

2001

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### Recommended Citation

William N. Eskridge, Jr., *Relationship between Obligations and Rights of Citizens*, 69 Fordham L. Rev. 1721 (2001).

Available at: <https://ir.lawnet.fordham.edu/flr/vol69/iss5/9>

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# THE RELATIONSHIP BETWEEN OBLIGATIONS AND RIGHTS OF CITIZENS

*William N. Eskridge, Jr.\**

Citizenship is a matter of unquestionable but ambiguous constitutional significance. Section 1 of the Fourteenth Amendment begins by announcing, “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are *citizens* of the United States and of the State wherein they reside.”<sup>1</sup> Only after this framing announcement does Section 1 declare the protections of the privileges or immunities, due process, and equal protection clauses. The few academics who focus on this first sentence maintain that it is a source or a framing mechanism for the recognition of individual *rights*.<sup>2</sup> Professor Kenneth Karst, the leading contemporary theorist, argues that the Fourteenth Amendment’s citizenship clause, read with the balance of Section 1, prohibits the state from treating members of socially stigmatized groups as outsiders to the law or from denying them “full inclusion in the public life of the community.”<sup>3</sup> Karst’s body of work presents an impressive case for rights of inclusion as entailed in the citizenship clause.

The great virtues of Karst’s theory are that it makes coherent sense of a neglected constitutional provision and that its sense coheres well with leading theories of the liberal state. I wonder, however, whether a rights-based theory is a complete understanding of citizenship, either at the time of the framing or even today. This article is a

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1. U.S. Const. amend. XIV, § 1 (emphasis added).

2. I am using the term *rights* broadly, but only as mediating the relationship between a person and the state or the community. Person A has a right if the state (or community) is precluded from narrowing A’s choices or affecting his interests in some other way, unless there is some special justification for doing so. See, e.g., Ronald Dworkin, *Taking Rights Seriously* 91-93, 189-91 (1977). Contrast an *obligation*. Person A has an obligation if she must narrow her choices or sacrifice her interests in some other way to serve the state (or community), unless there is some special justification for not doing so.

3. Kenneth L. Karst, *Law’s Promise, Law’s Expression: Visions of Power in the Politics of Race, Gender, and Religion* 193-94 (1993) (analyzing *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), an abortion case whose holding was rooted in the due process clause); see also Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* 201-06, 227 (1989); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 *Harv. L. Rev.* 1, 5-11 (1977).

preliminary inquiry into an alternative understanding of citizenship—one that considers *obligations* as well as *rights*, and ultimately their interrelationship. The idea, originally suggested to me by Professors Robert Cover and Susan Koniak, is simple enough.<sup>4</sup> Individual rights, without more, are a thin way to express or normalize the relationship of the individual to the community. Jewish law provides a different focus. When the Jewish child moves into adulthood by becoming a *bar* or *bat mitzvah*, he or she gains no greater rights than before but instead assumes more obligations, and this assumption of responsibility is what separates the full member of the community from the child or the outsider. This conception provides a richer understanding of the relationship between the individual and the community than does liberal theory.

An understanding of citizenship that considers obligations as well as rights can also enrich our understanding of the Fourteenth Amendment, both as it has been interpreted in the jurisprudence of race, and as it should be interpreted in our nation's evolving jurisprudence of sexuality, sex, and gender. The bulk of this article will explore those doctrinal implications. I shall conclude with reservations. In an era of expanding and diffused community, does our nation's public law have room for a theory of citizenship that considers obligation? Is this a pipe dream, or is it something positive that constitutional law can contribute to our public culture?

## I. A PRELIMINARY BASIS FOR A CONSTITUTIONAL CONNECTION BETWEEN OBLIGATION AND RIGHTS

As Michael Sandel has documented in *Democracy's Discontent*, the dominant American tradition of liberal rights has existed in a dialectical relationship with a tradition of communitarian relationships and obligations.<sup>5</sup> An exemplar of this dialectic is political philosopher Francis Lieber's *Manual of Political Ethics*, published in 1838-39 and reissued throughout the century.<sup>6</sup> Lieber devoted an entire chapter to the "Reciprocal Relation of Right and Obligation."<sup>7</sup> He started with the observation that the polity where men "claim, maintain, or establish rights" cannot be a lawful and ordered one "without

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4. See Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & Religion 65, 68-69 (1987); Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 Geo. J. Legal Ethics 1, 21-30 (1995).

5. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 201-49 (1996); see also *Debating Democracy's Discontent: Essays on American Politics, Law, and Public Philosophy* (Anita L. Allen & Milton C. Regan, Jr. eds., 1998) (offering various scholars' commentary on Sandel's work).

6. 1 Francis Lieber, *Manual of Political Ethics* 383-411 (Theodore D. Woolsey ed., 2d ed. rev. 1911) (1838).

7. *Id.*

acknowledging corresponding and parallel obligations.”<sup>8</sup> He continued:

It is natural, therefore, that wherever there exists a greater knowledge of right, or a more intense attention to it, than to concurrent and proportionate obligation, evil ensues. . . . The very condition of right is obligation; the only reasonableness of obligations consists in rights. Since, therefore, a greater degree of civil liberty implies the enjoyment of more extended acknowledged rights, man’s obligations increase with man’s liberty. Let us, then, call that freedom of action which is determined and limited by the acknowledgment of obligation, Liberty; freedom of action without limitation by obligation, Licentiousness. The greater the liberty, the more the duty.<sup>9</sup>

What did Lieber mean by this analysis? He clearly had two ideas in mind, and I would read him for a third idea as well.

First, Lieber’s invocation of “corresponding and parallel obligations” that accompany rights, posits the importance of reciprocity in the normative case for rights. Thus, someone who comes to this country must obey our laws, but in return is also protected by our laws.<sup>10</sup> Call this the “reciprocity understanding” of the relationship between rights and obligations: our rights and obligations are parallel and roughly correlative.<sup>11</sup> Second, and more deeply, Lieber was expressing the notion that the citizen’s relationship to the state is not just one of obedience to its laws, but also involves the exercise of civic virtue. Necessary to a free polity is the citizens’ desire to obey the law, and even to restrain themselves beyond the law’s letter. As Lieber later stated in the book, “a conscientious citizen is not at liberty to do all that is directly permitted by law,” and is not absolved of his own moral responsibility to abstain from doing “unjust, immoral, and cruel things,” even though allowed by the law.<sup>12</sup> The citizen who acts in accord with obligation and responsibility is the mature citizen, the complete political man, the only person who is “free” in the positive sense. Call this the “civic virtue understanding” of the relationship between rights and obligations: our obligations are paramount. They not only undergird our rights but also require us to forego them sometimes.

8. *Id.* at 383.

9. *Id.* at 383-84.

10. *Cf. id.* at 145, 150, 384 n.1 (making various references to the mutuality and reciprocity of rights guaranteed by the state).

11. *Cf. Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L.J.* 16, 30-32 (1913) (positing a theory of “jural opposites” under which a right for A entails an obligation for B).

12. 2 Lieber, *supra* note 6, at 149; *see also* 1 Lieber, *supra* note 6, at 401-02 (stating that every citizen owes duties of “justice” to other citizens; even if not required by law, one must give one’s colleague his “due”).

A third meaning is consistent with and even suggested by the foregoing passages but may go beyond Lieber's own thinking.<sup>13</sup> Under this reading, citizenship entails a web of interconnected rights and obligations. Rights and obligations are not just reciprocal, they are interwoven; citizenship in the polity entails a web of communal bonding and individual security. Ex ante, rights can help create the conditions for obligations to be carried out and a spirit of dutifulness inculcated; obligations, can in turn, create conditions for mutual respect among citizens that facilitate the operation of rights. Call this the "pragmatic understanding" of the relationship between rights and obligations. A crude example of the pragmatic understanding comes from the most famous lawyer in America at the time when Lieber published the *Manual*, Roger Taney, Chief Justice of the United States from 1836 to 1864.

The original Constitution mentions national citizenship only in the presidential qualification clause,<sup>14</sup> but in two places importantly deploys the idea of state citizenship. Article IV assures "Citizens of each State . . . all the Privileges and Immunities of Citizens in the several States."<sup>15</sup> This clause prohibits state discrimination against citizens of other states: a citizen of Virginia passing through or doing business in Maryland could not be denied legal privileges or immunities then enjoyed by citizens of Maryland. Article III extends the "judicial Power" of the United States to various kinds of cases and controversies, including "Controversies . . . between Citizens of different States."<sup>16</sup> The most famous construction of this diversity of state citizenship element of federal jurisdiction was Chief Justice Taney's opinion for the Court in *Dred Scott v. Sandford*,<sup>17</sup> decided almost twenty years after Lieber's treatise. Dred Scott had sued in federal court, invoking the court's diversity jurisdiction to seek a judicial declaration of his emancipation because he claimed citizenship in a free state.<sup>18</sup> The first issue was: "Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into

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13. This meaning is based on my reading of the *Manual* and on the burgeoning Lieber scholarship, notably the Cardozo Law Review symposium on his *Legal and Political Hermeneutics*, see Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 Cardozo L. Rev. 2107 (1995), as well as Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. Rev. 1501, 1515-24 (1997), especially her meticulous link between Lieber's theory and Hegel's.

14. U.S. Const. art. II, § 1, cl. 5.

15. *Id.* art. IV, § 2, cl. 1.

16. *Id.* art. III, § 2, cl. 1. Various other heads of jurisdiction also rely on citizenship of states or foreign states. Nowhere does Article III speak explicitly of national citizenship.

17. 60 U.S. 393 (1857). See generally Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978).

18. *Dred Scott*, 60 U.S. at 396-99, 400.

existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied [sic] by that instrument to the citizen?"<sup>19</sup> Taney ruled that a black man descended from slaves could not be a "citizen" for purposes of Article III.<sup>20</sup>

The Chief Justice's opinion presented a thorough case for the proposition that the framers of the Constitution considered people of African descent incapable of holding citizenship and having rights. At the most general level, Taney argued, slaves were legally invisible to the founding generation. Even Native Americans, who could be naturalized by Congress, could not be made "citizens in a civilized community."<sup>21</sup> Hence, it went without saying that the descendants of African slaves, who could not even be naturalized,<sup>22</sup> would presumptively not be citizens under the Constitution.<sup>23</sup> Having established this as the baseline, Taney examined specific legal sources contemporary with the founding generation, starting with a 1792 statute (adopted by a Congress filled with constitutional framers) requiring every "free able-bodied white male citizen" to be enrolled in the militia.<sup>24</sup> This was evidence that "the African race" owes allegiance to the United States, "but it is repudiated, and rejected from the duties and obligations of citizenship in marked language."<sup>25</sup>

*Dred Scott* was the leading legal examination of citizenship before the Civil War. The first sentence of the Fourteenth Amendment—the citizenship clause—overrides this holding of *Dred Scott*. Not only did former slaves become citizens by operation of this clause, but thereafter people of African descent were eligible to become citizens.<sup>26</sup> The importance of the citizenship right was illustrated by the Chinese exclusion cases. In the early cases, the Supreme Court

19. *Id.* at 403.

20. *Id.* at 406.

21. *Id.* at 420.

22. *Cf.* An Act to Establish An Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (America's first naturalization law, providing that "any alien, being a free white person," might be naturalized).

23. *Dred Scott*, 60 U.S. at 420. Taney therefore created as a baseline presumption "the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery, and governed at their own pleasure." *Id.*

24. *Id.* (quotation omitted).

25. *Id.*; *see also id.* at 420-21 (noting an 1813 law, 2 Stat. 809, providing that U.S. ships could only employ "citizens of the United States, or persons of color," and an 1820 law authorizing the District of Columbia's government to enact special legislation for disorderly conduct by "slaves, free negroes, and mulattoes"). Taney stated: "This law, like the laws of the States, shows this class of persons were governed by special legislation directed expressly to them, and always connected with provisions for the government of slaves, and not with those for the government of free white citizens." *Id.* at 421.

26. *See* Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254 (1870) (opening naturalization to "aliens of African nativity and to persons of African descent").

upheld Congress' power to expel as well as exclude noncitizens—including Chinese residents of the United States—as a necessary attribute of national sovereignty.<sup>27</sup> In *United States v. Wong Kim Ark*,<sup>28</sup> however, the Court interpreted the citizenship clause to apply to the children of Chinese noncitizens who were born in the United States.<sup>29</sup> Because they were constitutional “citizens,” those children were not subject to expulsion, even though their parents were.<sup>30</sup>

The second sentence of the Fourteenth Amendment assures that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*”—the third time in the Constitution that citizens are identified as being “of the United States.”<sup>31</sup> This provision has enjoyed a surprisingly marginal interpretive history.<sup>32</sup> The Supreme Court in *The Slaughterhouse Cases*<sup>33</sup> confirmed that the citizenship clause overrode *Dred Scott*, but rejected a broad reading of the privileges or immunities clause that would have policed state regulation of local monopolies.<sup>34</sup> The Court's fear was that recognizing all fundamental economic rights as constitutionally cognizable privileges or immunities would essentially federalize state regulatory policy.<sup>35</sup> That holding seems essentially correct but does not preclude a narrower reading of the privileges or immunities clause. *The Slaughterhouse Cases* need not be overturned, as many law professors argue they should be,<sup>36</sup> to read that precedent for the narrower proposition that the “privileges or immunities of citizens of the United States” are those entailing obligations as well as rights that set apart the full membership in the political community from the outsider, or alien. Such a reading of the privileges or immunities clause has the advantage of giving that clause a civic

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27. *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889). These cases are discussed in Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, at 298-311 (1993) (volume VIII of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States).

28. 169 U.S. 649 (1898).

29. Justice Horace Gray's learned opinion looked to the common law, international practice, and constitutional history to resolve the unsettled issue, discussed in *Minor v. Happersett*, 88 U.S. 162, 167 (1874), whether people born in the United States were citizens even though their parents were not. *Wong Kim Ark*, 169 U.S. at 654-58.

30. *Wong Kim Ark*, 169 U.S. at 704-05.

31. U.S. Const. amend. XIV, § 1 (emphasis added). The first time citizens are so identified is the presidential qualifications clause, *id.* art. II, § 1, cl. 4, the second is the citizenship clause discussed above. See *supra* text accompanying notes 1, 14.

32. On the citizenship clause generally, see Akhil Reed Amar, *The Bill of Rights 181-87* (1998).

33. 83 U.S. 36 (1873).

34. *Id.* at 73, 80-81.

35. *Id.* at 76-82.

36. See, e.g., Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution 297-319* (1990); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 *Yale L.J.* 1385 (1992).

reading that would have been analytically congenial to a lawyer in the 1860s. Although Taney's holding and the racist tradition embedded in his *Dred Scott* opinion were overridden by the citizenship clause, the mode of analysis—thinking about citizenship as a web of interrelated obligations as well as rights—was not. That web would in the 1860s have included service on juries and the armed forces, marriage, access to the courts, and would today include voting and public education as well.<sup>37</sup>

The Supreme Court's actual enforcement of these rights and obligations has been tied to the due process and (especially) equal protection clauses, not the privileges or immunities clause of Section 1. The due process and equal protection clauses protect "persons" and not just "citizens." Thus, the Court applied the protections of the Fourteenth Amendment, as well as the Bill of Rights, to noncitizens from China in the first generation after Reconstruction,<sup>38</sup> for reasons suggested by the reciprocity understanding of rights and obligations: "A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."<sup>39</sup> Even though the United States could expel noncitizens, it had to treat them fairly so long as they were in this country.<sup>40</sup>

Pursuant to the civic virtue or pragmatic understanding of rights and obligations I have derived from Lieber, the Court's jurisprudence ought to read the equal protection clause differently, in some respects, for citizens than for noncitizens. For citizens, the Court ought to insist upon military service, jury service, marriage, and contract rights as a package of rights and obligations that the states are essentially prohibited from apportioning on a discriminatory basis—not just because such discrimination denies citizens important benefits, but also because it denies them the respect and community bonding entailed in their assuming the obligations of citizenship. This would entail the pragmatic understanding of rights and obligations, which I shall show to be roughly consistent with the Court's general

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37. See *infra* Part II. The list of rights and obligations in the text would make the Fourteenth Amendment's clause cover different "privileges" and "immunities" than Article IV's clause, just as the current stingy interpretation of the Fourteenth Amendment's clause does. The different readings could be justified by the different purposes of the clauses: Article IV seeks to assure national union by discouraging the states from discriminating against out-of-staters, while the Fourteenth Amendment seeks to assure the conditions of citizenship for in-staters.

38. See, e.g., *Wong Wing v. United States*, 163 U.S. 228 (1896) (applying Bill of Rights to protect citizens of China from being unlawfully detained in the United States); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (applying the equal protection clause to protect citizens of China living in the United States).

39. *Wong Wing*, 163 U.S. at 242 (Field, J., concurring in part).

40. *Fong Yue Ting v. United States*, 149 U.S. 698, 724-25 (1893) (distinguishing *Yick Wo*, 118 U.S. at 356).

jurisprudence of equal protection. A civic virtue understanding of that relationship would not be judicially enforceable per se, but would provide constitutional support for more aggressive political measures, such as legal requirements that citizens vote, serve on juries, and serve in the armed forces. The civic virtue understanding has also traditionally been the conceptual underpinning for the right to marry, although recent decisions suggest that is no longer the case.<sup>41</sup>

## II. A RE-EXAMINATION OF THE SUPREME COURT'S EQUAL PROTECTION CASE LAW IN LIGHT OF PRAGMATIC UNDERSTANDINGS OF RIGHTS AND OBLIGATIONS

Part I adds one further reason supporting the proposition that *The Slaughterhouse Cases* ought to be limited to their facts and the Fourteenth Amendment's privileges or immunities clause be given teeth.<sup>42</sup> The Supreme Court can do that without much violence to precedent, and a principle of civic obligation provides a way to limit the federal intrusion into state regulation, the legitimate concern of the *Slaughterhouse* Court. Under that principle, pragmatically conceived, the privileges or immunities of national citizenship enforceable against one's domicile state (as opposed to Article IV's privileges and immunities of state citizenship when one moves from one state to another) would be those rights that most closely entail civic obligations as well, including jury service, voting, military service, marriage, education, and access to courts and the rule of law.

Assume that the Court does not choose to extend the privileges or immunities clause in this way. The understandings of civic obligation described in Part I are still potentially relevant as an interpretive principle explaining the Supreme Court's construction of the equal protection clause, in particular. As Daniel Ortiz has argued, the cases can be sorted in a way not otherwise justified by the text: state policies abridging fundamental interests are, as a practical matter, subject to closer scrutiny than policies abridging other kinds of interests, including in some cases interests that seem important to many people.<sup>43</sup> The principle of civic obligation helps us identify which interests are most fundamental and must be guarded with special care by the judiciary—namely those rights imbricated with moral or legal obligations: jury service, voting, military service, and marriage. This principle already finds explicit expression in some of the case law and provides a useful conceptual way of understanding some otherwise puzzling precedents. Furthermore, thinking about the interrelation between rights and responsibilities as integral to the case

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41. See discussion *infra* Part II.5.

42. See *supra* text accompanying notes 36-37.

43. See Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 Stan. L. Rev. 1105, 1137 (1989).

law provides an internal-to-the-law fulcrum for criticizing a few of the cases. Finally, my earlier distinction between reciprocity and civic virtue understandings of civic obligation help us see how some of the cases can be viewed dialectically: the pragmatic and reciprocity understanding is the dominant theme of the Court's jurisprudence, but the civic virtue understanding persists as a minor theme that enriches the cases.

As the gentle reader ponders this thesis, consider several lines of cases that the idea of civic obligation illuminates.

### 1. *The Jury Cases*

The foregoing thesis is most clearly and persistently a theme in the jury selection cases; indeed, you cannot make sense of the cases without viewing them through the lens of civic obligations as well as civil rights. Among the earliest equal protection cases were those addressing laws excluding African Americans from juries.<sup>44</sup> In *Strauder v. West Virginia*,<sup>45</sup> the Supreme Court ruled that a state law limiting juries to "white male persons"<sup>46</sup> violated the equal protection clause, because it was a blatant discrimination against people of color and "practically a brand upon them, affixed by the law, an assertion of their inferiority."<sup>47</sup> My view is that *Dred Scott* provided important background for this unexplained assertion: like the early federal statutes excluding people of color from military obligations, newer laws excluding them from juries undermined their status as citizens because it excluded them from a key obligation of citizenship. Even though the Supreme Court subsequently upheld racial segregation policies in transportation and education, it never retreated from *Strauder*, in part because jury service was an appurtenance of citizenship in ways that transportation and education were not then perceived to be.<sup>48</sup> Exclusion from jury service expressed a profound

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44. Ironically, southern states excluded people of color from juries right after they had (under pressure from the Reconstruction Congress) adopted laws allowing people of color to testify in court. See George Fisher, *The Jury's Rise as Lie Detector*, 107 Yale L.J. 575, 658, 672-97 (1997).

45. 100 U.S. 303 (1880).

46. *Id.* at 305.

47. *Id.* at 308; see also 18 U.S.C. § 243 (codifying an Act of March 1, 1875, ch. 114, § 4, 18 Stat. 336, a Reconstruction era law making it a crime to exclude persons from jury service because of their race, discussed in *Virginia v. Rives*, 100 U.S. 313, 321 (1880)). Cf. *Neal v. Delaware*, 103 U.S. 370, 388-89 (1881) (stating that the right of a juror to serve provides a basis for constitutional intervention).

48. There is this potential difference between *Strauder*, 100 U.S. 303, and *Plessy v. Ferguson*, 163 U.S. 537 (1896): the former was a complete exclusion, while the latter was a segregation. The states, of course, would not have adopted a policy whereby criminal prosecutions of black defendants would have been heard by all-black juries, so in that important sense jury segregation was inconsistent with the philosophy of apartheid.

disrespect for people of color as citizens and deprived them of an important obligation by which they could show their worth as citizens.

In practice, unfortunately, people of color were kept off juries through the discriminatory administration of the criminal and civil justice system. The Supreme Court was lethargic in policing this practice for several generations but showed stronger interest after World War II,<sup>49</sup> for reasons expressed by Justice Frankfurter in his dissent in *Thiel v. Southern Pacific Co.*:<sup>50</sup> citizens of color should not be arbitrarily excluded from jury venires, "partly as assurance of a diffused impartiality" in the functioning of the jury, and "partly because sharing in the administration of justice is a phase of civic responsibility."<sup>51</sup> Agreeing with Frankfurter's general idea, the Court extended it beyond the racial context to hold that an exclusion from jury venires of people who worked for a daily wage, and therefore would suffer financially from jury service, could not be justified. "Jury service is a duty as well as a privilege of citizenship; it is a duty that cannot be shirked on a plea of inconvenience or decreased earning power."<sup>52</sup>

Even when people of color were represented in jury venires, prosecutors often struck them from actual service through peremptory challenges, a process the Court left unregulated for a longer period of time.<sup>53</sup> Finally, in *Batson v. Kentucky*,<sup>54</sup> the Court struck down a prosecutor's discriminatory deployment of peremptory challenges during jury selection from an unchallenged venire.<sup>55</sup> Justice Powell's opinion justified judicial monitoring of peremptory challenges mainly by reference to the need to assure defendants a representative and impartial jury and to preserve the legitimacy of the jury system, with only a brief mention of the juror's interest.<sup>56</sup> Powell's cursory treatment may reflect the common attitude that jury service is a pain in the neck rather than a civic opportunity—an attitude that should not be encouraged, and certainly not by the nation's highest court. The principle of civic obligation helps explain why peremptory challenges should be monitored so intrusively.<sup>57</sup> It also provides the

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49. See *Avery v. Georgia*, 345 U.S. 559, 562 (1953).

50. 328 U.S. 217 (1946).

51. *Id.* at 227 (Frankfurter, J., dissenting).

52. *Id.* at 224 (opinion of the Court).

53. See *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965) (holding that federal courts are not to inquire into the motives for prosecutors' peremptory challenges to jurors).

54. 476 U.S. 79 (1986).

55. *Id.* at 89.

56. See *id.* at 87.

57. Civic obligation also serves as a response to Chief Justice Burger's concern that judicial monitoring would intrude into the liberty of litigants to challenge jurors without giving reasons. See *id.* at 118-31 (Burger, C.J., dissenting). The principle also lends support to Justice Marshall's proposal that peremptory challenges be abolished (they are creatures of statute) and that challenges for cause be expanded as a check on juror bias. See *id.* at 105-08 (Marshall, J., concurring).

key justification for the Court's extension of *Batson* to race-based peremptory challenges by private defense or civil case attorneys (who are not state actors in the way prosecutors are). Because the juror's interest in carrying out his *civic* obligation is entailed in peremptory challenges, and because the whole judicial process is involved in excusing him, race-based strikes in the context of state trial proceedings ought to be unconstitutional whoever exercises them, as the Supreme Court has firmly held.<sup>58</sup> Similarly, it is unconstitutional for a prosecutor to strike jurors of the same race as the defendant, because "[j]ury service is an exercise of responsible citizenship" to which the citizen as juror has both a right and a responsibility.<sup>59</sup>

In *Strauder*, the Court observed that the state could exclude women from service on juries, even if not people of color.<sup>60</sup> This dictum is strikingly inconsistent with the principle of civic obligation: women were citizens in 1880, but second-class ones because they were considered too home-bound or ill-suited to participate in the serious public business of jury deliberation. This was a reflection of the separate spheres notion, whereby women were considered best-suited to domestic duties and men to public ones.<sup>61</sup> Even after they acquired the right to vote, women were either excluded from juries or, if allowed to serve, were excused if they chose to opt out.<sup>62</sup> It was not until *Taylor v. Louisiana*<sup>63</sup> that the Supreme Court invalidated this system—to protect the "civic responsibility" interests of the jurors as well as the fair trial interests of the litigants.<sup>64</sup>

In *J.E.B. v. Alabama ex rel. T.B.*,<sup>65</sup> the Court extended *Batson* to require judicial monitoring of sex-based peremptory challenges.<sup>66</sup> This would appear a logical extension, now that sex has joined race as a classification requiring heightened equal protection scrutiny, but the dissenting opinion raised a pertinent objection. Because there are, as a matter of convention, just two sexes pretty equally apportioned across the population, the fairness of trials ought not be affected by

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58. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), *followed in* *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that race-based strikes by criminal defense counsel constitute state action).

59. *Powers v. Ohio*, 499 U.S. 400, 402 (1991). *But see id.* at 418 (Scalia, J., dissenting) (dissenting apparently because he viewed the discrimination as affecting only the criminal defendant).

60. 100 U.S. 303, 310 (1879).

61. *See Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

62. *See Fay v. New York*, 332 U.S. 261, 289-90 (1947) (stating that fifteen of twenty-eight states allowing women to serve allowed them to be excused).

63. 419 U.S. 522 (1975) (effectively overruling *Hoyt v. Florida*, 368 U.S. 57 (1961)).

64. *Id.* at 530-31 (quoting *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)).

65. 511 U.S. 127 (1994).

66. *Id.* at 129-31.

sex-based challenges: if the prosecutor strikes men, the defense counsel can strike women in paternity cases such as *J.E.B.* (where men could be expected to be more lenient to the putative father than women). Hence, the state's and the litigants' interests in trial fairness were not implicated so strongly as they were in *Batson*.<sup>67</sup> Justice Blackmun's opinion for the Court responded with the civic interests of the jurors struck by reason of their sex: as long as the Court adhered to the view that sex discrimination against men as well as women is unconstitutional when exercised by the state, the jurors themselves had an interest in not having a "brand upon them, affixed by the law, an assertion of their inferiority" or bias in deciding a matter of importance.<sup>68</sup>

## 2. The Voting Cases

The Supreme Court in *Minor v. Happersett*<sup>69</sup> interpreted the privileges or immunities clause to have no bearing on state laws depriving women of the right to vote.<sup>70</sup> The Court announced a weak understanding of citizenship, as "membership of a nation, and nothing more."<sup>71</sup> This dictum, narrowly conceived, had a short life, as it was implicitly renounced in *Wong Kim Ark*<sup>72</sup> and other nonexpulsion cases, but the Court's specific holding made originalist sense: when the Constitution and the Reconstruction Amendments were adopted, states excluded many citizens from voting, and so the Fourteenth Amendment's term "citizen" did not entail that particular right.<sup>73</sup> Moreover, when the slaves, assured their freedom under the Thirteenth Amendment, were made citizens by the Fourteenth Amendment's citizenship clause, Congress still felt it incumbent upon them to guarantee these new citizens' right to vote through a subsequent amendment, the Fifteenth.<sup>74</sup> And of course, it took the Nineteenth Amendment, forbidding discrimination on account of sex in state and national voting rules,<sup>75</sup> to override *Happersett*. Conversely, the Court's reasoning, which delinks citizenship from voting, has been superseded. The supervening constitutional

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67. See *id.* at 160 (Scalia, J., dissenting).

68. *Id.* at 142 (opinion of the Court) (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

69. 88 U.S. 162 (1874).

70. *Id.* at 171-72.

71. *Id.* at 166.

72. 169 U.S. 649 (1898) (holding that children of noncitizens born in the United States are citizens of the United States).

73. *Happersett*, 88 U.S. at 172-77.

74. U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

75. *Id.* amend. XIX, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex").

developments provide important support for the doctrinal importance of a principle of civic obligation.

The Constitution itself has been repeatedly amended to assure the “right of citizens of the United States to vote.”<sup>76</sup> The document has thereby changed in ways that negate *Happerset’s* premise that voting and citizenship are not linked: while they were not associated in 1789 or 1868, they are in 2001. Thus voting ought now to be treated as an interest implicated by the civic obligation idea. The Supreme Court has so recognized. *Harper v. Virginia Board of Elections*,<sup>77</sup> for example, anticipated the Twenty-Fourth Amendment in striking down poll taxes. The Court ruled that “‘the political franchise of voting’ [is] a ‘fundamental political right, because [it is] preservative of all rights.’”<sup>78</sup> The Court has extended *Harper* to strike down most laws requiring property ownership in limited purpose elections<sup>79</sup> and most durational residence requirements.<sup>80</sup> All these cases reflect the idea that “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”<sup>81</sup>

Today, there are few direct and general exclusions from the right to vote in our polity, and they are tailored to the civic obligation principle. The main exclusions are for noncitizens, people under the age of eighteen, and people convicted of serious crimes.<sup>82</sup> The first exclusion, of course, reflects the distinction between the reciprocity and other understandings of right and obligation. The state owes noncitizens due process and equal protection of laws that they are charged with obeying, but does not owe them the right to vote. The right to vote is brigaded with various obligations and other rights, and partly for that reason limited to people who have a more permanent and weblike relationship to the polity. The reciprocity understanding could justify extending the franchise to noncitizens for some purposes, such as the election of school boards in districts where noncitizens pay

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76. See *id.* amend. XV, § 1 (citizens’ right to vote shall not be abridged on account of race or color); *id.* amend. XIX (right shall not be abridged on account of sex); *id.* amend. XXIV (right shall not be abridged by reason of failure to pay a poll or other tax); *id.* amend. XXVI (right shall not be abridged on account of age, so long as the citizen is eighteen years or older).

77. 383 U.S. 663 (1966).

78. *Id.* at 667 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

79. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969), followed in *Quinn v. Millsap*, 491 U.S. 95 (1989); *Phoenix v. Kolodziejewski*, 399 U.S. 204 (1970); *Cipriano v. Houma*, 395 U.S. 701 (1969). *But distinguished in* *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

80. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330 (1972).

81. *Kramer*, 395 U.S. at 626.

82. Many, and probably most, states have similar exclusions for jury service. See, e.g., *Rubio v. Superior Court*, 593 P.2d 595 (Cal. 1979) (upholding jury exclusions for noncitizens and people convicted of felonies).

taxes and send their children to school, but the civic obligation principle assures that this possibility ought not be a constitutional requirement, because noncitizens have not made the permanent commitment to our polity and corresponding obligations (jury and military service) that citizens have. It is for this reason that the Supreme Court has ruled that states cannot discriminate generally against hiring noncitizens for the civil service but can do so for offices that are at "the heart of representative government."<sup>83</sup>

The idea underlying the second exclusion is that people under a certain age are not mature enough to assume the obligations as well as rights of citizenship. (Recall the *bar* or *bat mitzvah*.) This exclusion is tailored to the civic obligation principle, in fact. People who are sixteen or seventeen years old, whom the Twenty-Sixth Amendment allows to be excluded from voting, are typically just as well informed as eighteen year olds, whom the amendment assures the right to vote. So there is not a huge liberal reason to draw the line at age eighteen. The best reason (I can think of) is that eighteen year olds have traditionally been subject to compulsory military service, and were risking their lives in Vietnam when that amendment was proposed and ratified in 1971. The killer argument for lowering the voting age in this country was one grounded in civic obligation: if they are old enough to die for their country, they are old enough to vote.

Nearly half the states have laws excluding citizens convicted of serious crimes from voting or holding elective office.<sup>84</sup> These laws would appear questionable under purely liberal premises: once the felon has paid his debt to society, he should be free to rejoin the polity. Yet the Supreme Court upheld such exclusionary laws in *Richardson v. Ramirez*.<sup>85</sup> The Court distinguished *Harper* on the ground that Section 2 of the Fourteenth Amendment explicitly contemplated that the states can deny the right to vote by reason of "participation in rebellion [i.e., the Civil War], or other crime."<sup>86</sup> Therefore, the framers of Section 1 of the amendment could not have intended for the right to vote to be absolute. Section 2 is an example of the civic obligation principle, which can (as the Court held) justify the voting exclusion in a broad array of cases: committing particularly heinous crimes shows such disregard of civic obligations that the felon is not morally capable of assuming the full rights of citizenship. The civic obligation principle also suggests judicial monitoring of this kind

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83. *Bernal v. Fainter*, 467 U.S. 216, 222 (1984) (quoting *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982)). Compare *Sugarman v. Dougall*, 413 U.S. 634 (1973) (states cannot generally discriminate), with *Ambach v. Norwick*, 441 U.S. 68 (1979) (state can discriminate against noncitizens in public school teacher hiring).

84. See Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates Under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & Pol. 543 app. A (1988).

85. 418 U.S. 24 (1974).

86. *Id.* at 43.

of exclusion, as in *Hunter v. Underwood*,<sup>87</sup> where a unanimous Court struck down exclusion of felons on the ground that it was motivated by racial animus.<sup>88</sup>

### 3. *The Military Service Cases*

Matters of citizenship and the armed forces have traditionally been decided by Congress and the President, typically implementing the civic obligation principle in the military sphere *before* the Supreme Court was willing to implement it in other arenas. During the Civil War, for example, President Lincoln ended the exclusion of African-Americans from the armed forces—the policy that had formed a basis for the Article III holding in *Dred Scott*.<sup>89</sup> Given Reconstruction's commitment to citizenship for the freed slaves, the exclusion was not revived afterward and was considered a necessary accompaniment of the Reconstruction Amendments. As W.E.B. DuBois later put it, “[n]othing else made Negro citizenship conceivable, but the record of the Negro soldier as a fighter.”<sup>90</sup> Unfortunately, people of color were segregated in the armed forces. It is notable that the U.S. military was desegregated, by order of President Truman, before the Supreme Court ruled that apartheid was unconstitutional in state and District of Columbia public schools. The justification for desegregation was strongly influenced by the civic obligation idea: as soldiers of color were risking their lives and contributing to a war against racist totalitarianism, it was intolerable that they not carry out their obligations side by side with white soldiers.

Similarly, the United States armed forces admitted women for service—as nurses and in 1917 as “yeomen” auxiliaries—before the Nineteenth Amendment admitted women to the voting booth.<sup>91</sup> Like people of color, women served in their own special units. Desegregation of the armed forces came more slowly for women than for people of color, and women have never been subject to the draft in this country—a key obligation of citizenship. When President Carter prepared for a possible confrontation with the Soviet Union in 1980, he proposed requiring both women and men to register for a potential

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87. 471 U.S. 222 (1985).

88. *Id.* at 233. That ground was surely sufficient, but a supporting ground would be the idea that some of the crimes triggering the exclusion (such as consensual sodomy or indecency) are ones whose seriousness is nowadays discredited. Even if Alabama can make consensual sodomy a misdemeanor, as it now does, the civic obligation principle strongly augurs against doing so.

89. See generally Bernard C. Nalty, *Strength for the Fight: A History of Black Americans in the Military* (1986); Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. Rev. 499 (1991) [hereinafter Karst, *The Pursuit of Manhood*].

90. W.E.B. DuBois, *Black Reconstruction in America* 104 (1935).

91. See generally Jeanne Holm, *Women in the Military: An Unfinished Revolution* (1982); Judith Hicks Stiehm, *Arms and the Enlisted Woman* (1989).

draft, but Congress vetoed the idea. The Supreme Court in *Rostker v. Goldberg*<sup>92</sup> upheld the registration law agreed upon by Congress and the President against a sex discrimination claim. The Court's rationale was deference to the political process as to matters of military preparedness.<sup>93</sup> Here, the principle of civic obligation would register a dissent. The complete exclusion of women from an undeniable responsibility of citizenship is an affront to women as citizens, a bow to their continued (symbolic) infantilization.<sup>94</sup> This kind of symbolic action and its unquestionable link to citizenship—going back to the early militia statutes and memorably codified in *Dred Scott*—are precisely the kinds of issues where the Court is well situated to lead the political process. It is true that the Court defers to that process on military preparedness issues, but the best reason for deference is that the Court is not competent to second-guess the judgment of military experts. This reason provides little cover for *Rostker*, though, because the Joint Chiefs of Staff testified that “[w]omen should be required to register . . . in order for us to have an inventory of what the available strength is within the military qualified pool in this country.”<sup>95</sup> Accordingly, the deference argument ought not to have been strong enough to sustain a registration law that “categorically exclude[d] women from a fundamental civic obligation.”<sup>96</sup>

#### 4. *The Education Cases*

It is unlikely that the Reconstruction framers expected the Fourteenth Amendment to affect public education, which was not the universal practice in 1868 that it is today. But the twentieth century saw education emerge as a key service provided by local and state governments, and a learned citizenry is now considered essential for rational self-government. It is no coincidence, therefore, that the lawsuits that brought down apartheid as a formal policy were brought in the context of public schools, first at the university level and then at the elementary and secondary level. Thus, the key analytical move in Chief Justice Warren's opinion for the Court in *Brown v. Board of*

92. 453 U.S. 57 (1981).

93. *Id.* at 64-72.

94. I mean this: military service limited to men owes something to the tradition of war as a campaign to protect the “women and children” at home. By constitutionally reaffirming this exclusion, the Court and Congress were not only denying women one of the responsibilities of adult citizenship, but they were denying it for reasons linked with this traditional trope. See Karst, *The Pursuit of Manhood*, *supra* note 89, at 503-06 (arguing that armed forces' exclusions and segregations of women cater to notions linking citizenship to “manhood”).

95. *Rostker*, 453 U.S. at 99 (Marshall, J., dissenting) (quoting the Army Chief, followed by similar remarks from each of the other Joint Chiefs).

96. *Id.* at 86.

*Education*,<sup>97</sup> was his characterization of public education as “the very foundation of good citizenship,” which “is required in the performance of our most basic public responsibilities, even service in the armed forces.”<sup>98</sup> The right that Warren recognized for plaintiff Linda Brown was one inherently tied to obligations—those of Brown to attend school, of her parents to enforce that attendance and to assist in her education, and of the state to provide adequate schools for the purpose. Linda Brown’s obligation to attend school was a prerequisite to her ability to carry out her future adult obligations of citizenship.

Brown’s arguable recognition of education as a fundamental right was reinterpreted in *San Antonio Independent School District v. Rodriguez*.<sup>99</sup> The Court in the later case ruled that documented inequalities in education levels across different school districts did not, standing alone, justify beady-eyed equal protection scrutiny.<sup>100</sup> As in *The Slaughterhouse Cases*, the Court’s concern was that a broadly defined fundamental right under the equal protection clause would federalize matters traditionally and properly left to state and local regulation.<sup>101</sup> A pragmatic understanding of civic obligation is open to this notion, with the caution suggested by Justice Powell’s opinion for the Court, that a complete denial of educational opportunities to citizens, or a denial of the chance to learn the “basic minimal skills” needed in our polity could be constitutionally objectionable.<sup>102</sup>

The next case, *Plyler v. Doe*,<sup>103</sup> is conceptually the most interesting. Mindful of *Rodriguez*’ dicta warning against gross deprivations of minimal educational opportunities for citizens, and of the holding in *Wong Kim Ark* that noncitizens’ children born in this country are citizens, Texas adopted a law denying public education to children who were themselves “not legally admitted” to the United States.<sup>104</sup> In his opinion for a closely divided Court, Justice Brennan ruled the law unconstitutional.<sup>105</sup> His opinion is famously eclectic; most interesting to me is how it invokes all three understandings of the relationship between rights and duties. Thus, Brennan appealed to the reciprocity understanding with this argument: because noncitizens (both parents and their children) underutilize state resources while

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97. 347 U.S. 483 (1954). *Brown* disapproved of and essentially overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896), a transportation case, and implicitly overruled *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), an education case.

98. *Brown*, 347 U.S. at 493.

99. 411 U.S. 1 (1973).

100. *Id.* at 44-55.

101. *Id.* at 50; see also *supra* text accompanying note 35.

102. *Rodriguez*, 411 U.S. at 37.

103. 457 U.S. 202 (1982).

104. *Id.* at 205 (citing Tex. Educ. Code ann. § 21.031 (Vernon Supp. 1981)).

105. *Id.* at 227-30.

contributing labor to local economies, it was fundamentally unfair to deny them any access to schooling.<sup>106</sup> The opinion also appealed to civic virtue and pragmatic understandings: because many (realistically, most) of these children would remain in the community for the rest of their lives, the state's denying them even a minimal education would disable them from becoming productive and socially mobile members of society; this would risk the creation of a pre-ordained underclass of people.<sup>107</sup> Justice Blackmun's concurring opinion also reflected this complex understanding of the increasingly interconnected relationship of these children and the country if they remained here, as was likely. Like Brennan, Blackmun emphasized the "special place" education must occupy in the Fourteenth Amendment, because, as *Brown* held, it is a precondition to one's political rights and responsibilities.<sup>108</sup>

The most remarkable feature of *Plyler* is that the Court's majority applied something beyond the reciprocity understanding of rights and obligations to people who were not citizens, but whose life trajectories did augur increasing connections with our polity—and therefore conjured up a pragmatic understanding of their obligations and rights as well. Dissenting in the leading Chinese expulsion case, Justice David Brewer recalled the old English term for this kind of person: "A *denizen* is in a kind of middle state, between an alien and a natural-born subject, and partakes of both of them."<sup>109</sup> Ironically, *Plyler* may be a good argument for leaving the citizenship and privileges and immunities clauses dormant, for the equal protection clause's more capacious ambit—"person"—can bring within it citizens, denizens, and noncitizens alike, but with different applications through the different ways of thinking about obligations and rights.

### 5. *The Marriage Cases*

Although the right to marry would seem least amenable to a citizenship analysis, its case law provides the richest array of possibilities. To begin, Justice Curtis dissented in *Dred Scott* on the ground that Scott had "enter[ed] into a lawful contract of marriage, attended with the civil rights and duties which belong to that condition," which necessarily implied his emancipation and potential citizenship.<sup>110</sup> As Professor Maura Strassberg has shown, Curtis'

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106. *See id.* at 228.

107. *See id.* at 219-23. Reconciling the different treatments of education in *Brown* and *Rodriguez*, Brennan ruled that education is neither a fundamental right nor just another benefit. *Id.* at 221-23.

108. *See id.* at 233-34 (Blackmun, J., concurring).

109. *Fong Yue Ting v. United States*, 149 U.S. 698, 736 (1893) (Brewer, J., dissenting) (emphasis added); *see also* Fiss, *supra* note 27, at 312.

110. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 601 (1856) (Curtis, J.,

thesis may owe something to Lieber's understanding of marriage as fundamental to the polity because its stringent obligations both reflect and inculcate the civic virtue distinctive to citizenship.<sup>111</sup> Echoing Hegel and other continental thinkers, Lieber maintained that marriage was the sound basis for the civic republic, because it promotes the development of "sociality" and self-sacrifice for the common good on the part of the family members, especially the husband.<sup>112</sup>

In its post-Reconstruction cases upholding criminal and other penalties for polygamy, the Supreme Court explicitly invoked Lieber as support for the idea that plural marriage undermines the social fabric and democracy itself; only monogamous marriage is consistent with the democratic spirit.<sup>113</sup> To the extent they were following Lieber, these early precedents seem to view marriage not as a liberal right associated with state-citizen reciprocity, but as a civic republican right associated with the common good—indeed obligatorily associated. Furthermore, the cases are textbook illustrations of the pragmatic understanding of interlinked rights and responsibilities. The federal government, which had plenary control over the territory of Utah where the (Mormon) polygamists were concentrated, not only made the relationships a crime against society, but also deprived polygamists—and even people who advocated such practices—of the rights to vote, hold office, and serve on juries.<sup>114</sup> Immigration laws of the period excluded people who practiced polygamy,<sup>115</sup> and the armed forces probably excluded such people as well.

These civic virtue features receded from the cases in the next century. In the contraception cases, which were ostensibly brought to enable married couples to enjoy nonprocreative sex, Justice Douglas tied the autonomy of the marital union, with its "harmony in living" and "bilateral loyalty,"<sup>116</sup> to the "democratic understanding of social good and with the actual make-up of the human community."<sup>117</sup> The

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dissenting). See Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 Yale L.J. 1033, 1100-09 (1997), for a most illuminating discussion of the key role that marriage played in the two lawsuits, one by Dred Scott and the other by his wife.

111. See Strassberg, *supra* note 13, at 1511-23.

112. See 1 Lieber, *supra* note 6, at 102-04. Lieber even saw a connection between family and patriotism: "As he has affection for the members of the same family, so he found them enlarged into affections for a wider society, he felt himself mingled with it, with its recollections, its history, and its future destiny." *Id.* at 107.

113. See *Reynolds v. United States*, 98 U.S. 145, 165-66 (1878) (citing Professor Lieber).

114. All laws were upheld by the Supreme Court. See *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885).

115. See Act of March 3, 1875, ch. 141, 18 Stat. 477; Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084.

116. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Douglas, J.).

117. *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Douglas, J., dissenting) (quoting Robert L. Calhoun, *Democracy and Natural Law*, 5 Nat. Law. F. 31, 36 (1960)).

rhetoric recalled Lieber's conclusions, but not his particular analysis. Beginning with its decision in *Loving v. Virginia*,<sup>118</sup> which recognized the "freedom to marry" by different-race couples,<sup>119</sup> the Supreme Court has tended to view marriage more as a liberal right than as a civic obligation or a community need.<sup>120</sup> In my view, the latter theme is merely suppressed and not absent from the decisions. Thus, the pragmatic understanding of rights and obligations would have provided useful support for the Court's cryptic due process right to marry holding in *Loving* and would have tied it more closely to the Court's equal protection holding. Virginia's criminalization of different-race marriage was both an invidious race discrimination linked to the philosophy of white supremacy (the equal protection holding) and a state effort to denigrate the citizenship of integrative couples like the Lovings by denying their ability to enter into serious mutual obligations (the due process holding).

Contrast a civic virtue understanding of the right to marry, for it would hold that the state has an obligation to provide marriage as an institution for its citizens, to encourage marriage through liberal benefits, and to discourage divorce through procedural entailments at least. The Supreme Court cases in the last generation have abandoned this kind of thinking about marriage.

In contrast, the pragmatic understanding has not been so renounced. In *Turner v. Safley*,<sup>121</sup> for example, the Court ruled that states could not deny prisoners the right to marry as a general rule, but said (in dicta) that states did have discretion to attach marriage limitations tailored to particular prisoners' crimes.<sup>122</sup> This condition is defensible for the same reason states can deny felons the right to vote: the breach of important social and legal obligations suggests an inability to carry out one's duties of citizenship, and a denigrated status is an appropriate state response.

One case ought to be reconsidered, however. In *Zablocki v. Redhail*,<sup>123</sup> the Court held that states could not deny remarriage to spouses who were in arrears in their child or spousal support payments.<sup>124</sup> The Court's holding reflects an excessively liberal understanding of marriage as simply a choice that citizens can make

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118. 388 U.S. 1 (1967).

119. *Id.* at 12.

120. See *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding that prisoners have a restricted right to marry, primarily because of the legal rights and benefits associated with it); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978) (holding that deadbeat dads have a right to marry).

121. 482 U.S. 78 (1987).

122. *Id.* at 96-98; see also *Butler v. Wilson*, 415 U.S. 953 (1974), *aff'g mem.* *Johnson v. Rockefeller*, 365 F. Supp. 377 (S.D.N.Y. 1973) (three-judge court) (holding that the state can restrict the marriage rights of felons as part of their punishment).

123. 434 U.S. 374 (1978).

124. *Id.* at 375-77.

and then shed virtually at will. A pragmatic understanding would insist that the deadbeat dad, who reneges on his sworn obligations, could be the proper object of state discipline. If he has shown bad faith or incapacity in carrying out his preexisting obligations, the state ought to be able to preclude him from entering into new ones and ought to attach some stigma to any bad faith conduct.<sup>125</sup>

#### 6. *The Access to Court and Contract Cases*

The Civil Rights Act of 1866 expressly guaranteed the citizenship of the former slaves<sup>126</sup> and assured them and their descendants that they would be able to enter into contracts and leases on the same terms and conditions as “white citizens.”<sup>127</sup> The 1866 statute was a template for the Fourteenth Amendment, whose citizenship clause codified the statute’s initial guarantee and whose privileges or immunities and equal protection clauses codified and expanded upon the assurance that state courts would be open to all citizens for equal enforcement of contractual and property rights, whatever the race or color of the litigant. The *Slaughterhouse* dissenters would have expanded this assurance to monitor a wide range of state regulations of the free market. The core reading of the 1866 statute and the public value it involved is that citizens must have nondiscriminatory access to courts for enforcement of their voluntary agreements—and of course are also obliged to follow the obligations they have themselves undertaken.<sup>128</sup>

Starting in 1968, the Supreme Court has construed the 1866 statute to prohibit race discrimination by private parties (not just the state) in property and contract transactions.<sup>129</sup> This line of cases has been persuasively criticized as inconsistent with the language and intent of the Reconstruction Amendments.<sup>130</sup> The principle of civic obligation lends potential support to these cases, however. Contracts and leases

125. Contrast my criticism with the premodern stance taken by two concurring Justices in *Zablocki*: they worried that the right to marry might undermine the ability of the state to exclude same-sex and brother-sister couples from the institution. See *id.* at 392 (Stewart, J., concurring); *id.* at 399 (Powell, J., concurring).

126. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (currently codified as amended at 42 U.S.C. §§ 1981-1982 (1994)) (“That all persons born in the United States and not subject to any foreign power . . . are hereby declared to be citizens of the United States”).

127. See *id.*

128. This argument is just as consistent with a reciprocity as with a pragmatic understanding. For a defense of free access to courts as entailed in the petition clause of the First Amendment, see *United States v. Kras*, 409 U.S. 434, 462-63 (1973) (Marshall, J., dissenting).

129. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (addressing private property leases). The Court’s holding was reaffirmed and extended to contract dealings in *Runyon v. McCrary*, 427 U.S. 160 (1976), and reaffirmed again by *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

130. See *Jones*, 392 U.S. at 452-76 (Harlan, J., dissenting).

create rights and obligations ultimately and immediately guaranteed by the state's legal and judicial process. A benefit of being a citizen in a political community is that you can expect other citizens to deal with you without regard to your race or color; an obligation of being a citizen is that you owe that same courtesy to those with whom you deal.

### III. THE NEXT FRONTIER, GAY PEOPLE'S RIGHTS AND OBLIGATIONS

The pragmatic understanding of the relationship of rights and obligations not only provides a reason to give more bite to the privileges or immunities clause (the first part of this article) or insights as to certain features of the Court's equal protection jurisprudence (second part), but also suggests a framework for thinking more systematically about a constitutional frontier: equal citizenship for gay, lesbian, and bisexual ("GLB") Americans. Like women and people of color, GLB people have been denied fundamental rights of citizenship and have sought to reclaim their citizenship by insisting on their equal participation in jury service, the armed forces, and marriage. Generally, gay claims for citizenship have been founded on liberal baselines of formal equality, while opposition has been asserted along republican lines, emphasizing a privileged place for the (heterosexual) husband-wife family in our polity.<sup>131</sup>

The pragmatic understanding of the relationship between obligations and rights helps us see why equality as to jury and military service and, especially, marriage are particularly important to gay people—and why the exclusion of gay people is particularly important to some traditionalist people. As Roger Taney would remind GLB people, they are not fully *citizens* until they are equally obligated as well as equally entitled in their citizenship. The duties and benefits described in this article—jury service, voting, military service, education, marriage, contracts—are both badges and burdens of citizenship. They are public marks of respect and dignity—and denying any of this bundle of rights and responsibilities to gay people is a public mark of disrespect. This premise lends straightforward support to constitutional arguments for the inclusion of gay people in these civic institutions. Consider three obvious applications.

The California Court of Appeal for the Fourth District recently extended *Batson*<sup>132</sup> and *J.E.B.*<sup>133</sup> to require judicial monitoring of peremptory challenges to lesbian and gay jurors as a matter of state

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131. See, e.g., William N. Eskridge, Jr., *Equality Practice: The Jurisprudence of Civil Unions* (forthcoming Routledge 2001) [hereinafter Eskridge, *Equality Practice*], which examines liberal (ch. 4) and republican (ch. 5) arguments surrounding same-sex marriage and civil unions.

132. See *supra* text accompanying *supra* notes 54-55.

133. See *supra* text accompanying *supra* notes 65-66.

constitutional law.<sup>134</sup> The court ruled that lesbians and gay men constitute a “cognizable group” whose exclusion would violate both the parties’ right to a representative jury and gay men’s and lesbians’ rights and duties to serve on juries.<sup>135</sup> Most interestingly, the court reasoned that:

in the long run, the greatest threat of failure to guarantee the rights of gays and lesbians to serve on juries is to the commonwealth. . . . If we deny that civic responsibility to any group, if we deny them the “privilege of participating equally . . . in the administration of justice,” we deprive them of part of their membership in the community, and while that has an immediate impact on the excluded group, it must inevitably damage the community as well.<sup>136</sup>

A pragmatic or civic republican understanding of rights and obligations also provides theoretical support for the Vermont Supreme Court’s decision in *Baker v. State*,<sup>137</sup> holding that the state’s exclusion of same-sex couples from civil marriage was discrimination invalid under the state constitution.<sup>138</sup> Vermont’s constitution has no equal protection clause; the constitutional provision applied in *Baker* was one requiring that government policy pursue “the common benefit, protection, and security of the people, nation, or community,” and not just “any single person, family, or set of persons, who are a part only of that community.”<sup>139</sup> The court unanimously held that excluding lesbian and gay couples was not for the common benefit and directed the legislature to create a statutory scheme extending “the same rights and obligations provided by the law to married partners” to same-sex couples.<sup>140</sup> The legislature created a new institution of civil unions, with all the same benefits and responsibilities of marriage, for same-sex couples. While dissenters in the court and the legislature cogently argued that formal equality required same-sex marriage,<sup>141</sup> the statute was important because it imposed all the obligations of marriage, as well as its benefits, on same-sex couples who choose to enter into civil unions.

The application of the civic obligation principle to the federal exclusion of lesbians, gay men, and bisexuals from the armed forces<sup>142</sup>

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134. *People v. Garcia*, 92 Cal. Rptr. 2d 339 (Ct. App. 2000).

135. *Id.* at 343-44.

136. *Id.* at 346 (quoting *Peters v. Kiff*, 407 U.S. 493, 499 (1972)) (internal quotation marks omitted).

137. 744 A.2d 864, 868-89 (Vt. 1999) (citing 18 Vt. Stat. Ann. § 5131(a)).

138. *Id.* at 867.

139. Vt. Const. ch. I, art. 7.

140. *Baker*, 744 A.2d at 886.

141. *See id.* at 897-912 (Johnson, J., dissenting in part); Eskridge, *Equality Practice*, *supra* note 131, chs. 2 & 4 (presenting the story of the civil unions law and the liberal critique).

142. Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1670 (1993) (adding new 10 U.S.C. § 654).

would appear straightforward: like prior exclusions of women and people of color, the exclusion of GLB people in effect disrespects them as second-class citizens. All citizens should be able and obliged to serve and help defend this country; any group-based exclusion ought to be questioned closely. But the leading case, *Thomasson v. Perry*,<sup>143</sup> applied *Rostker* to this issue and found that as long as the experts in the executive and legislative branches agreed that gays would impair the effective functioning of the modern army, the judiciary should be loath to intervene on abstract grounds such as equal citizenship.<sup>144</sup> The Supreme Court has yet to address the issue.

In short, the pragmatic understanding provides strong reasons for GLB people to insist on equal access to the obligations as well as the rights of jury service, marriage, and military service: these matters are essential to claims of equal citizenship and to the social assertion that gay people are mature adults and not adolescent sex maniacs.<sup>145</sup> The lesbian juror, the bisexual soldier, and the gay couple joined in civil union engage in everyday performances of responsibility that contribute to attitudes of somewhat greater respect for gay people generally. Moreover, the community itself is better off if unjustified divisions are erased from the duties of citizenship. Now as much as ever before, the United States needs conscientious jurors, dedicated soldiers, and committed couples (including the many GLB couples that raise children) doing the hard work of nation-preservation.

At the same time, however, the pragmatic—and even more so the civic virtue—understanding of the relationship between obligations and rights helps us understand the continuing power of arguments against equal citizenship for gay people.

### 1. *Homosexuals as per se criminals*

A key Clinton administration justification for excluding GLB people from the armed forces was that because sodomy between consenting adults is a felony under military law, such people are presumptive criminals and surely have a propensity to be criminals.<sup>146</sup> Similar arguments could be made against GLB people's jury service and marriage: the state ought not enroll as jurors people who openly

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143. 80 F.3d 915 (4th Cir. 1996) (en banc).

144. *Id.* at 923-27. *Thomasson's* result and analysis have been followed in *Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1999); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1135 (9th Cir. 1997); and *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996).

145. There is an absurdity about this statement, I concede, but in my view the social stigma against homosexuality remains strongly connected to many people's tendency to see GLB people only through the lens of sexuality.

146. *See, e.g.*, Department of Defense Directive No. 1332.14.H.1.a and b(1)-(2) (Dec. 1993) (separation from the armed services justified either by illegal sodomy or a statement [like "I am a homosexual"] showing a propensity to commit criminal sodomy).

announce their repeated criminal law violations, and ought not sanction marriages that are sure to be consummated with sexual acts considered criminal in the jurisdiction. Indeed, this could even be a justification for denying GLB people the right to vote: as presumptive sodomites, gay voters routinely commit one of the “crimes of moral turpitude” which have traditionally been a basis for disenfranchisement in some states.

Commentators reject and even make fun of this kind of argument as a multifaceted conflation of status and conduct,<sup>147</sup> but such a critique does not completely understand the argument or its cultural depth. The state can and often ought to treat a group of citizens as second-class based upon their criminal conduct: rapists ought to have their marriage rights restricted, perjurers ought not serve on juries, and violent criminals ought not serve as soldiers. The Constitution poses no barrier to these exclusions, because the state can not only regulate conduct directly, but in the civic republic it ought to deny some rights to those prone to break the law. Under this line of thinking, the difference between gay people and racial minorities or women is that the latter groups are not defined by their illegal conduct. One can read the Supreme Court’s decision in *Bowers v. Hardwick*<sup>148</sup> for the proposition that, because Congress and the states can make consensual sodomy a serious crime, they can also treat presumptive sodomites as second-class citizens. Authority to impose a great penalty suggests authority to impose lesser ones.

Yet the Court at least implicitly rejected this reading of *Hardwick* in *Romer v. Evans*,<sup>149</sup> which overturned an anti-gay initiative on equal protection grounds, because it seemed to deprive gay people of a broad array of ordinary legal protections. Justice Kennedy’s opinion for the Court started with the proposition that “the Constitution ‘neither knows nor tolerates classes among citizens.’”<sup>150</sup> A pragmatic understanding could read *Evans* to negate the “homosexuals-are-presumptive criminals” argument as a basis for broad denials of the obligation-related rights identified in this article (e.g., jury service), but *possibly* key to Kennedy’s opinion was his concern that the initiative could have deprived gay people of recourse to the courts.<sup>151</sup> The latter point could be a basis for reading *Evans* narrowly, the former a basis for a broader reading. Consistent with the broader

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147. See Janet E. Halley, *Don’t: A Reader’s Guide to the Military’s Anti-Gay Policy 27-33 & passim* (1999), for the most detailed critique of the distinction.

148. 478 U.S. 186 (1986) (rejecting a privacy attack on a law making sodomy between consenting adults a felony).

149. 517 U.S. 620 (1996).

150. *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (emphasis added)).

151. *See id.* at 627-31 (criticizing even a narrow reading of the initiative as taking away from gay people “the safeguards,” that is, antidiscrimination laws enforced through courts and agencies, “that others enjoy or may seek without constraint”).

reading, I would interpret *Evans*' insistence on full gay citizenship as one further justification for overruling or abrogating *Hardwick*.<sup>152</sup> Viewing the matter through the lens of obligation, I agree with Justice Scalia's dissenting view (through the lens of rights) that *Evans* and *Hardwick* cannot be reconciled,<sup>153</sup> but of course the civic obligation principle insists that it must be *Hardwick* and not *Evans* that bites the constitutional dust. I should add this obvious but still resistible point: there is no cogent justification for disrespecting lesbians and gay men for consensual intimacy—and the few laws still deeming this a serious felony<sup>154</sup> are more serious as infringements on citizenship than as infringements on privacy.<sup>155</sup>

## 2. *Don't Ask, Don't Tell and the Closet*

The “homosexuals-as-presumptive-criminals” argument has receded (but by no means disappeared) in American public discourse; many moderates who consider such an argument bigoted or old-fashioned are receptive to another argument against full citizenship for GLB people. This argument exploits the fact that sexual orientation, unlike race and sex, is perceived to be invisible: you cannot identify a lesbian as such unless she self-identifies. The argument is that a reasonable obligation of citizenship is that people not “flaunt” themselves in ways upsetting to other citizens and their children; being openly gay in jury, military, and marital settings is flaunting of one's sexuality; therefore, the state can follow strategies that encourage gay people to be discreet, even if the state cannot or ought not make homosexual conduct illegal. The rule supported by this argument is that GLB people may vote, serve on juries and in the armed forces, participate fully in the public school system, or some combination of these, so long as they are reasonably discreet about their sexual orientation. What that discretion entails is a local matter; it may vary across jurisdictions and may change over time.

This civic virtue argument has significant descriptive power. That judges, lawyers, other jurors, and general cultural norms discourage

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152. See William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* 149-73 (1999) (discussing various reasons, including *Evans*, for overruling or narrowing *Hardwick*) [hereinafter Eskridge, *Gaylaw*].

153. See *Evans*, 517 U.S. at 641-42 (Scalia, J., dissenting).

154. The Code of Military Justice still considers consensual sodomy a felony, as do the criminal codes of Idaho, Louisiana, Maryland, Michigan, Mississippi, North Carolina, Oklahoma, South Carolina, and Virginia. Other states criminalizing consensual sodomy make the crime a misdemeanor. For references, see Eskridge, *Gaylaw*, *supra* note 152, at 342-51.

155. Realistically, laws criminalizing sodomy are almost never enforced against relations between consenting adults (straight as well as gay) and are overwhelmingly enforced against relations that prosecutors think are nonconsensual. Hence, most of the “consensual sodomy” prosecutions nowadays are insurance prosecutions in male-female rape cases.

gay jurors from announcing their homosexuality is surely the reason there have been so few jury discrimination cases.<sup>156</sup> GLB people have routinely voted, even during periods of antigay Kulturkampf, because the registrars could not possibly sort gay from nongay voters.<sup>157</sup> Similarly, countless GLB people have served in the United States armed forces, and their secret identities have rarely caused problems for other soldiers and the military command.<sup>158</sup> Reflecting actual practice, the current policy for enforcing the exclusion is a porous one whose tag line is “don’t ask, don’t tell”: GLB people can serve so long as they keep their orientations and conduct a secret, which the chain of command supposedly makes easy by enforcing the rule against asking soldiers about their sexual orientation.<sup>159</sup> Most same-sex relationships and unions have to be less secret than does a gay identity in the military, but they are tolerated as long as the participants are discreet and do not seek a state “stamp of approval” through marriage licenses.<sup>160</sup> And, as always, gay people are free to marry—people of the “opposite” sex, that is. Marriage to someone of the opposite sex has been a common way that GLB people have covered their secret orientations and defended themselves against state and private inquisitors.<sup>161</sup>

The don’t ask, don’t tell line of thinking retains some normative bite as well. It is presented as a tolerant policy, allowing gay people their private space while preserving public space for heterosexuality. It has great appeal to parents, who are fearful that gays in the military, gay marriages, and lesbian and gay schoolteachers would constitute powerful state signals to their own children, wavering on the sexual precipice, always in danger of falling into the abyss of homosexuality or worse. Don’t ask, don’t tell offers homophobic people refuge from

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156. Cf. *Johnson v. Campbell*, 92 F.3d 951, 952 (9th Cir. 1996) (rejecting objection to an allegedly antigay peremptory challenge on the ground that the sexual orientation of the juror was not known, and objecting counsel could only point to “mannerisms” as the basis for his “knowledge”).

157. Even in states that made consensual sodomy a crime and disenfranchised people for violating the sodomy law, few actually lost their votes, because gay people were almost always arrested for a lesser crime, like solicitation or lewd conduct, and when they were arrested for sodomy were usually able to plea-bargain to a lesser offense. See Eskridge, Gaylaw, *supra* note 152, at 60, 67.

158. See generally Allan Bérubé, *Coming Out Under Fire: The History of Gay Men and Women in World War Two* (1990); Randy Shilts, *Conduct Unbecoming: Lesbians & Gays in the U.S. Military, Vietnam to the Persian Gulf* (1993).

159. Thus, Thomasson also rejected the argument, forwarded by the Family Research Council, that the “don’t ask, don’t tell” enforcement policy was inconsistent with the statute. Compare *Thomasson v. Perry*, 80 F.3d 915, 919-21, *with id.* at 935, 942-43 (Luttig, J., concurring).

160. See Richard A. Posner, *Sex and Reason* 311 (1992) (the most persuasive argument against same-sex marriage is pragmatic—people would read it as a “stamp of approval” for relationships they consider icky).

161. See, e.g., Laud Humphreys, *Tearoom Trade: Impersonal Sex in Public Places* 105 (rev. ed. 1975) (stating that in the olden days, more than half of the men who had anonymous sex with other men in public restrooms were married).

the objects of their fears, and sex-negative people refuge from even more sexualization of public spaces.<sup>162</sup> On the other hand, from the perspective of GLB people and those with empathy for gays, state-imposed or state-encouraged discretion about their orientation creates a suffocating *closet*.<sup>163</sup> What equal gay citizenship is all about is the ability of *openly* GLB people to marry, serve on juries and in the military, and so forth. Would people of color be equal citizens in this country if they were required to hide their race, or be discreet about it, in order to participate in the armed forces and juries? Would women be equal citizens if they had to pass for men (which many did) in order to serve in the military or to vote?

### 3. Incrementalism

A pragmatic understanding of rights and obligations will, over time, insist on full citizenship for GLB people, but also cautions against the liberal's (and the lawyer's) tendency to insist that the state immediately recognize and implement all legitimate rights. If citizenship is a web of rights and obligations, and is social as well as legal, longstanding exclusions will not easily melt away. Those who are holders of the status-enhancement will not yield it easily; and many will view the citizenship-recognition of a long-excluded group as a denigration of their own citizenship. As long as there is continuing prejudice and stereotyping against the outsider group, many privileged citizens will be alarmed that the things they find most repulsive about the outsiders (their imagined conduct) will be promoted by an egalitarian state policy.

The insight of *Baker*<sup>164</sup> is that the state obligation to equalize the citizenship of unfairly excluded groups is not an obligation that must be carried out instantly. In tolerant Hawaii, the judicial insistence that same-sex couples be given marriage licenses resulted in a state constitutional amendment negating that right.<sup>165</sup> In contrast, the Vermont political process created a new institution, civil unions, that enable lesbian and gay couples to announce their mutual commitments and show the doubters that lesbians and gay men are capable of adult obligations. The normalization of same-sex unions through an intermediate institution enabled the Netherlands' parliament to enact a same-sex marriage statute earlier this year. The

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162. The latter point in text depends upon the premise that the open homosexual is perceptively sexualized in more ways than the open heterosexual. For many Americans, the sight of a man wearing a pink triangle immediately conjures up sexual images—disgusting images—that the sight of a man wearing a wedding ring does not.

163. The psychological harms of the sexual closet are well-recognized by medical professionals. See, e.g., Janis S. Bohan, Psychology and Sexual Orientation: Coming to Terms 94-104 (1996).

164. See *supra* text accompanying notes 137-41.

165. The story is told in Eskridge, Equality Practice, *supra* note 131, ch. 1.

new law enjoyed a degree of wide public support (and acquiescence) that was not possible in the 1990s before the country had experimented with registered partnerships. When the earlier law yielded no disasters and allowed thousands of couples to be joined in productive unions, public sentiment was more hospitable to same-sex marriage. The same phenomenon ought to occur in Vermont, presumably over a much longer period of time, given the more intense level of public homophobia in the United States.

The incrementalism feature of the pragmatic understanding is the most legitimate point raised by the Defense Department in its ambivalent support for the don't ask, don't tell policy. The problem with don't ask, don't tell is that it legitimizes the closet and is a state signal that young men's hatred for, or anxiety about, homosexuals is a valid feeling. Don't ask, don't tell was predicted to be a dumb experiment, and its operation has largely vindicated the pundits' skepticism. A better experiment would be for the armed forces to do for GLB people what it did for people of color near the end of World War II—identify particular units that would be “integrated” and see how they work. It is highly likely that battalions operating under strong directives against excluding or discriminating against GLB colleagues would encounter very few problems: most of the gay soldiers would remain closeted, but at least relieved of the possibility of interrogation about their private thoughts and actions, and in the units where some would be empowered enough to come out of their closets, friction with homophobic colleagues could be managed. Over time, there would probably be some sorting, whereby some units would have reputations as gay-friendly, attracting not just gay people into service but an increasing number of genuinely gay-friendly straight people. I bet that such units would have above-average performances, not just because lesbians and gay men are excellent soldiers, but also because the units would bond in a special way to prove that tolerance can work. Although the Defense Department itself would have to devise and implement this kind of plan, and therefore the plan would work best if the initiative came from within the executive branch, even a pragmatic approach has room for gentle nudges from the judiciary. Thus, the Supreme Court could abrogate *Thomasson* without requiring the armed forces to abandon its old policy overnight. Following the *Baker* strategy, the Court could remand the matter to the Defense Department to devise an appropriate remedy, such as the special units idea.<sup>166</sup>

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166. Recall that it was the President or Congress that abandoned earlier racial and gender exclusions from military service. This would augur in favor of a judicial push rather than a judicial shove.

## CONCLUSION

The conceptual exercise reflected in this article would not be complete without recognizing that a Lieber-like or nomos-inspired connection between right and obligation is an idea whose time has come and gone. Doctrinally, the Supreme Court has for more than a century given no normative weight to Section 1 of the Fourteenth Amendment, and very little to the privileges or immunities clause. The Court missed its opportunity to explore connections between right and obligation in *The Slaughterhouse Cases*, and the Equal Protection Clause (in particular) has come to occupy whatever potential constitutional space a meaningful citizenship or privileges and immunities clause could inhabit. Through a twisted path of dependence, these provisions have been rendered a kind of constitutional appendix. But it would require little disturbance of precedent to read either provision more broadly; the holding of *The Slaughterhouse Cases* can easily survive even if the dicta were trimmed back. Recall, moreover, that the ways in which right and obligation interconnect to produce citizenship can help explain puzzles in the Court's application of the equal protection clause. Because the equal protection clause is so open-ended, it requires a limiting principle and a guiding purpose. Enforcing rights with special vigor when they are needed to reaffirm the universal obligations of citizenship can serve both ends admirably.

A much bigger problem is that the focus on *citizenship* itself is becoming obsolete and may not be saved by Justice Brewer's *denizen* concept. In the new world order, the civic virtue and pragmatic advantages of local citizenship are giving way to a transnational marketplace, where citizenship in a particular country is increasingly an adventitious formality. Internationalization may press the industrial world relentlessly toward abstract universal human rights and an ever-thinning reciprocity understanding of the relationship between rights and obligations. This possibility strikes me as both real and speculative. In my equally speculative view, the transnational forces that push us outward and apart are not the only ones generated by the post-industrial economy. The same economy impels us to seek local community and rooted citizenship. Just as federalism and the virtues of local government could make a comeback in a period of shrinking distances, so those of civic obligation can gain traction in the teeth of expanding horizons.

The outward push of transnational livelihood is related to the deepest problem for the venture I endorse: Does our culture have

enough *social capital* to make it workable?<sup>167</sup> It is surely true that citizens do not take jury duty, military service, voting, marriage, or contractual promises as seriously as they did a generation ago. And it is doubtful that the Supreme Court's announcement of a thicker connection between right and obligation will reverse this ongoing trend. Like other academic theories, my links between rights and obligations may be merely aspirational, but I remain confident that institutions like marriage and voting will retain at least some of their cultural power. In any event, these are aspirations we must have as a polity, for otherwise we shall wither. Thus, the decline of old forms of cooperation and community must be counterbalanced by the rise of new ones—the internet, professional activities, social movement engagements, and so forth. It may be that jury duty and military service will continue to erode as *bridging* institutions that bring people together—but that trend makes it even more important that the country develop other kinds of bridging institutions. These new institutions, such as new forms of family recognition and of dispute resolution, will be the new frontier for constitutional jurisprudence.

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167. See generally Robert D. Putnam, *Bowling Alone: The Collapse of American Community* (2000) (arguing that many indicia suggest a steady decline after 1960 in American “social capital,” that is, willingness to trust and cooperate with one’s neighbors).

*Notes & Observations*