stabilizes society by ensuring that "all members of our heterogenous society must have confidence in the openness and integrity of the educational institutions that provide this training."¹²⁷

¹²² See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹²³ See generally *Id.* 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 Clause, that the school had a compelling interest in obtaining a 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.*

¹²⁴ *Id.* at 343.

¹²⁵ *Id.* at 324 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J., concurring)).

¹²⁶ *Id.* at 329.

¹²⁷ *Id.* at 332; see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 834 (2007) (Breyer, J., dissenting) (arguing strict scrutiny is necessary when government uses race "to decide who will receive goods or services that are normally distributed on the basis of merit and which are in short supply").

Second, those in favor of legacy preference policies will argue, as they did in *Rosenstock*, that universities have an interest in raising money. They will argue that legacy preference policies increase alumni donations. This argument is often assumed to be correct; however, a statistical analysis of alumni contributions at top schools shows that there is no evidence of causation between an increase in alumni donations and legacy preference policies.¹²⁸

Those defending these policies argue that they increase university revenue.¹²⁹ There are two problems with this argument. First, there has never been an empirical analysis that proves a causation between legacy preferences and increased revenue. Second, profiting from discrimination is unlawful.¹³⁰

Universities will not be able to meet their burden to establish causation between legacy preferences and increased university revenue.¹³¹ A recent study performed an analysis of the effects of legacy preferences on private giving and found no statistically significant relationship.¹³² The study surveyed the top seventy-five national universities and top seventy-five liberal arts colleges as ranked in the 2007 edition of U.S. News & World Report.¹³³ Of the 150 schools, the study was able to confirm that 102 grant legacy preference and seventeen do not; of the latter, eight stopped granting legacy preferences within the past fifteen years.¹³⁴ The database included alumni giving rates from 1992 to 2006.¹³⁵ The data showed no statistically significant correlation between legacy preferences and alumni giving.¹³⁶ Further, of the eight universities that have recently terminated legacy preferences, seven experienced an *increase* in donations.¹³⁷

¹²⁸ Shadowen, Tulante & Alpern, *supra* note 2, at 129–32.

¹²⁹ Cameron Howell & Sarah E. Turner, *Legacies in Black and White: The Racial Composition of the Legacy Pool*, 45 RES. HIGHER EDUC. 325, 330 (2004) (arguing the purpose of preferences is “to keep . . . alumni happy—and donating”).

¹³⁰ Shadowen, Tulante & Alpern, *supra* note 2, at 125–26.

¹³¹ See, e.g., Kathrin Lassila, *Why Yale Favors its Own*, YALE ALUMNI MAG., Nov.–Dec. 2004, http://archives.yalealumimagazine.com/issues/2004_11/q_a.html.

¹³² Shadowen, Tulante & Alpern, *supra* note 2, at 129–32.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

Finally, even if a defendant-university is able to show a causation between donations and legacy preferences. Profiting from discrimination is not a legitimate government interest. The law cannot recognize the receipt of revenue from the discrimination's beneficiaries—here, alumni students—as a legitimate interest.¹³⁸ For example, 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 increases if the schools remained all white.¹³⁹ Similarly, in *Plyler v. Doe*, the State of Texas tried to justify the denial of a free education to undocumented children by pointing to the need to preserve scarce funds for the education of lawful residents.¹⁴⁰ The Supreme Court found that Texas's justification was not a lawful government interest.¹⁴¹

Additionally, legacy preference policies are not narrowly tailored to the goal of increasing revenue. The universities' purported interest here is simply in raising revenue, which can easily be done without discriminating based on lineage. They can obtain additional government funding, use their endowments, increase private fundraising efforts, and cut administrative expenses.¹⁴²

CONCLUSION

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 on the identity, status, and accomplishments of their parents. Although legacy preference policies infringe these fundamental values, it is unclear whether they are constitutional. If this case came before a judge it would be an issue of first impression. Because of the nature of Equal Protection Clause jurisprudence, the constitutionality of a legacy preference policy would depend on what level

¹³⁸ *Id.* at 125–26.

¹³⁹ *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

¹⁴⁰ See *Plyler v. Doe*, 457 U.S. 202, 227 (1982) (holding that denying undocumented residents' children access to public education).

¹⁴¹ *Id.* (“[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources.”). 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.” *Id.*; see also *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (holding the saving of welfare costs by invidious discrimination of aliens is unconstitutional).

¹⁴² *Plyler*, 457 U.S. at 229 n.25.

of review a judge decides to analyze the policy under. The judge's decision will turn greatly on the facts. The impact of what standard of review to apply could be the difference between the continued discrimination against non-rich, non-white individuals from the nation's top institutions, and the end to this meritless system that has discriminated against those most vulnerable since its racist founding.

