The Nobility Clauses: Rediscovering the Cornerstone

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> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the cornerstone of republican government; for so long as they are excluded there can never be serious danger that the government will be any other than that of the people.
>
> Alexander Hamilton[1]

The framers of the United States Constitution recognized that the prohibition on titles of nobility was the fundamental source of a republican government. The prohibition appeared in the Articles of Confederation,[2] and the framers, making few comments but implying great reverence,[3] included the prohibition in two clauses of the new Constitution (one applicable to the federal government[4] and one applicable to the states[5]).

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1. THE FEDERALIST No. 84, at 512 (A. Hamilton) (C. Rossiter ed. 1961).
2. U.S. ARTICLES OF CONFEDERATION art. VI, cl. 3.
3. "The prohibition with respect to titles of nobility is copied from the Articles of Confederation and needs no comment." THE FEDERALIST No. 44, at 283 (J. Madison) (C. Rossiter ed. 1961).
4. U.S. CONST. art. I, § 9, cl. 8: "No Title of Nobility shall be granted by the United States."
5. U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . grant any Title of Nobility." The division of the prohibition into two clauses located in different parts of the Constitution has proven to be a blunder. The state version is located in the same clause as the frequently cited prohibition of impairment of contracts, making it difficult for researchers to locate headnotes pertaining to the Nobility Clause. See U.S.C.A. Const. art. I, § 10, cl. 1 (West 1981 Supp.). In this respect, at least, the Articles of Confederation were more intelligently constructed. See note 2 supra (federal and state prohibitions in same clause).

For two centuries the courts followed Hamilton's lead and said nothing about the Nobility Clauses.[6] In the last two decades, however, the clauses have experienced a major renaissance, as courts have come to recognize a radical equality principle inherent in the clauses. Judges have invoked the Nobility Clauses to prevent a citizen from changing his name,[7] to halt discriminations against illegitimates,[8] and to cast doubt upon the constitutionality of Indian laws.[9] Justice Stevens has championed the Nobility Clauses in the Supreme Court, authoring ringing dissents in Fullilove v. Klutznick[10] and Mathews v. Lucas.[11]

Yet the cases reveal ad hoc application of the clauses, and no scholar has developed a systematic framework for identifying violations. This Article proposes a multi-factored balancing test. The factors include: (i) whether the government has granted or recognized an actual title; (ii) whether that title

6. The only prominent cases call on the wording of the clauses to support broad generalities concerning the structure of the Constitution. See Downes v. Bidwell, 182 U.S. 244, 277 (1901) (Nobility Clause exemplifies a per se restriction on Congressional power); Legal Tender Case, 110 U.S. 421, 447 (1884) (Congress and states both prohibited from granting titles, unlike other prohibitions applying only to states).

7. In re Jama, 272 N.Y.S.2d 677 (Sup. Ct. 1966). Judge Maurice Wohl denied Robert Paul Jama's petition to change his surname to "von Jama." The court declared that for the state to authorize such a change would violate the Nobility Clause, since "von" is a prefix "occurring in many German and Austrian names, especially in the nobility." Id. at 678. However, Judge Wohl's reasoning was based on a xenophobic aversion to the German people, whom he described as morally reprehensible followers of "the philosophies of a monstrosity and his cohorts." Id. He continued: "An American should measure himself by the American standard, and paraphrasing the bold Romans of old, proudly proclaim himself Civis Americanus Sum." Id. See also Roberts, The Sorry State of New York Name Change Law, 2 J. ATTEN. SUBT. (1983) (forthcoming).

8. Eskra v. Morton, 524 F.2d 9, 13 n.8 (7th Cir. 1975) (opinion of then-Circuit Judge Stevens); see also note 11 infra.

9. Makah Indian Tribe v. Clallam County, 73 Wash. 2d 677, 687 (1968) (en banc) (asking "whether the law has not conferred upon tribal Indians and their descendants what amounts [sic] to titles of nobility").

10. 100 S. Ct. 2758, 2803 & n.1 (1980) (Stevens, J., dissenting) (affirmative action plan violates equality principle of Nobility Clause).

11. 427 U.S. 495, 522 n.3 (1976) (Stevens, J., dissenting) (discriminating against illegitimate children attaches "badge of ignobility"). Justice Stevens's argument is textually and historically unsound. The framers of the Constitution permitted certain badges of ignobility. See, e.g., U.S. CONST. art. IV, § 2, cl. 3 (states required to deliver up fugitive slaves). Bastardy, moreover, was certainly known to the founding fathers. See, e.g., F. BRODIE, THOMAS JEFFERSON: AN INTIMATE BIOGRAPHY (1976).

bears a relation to the noble orders of Europe;[12] (iii) whether the "noble" individual also receives the traditional trappings and perquisites of nobility; (iv) whether the noble receives a tenurial interest in such trappings and perquisites which clearly distinguish the noble and his progeny from the common man; and (v) whether the perquisites include civil or military power. This test would apply equally to a grant of nobility by a state or by the federal government.[13]

The effect of the test is demonstrated by application to two governmental actions which might be challenged as grants of titles of nobility. One is the policy of certain state universities to recognize an elite cadre of undergraduates. For example, the University of North Carolina officially recognizes and provides facilities for the Order of the Golden Fleece.[14] The title derives directly from an order of eighteenth-century Austrian nobles, and membership insures unofficial but extraordinary influence in the University hierarchy.[15] However, the University does not itself select the members; more importantly, it grants none of the trappings of nobility. Finally, the benefits of membership are not tenurial. Weighing all of these factors leads to the conclusion that official recognition of the order does not rise to the level of a constitutional violation.

By contrast, the federal government's grant of a Congressional Medal of Honor together with all its ancillary benefits does violate the Nobility Clause.

12. The framers were particularly concerned about titles bearing a relation to noble orders of Germany and England. <u>See</u> 4 M.FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 32-36 (rev. ed. 1937) (statement of Charles Pinckney).

13. One might speculate that the use of the passive voice in the federal clause, <u>see</u> note 4 <u>supra</u>, distinguishes it from the state clause, which uses the active voice, <u>see</u> note 5 <u>supra</u>. However, the Supreme Court has stated that "Congress and the States equally are expressly prohibited from . . . granting any title of nobility." Legal Tender Case, 110 U.S. 421, 447 (1884).

14. The University provides meeting rooms for the order, and all members are automatically invited to the annual banquet given by the Chancellor. Interview with B. Steven Toben, former head of the Order of the Golden Fleece (April 24, 1982) (notes on file with <u>Journal of Attenuated Subtleties</u>).

15. Order members have easy access to the Chancellor's office to express their views on university policy. Interview with Steven W. DeVine, member of the Order of the Golden Fleece (April 28, 1982) (notes on file with <u>Journal of Attentuated Subtleties</u>).

Although the medal does not derive explicitly from an Old World title, it does bear a resemblance to an elite military order. The medal itself is an elaborate trapping of nobility.[16] Furthermore, legislation prevents both the medal and its concomitant pension from falling into the hands of common creditors.[17] Most significantly, the medal brings with it a tenurial right of special access to the corridors of power: the children of medal winners may bypass the ordinary admission process and apply directly to the President for admission to the service academies.[18] In sum, it is the exalting of military heroes and their families that currently poses the gravest threat to the republican form of government envisioned by the framers.

16. See 10 U.S.C. §§ 3741 (Army), 6241 (Navy), 8741 (Air Force) (1976) (medals authorized with "ribbons and appurtenances").
17. See, e.g., N.Y. CIV. PRAC. LAW § 5205(e) (medal exempt from bankrupt's estate); 38 U.S.C. § 562(c) (1976) (pension not subject to attachment, levy, or seizure).
18. 10 U.S.C. §§ 4342(c) (Military Academy); 6954(c) (Naval Academy); 9342(c) (Air Force Academy) (1976).

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