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Reviewed by Ann F. Thomas (New York Law School)
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The Long Hello: Uncovering the Citizenship of Women

Can a woman be a citizen of the United States? Since 1787 the answer has been yes, but not on the same terms upon which a man holds his citizenship. For most of the 211 years since the Constitution was adopted, the differences between the citizenship of men and of women have been most visible in the political and personal rights that men held and women were denied. In regard to civic obligation as well, the experience of citizenship for women in the United States has differed from that of men. Here women appear to have had the advantage. Traditionally, American law has excused women from important but onerous civic duties that men were compelled to perform, such as the draft and jury service.

Yet the obligation to defend the state by force of arms against external enemies is by ancient tradition the *quid pro quo* for the state's protection of the individual, and arguably this interdependence constitutes the core of citizenship. The obligation to serve on a jury gives reality to the right to trial by jury, a civic institution central to the rule of law in the Anglo-American tradition. Has it really been advantageous to women to be excused from these duties? What is the nature of a citizenship that is exempt from these fundamental responsibilities? In her compelling new book, *No Constitutional Right to Be Ladies*, Linda Kerber, the May Brodbeck Professor of History at the University of Iowa, undertakes to answer these questions in an ambitious exploration of the history and meaning of women's civic obligations.

Kerber's premise is that the defining features of citizenship are found not only in rights but also in the obligations of the individual to the state: "In the liberal tradition, rights are implicitly paired with obligation" (p. xxi). Moreover, obligations also embody opportunities to participate in the exercise of the power of the state. Kerber seeks an explanation for the differences between men's and women's citizenship obligations and the persistence of those differences in the common-law doctrine of marital unity or coverture.

The doctrine of coverture, which Kerber explains in her first chapter, held that during marriage a woman's separate legal identity was generally suspended and she was "covert" or covered by the legal personality of her husband. The wife's person, property, and labor became subject to the ownership and control of her husband and, for the duration of the marriage, she lost the legal capacity to enter into contracts, own and manage property, sue or be sued in her own name, choose her place of residence, designate a guardian for her children, and make testamentary dispositions. She was obligated to obey her husband; indeed, the concern that she was subject to his physical coercion extended so far that a wife might not be held responsible for her own criminal acts if they were performed in the presence of her husband. In exchange for all this, husbands were required to support and maintain their wives and were presumed to be their protectors.

Kerber's expansive but provocative thesis is that the law and norms of coverture "substituted married women's obligations to their husbands for obligations

to the state" and constituted "the central element in the way that Americans have thought about the relation of all women, including unmarried women, to state power" (p. 11). While starting with a common-law doctrine that is centuries old, Kerber gives us a book that is of necessity a history of contemporary American civic law and institutions.

She finds that there never have been any "wages of gender" (p. 309) for women to collect. In her view, whatever advantages that gender-based exemption from civic duties appeared to confer upon women have been illusory. Diminished rights were the more lasting accompaniment of reduced civic obligations. Kerber concludes that women have paid a double price for exemption from the full burdens of citizenship. In addition to second-class rights, exemption from obligation has come at the cost of excluding women from many of the institutions through which citizens participate in public life. The obligations of citizenship are themselves rights–the right to be acknowledged as a necessary part of the state and the right to participate in the exercise of the power of the state.

In detailed studies that range from the 1770s to the 1990s, Kerber examines five different civic duties, testing her thesis about coverture and civic obligation and tracing the changing understandings in American law of the identity and obligation of women as citizens. Kerber starts with a case testing the application to married women of Revolutionary-era loyalty laws and ends with the story of the lawsuits that, in 1979 and 1981, challenged the role of gender in draft law and contemporary military service. In the intervening three chapters, Kerber looks at the use of coverture and vagrancy laws to regulate the labor of freedwomen during Reconstruction, the suffrage tax protest movement of the 1870s, and the women's jury service cases of the 1960s and 1970s.

This survey thus examines legal features of women's citizenship both before and after the married women's separate property law reforms that began to take hold in the 1840s and before and after the attainment of woman suffrage in 1920. It builds on the work of Norma Basch, Marylynn Salmon, and Reva Siegel, who in recent years have considerably advanced the legal history scholarship on coverture in American domestic relations law and property law,[1] and on her own work in *Women of the Republic* (1980) examining the conscious incorporation of coverture into American law after the American Revolution. But *No Constitutional Right to Be Ladies* pushes beyond the question of coverture's impact on private law to focus attention on its influence on some of the most basic features of public law. This redirection of the study of coverture is one of her new book's central contributions.

Each of Kerber's five chapters is skillfully constructed around a case in which a court confronted the question of whether a woman owed the same duty to the state that a man would have owed in like circumstances. Kerber places each case in its era's social and political history, with a wealth of detail drawn from archival sources and contemporary literature and ample support from modern secondary sources. Kerber peoples her book with an extensive array of individuals whose brief biographical sketches enliven her case narratives and add depth to her descriptions of historical context. One of the most interesting contributions this book makes is in the identification of numerous lawyers who from 1801 (James Sullivan of Massachusetts) through the current era (former Deputy Attorney General for Civil Rights Isabelle Pinzler) have contributed to the formulation of theories of women's rights and citizenship in various settings.

The cases that Kerber investigates are not landmark cases establishing equal rights for women, but rather cases in which courts articulated legal doctrines that justified treating women and men quite differently. In the judicial rhetoric and analysis presented in support of the status quo, Kerber finds textual evidence of the peculiar persistence and strength of the doctrine and culture of coverture. At one level, the significance of these cases lies in their presentation of a legal ideology that served to restrict the political power of women. Yet they are also a fascinating, if unsystematic, record of developing theories of gender equality and, taken together, represent an interesting methodological approach.

The first chapter examines the manner in which the duty of loyalty to the state has been understood to apply to married women. Its focus is the Martin case, decided in 1805. In *Martin* the conflict between coverture and civic obligation was explicit. During the American Revolution, Massachusetts law made forfeit the property of anyone who fled to the protection of the British. Martin's mother fled Boston for New York (and later for England) with her British soldier husband in 1776. But the Massachusetts court held for her son when he claimed that she had not forfeited her property and he could therefore inherit it. The court concluded that Mrs. Martin had not treasonously withdrawn herself and her loyalty from the rebellion because she had been withdrawn by her husband whom it was her duty to follow and obey.

The court's decision preserved Mrs. Martin's prop-

erty and seemed to confer a benefit on married women in such situations. But Kerber argues that the understanding of woman's citizenship obligations upon which it was based–that a married woman owed primary allegiance to her husband rather than to the state–made married women vulnerable to the assertion that they lacked the capacity to continue to give their allegiance to the state of their birth if their husbands chose differently. Kerber points to subsequent case law and legislation questioning the nationality of American women (and their children) in those circumstances and the culmination of this trend in the Expatriation Act of 1907, by which Congress stripped U.S. women of their citizenship upon marriage to an alien even if they remained in the United States. Thus the substitution of loyalty to husband for loyalty to the state and the concomitant exemption from the personal obligation to refrain from treason is linked to the married woman's diminished claims to national identity.[2]

In her second chapter, Kerber explores the idea that one of the obligations of citizenship is visible economic productivity. She identifies vagrancy laws as an earlier legal expression of this obligation and argues that current welfare laws are a more contemporary version. This conceptualization of an obligation to work has resonance with the *Papachristou* case and Anthony Amsterdam's successful challenge to the constitutionality of vagrancy laws in the 1960s and early 1970s, and Kerber discusses his work in this context. But she takes the idea in a different direction. Her focus is the interaction of vagrancy laws and coverture in regulating the work of women and the role of race in producing diametrically-opposed outcomes for white wives and freedwomen.

This chapter focuses on the nearly recordless 1866 case of Harriet Anthony, a pregnant black woman who miscarried while working on the street repair crew in Houston, Texas, under a sentence for vagrancy. Through the files of the Freedmen's Bureau, Kerber documents the role of coverture in efforts to compel newly-freed African-American women to work in the fields or as domestic servants under family labor contracts entered into by their husbands without their consent. Coverture came into play because it enabled husbands to command the labor of their wives, and vagrancy law provided an enforcement mechanism because runaway wives risked punishment as vagrants. Some freedwomen objected to this form of emancipation. Kerber quotes a Freedmen's Bureau agent as reporting that "many negro women have failed to perform their part of the contracts, claiming the husband has no power to control her labor. She being free & responsible as himself" (p. 65).

But, Kerber argues, the legal structure that was used to compel black women to work in public was also used to restrict white women to a cloistered domesticity that simulated idleness. For white women, work outside the home was not respectable; it reflected badly on their husbands. Kerber connects this history with the "dizzying series of contradictions" of ideology and laws today concerning work and welfare, linking the double standards of the past with the confusions of the present about welfare and work for mothers of color. This brief chapter makes extensive use of the burgeoning scholarship in the fields of labor history, slavery, and Reconstruction, citing more than forty works published since 1990. The subject matter was new to me, and I found this chapter riveting.

Paying taxes is one of the most familiar civic obligations. In her third chapter, Kerber examines taxation and the terms upon which women have been required to bear this burden. Her primary focus is on the unsuccessful effort, in the years surrounding the 1876 centennial celebration of the Declaration of Independence, of woman-suffrage advocates to link the obligation of women to pay taxes to the right to vote. The chapter is built around a vivid retelling of the tax resistance of two spinsters, the redoubtable Smith sisters of Glastonbury, Connecticut, in the 1870s and 1880s and builds on the earlier work of tax historian Carolyn Jones.

Despite its rhetorical power and popular appeal, the "no taxation without representation" battle cry of the American Revolution did not carry the day for woman suffrage in the 1870s and 1880s. Seeking an explanation for the failure of the woman-suffrage tax protests to establish a legal or constitutional reciprocity between the obligation of women to pay taxes and the right to vote, Kerber turns to the work of nineteenth-century American tax-law and constitutional-law theorists Thomas M. Cooley, Judge John Dillon, and E. R. A. Seligman. In their influential tax treatises (published in 1876, 1872, and 1895, respectively), she notes theories of taxation that emphasize sovereignty and finds them to be implicitly hostile to the claims of the woman suffragists.

Tax is the area of law with which I am most familiar and I learned a lot from this chapter. But I have two quibbles with it. Kerber ends this chapter with an overly compressed sketch of the treatment of women in the federal income tax system. Here Kerber suggests that amendments enacted in 1969 resolved the gender inequities in the convoluted Internal Revenue Code (p. 122). Most observers would disagree and instead trace the current mar-

riage penalties imposed upon dual earner married couples to those changes.

Also, I cannot agree with Kerber's reading of Judge Cooley's treatise. I think Kerber is correct in identifying Cooley's 1876 tax treatise[3] as an important source of opposition to the theory that there was a constitutionally-required reciprocity between taxation and representation that could be enforced by the courts. But I am not sure that he was quite the villain that he appears to be in her reading. Cooley also was a source of support for taxpayer suffrage for women on public-policy grounds and a reformer in the critical area of corporate tax exemptions. Moreover, I find his responses to the woman suffrage tax protest in his explicit discussion of the limitations on the taxing power, rather than implicitly contained in his definition of taxation (as Kerber suggests).

Cooley defined taxation as an incident of sovereignty justified by the exchange of support for the protection of the state (quoted at pp. 114-15). Although this definition is related to the reciprocity issue, it seems to be targeted more directly at two other problems in nineteenth-century tax theory in which Cooley was deeply interested: 1) reasserting the taxing power of the states over private corporations to which legislatures had imprudently or corruptly given tax exemptions and 2) delineating local taxing jurisdictions.

Cooley was well-known for his explicit views on the question of the reciprocity of taxation and representation. Elsewhere in his 1876 treatise he developed a twofold answer that became the authoritative view on the question. It was adopted even by those who, like the Christian socialist Richard T. Ely, firmly rejected Cooley's exchange theory of taxation. The first part of his argument is a generalized historical refutation. He maintained that "the maxim that taxation and representation go together is true only in a territorial sense."[4] Hence he found that the "rallying cry in the contest for independence ... really meant ... that the local legislature must make the local laws."[5] The assertion that this maxim meant that "*no person* could be taxed unless in the body which voted the tax he was represented by someone in whose selection he had a voice," Cooley treated as an argument that proves too much.[6] He noted that there are always persons owning property within a state to whom the vote could not be given but who still receive benefits from government. In this category he listed infants and aliens. His conclusion, quoted extensively in the subsequent tax literature, was that "so long as all persons cannot participate in government, the limits of the exclusion and admission must always be determined on considerations of general public policy." [7]

Then as now, Judge Cooley has been regarded as the leading constitutional scholar of his time. His interpretation of the reciprocity question effectively severed the "no taxation without representation" argument from constitutional theory and placed it beyond the reach of the courts into the realm of political theory. Whether he sought to contain the use of the reciprocity argument by business corporations, which were at that time claiming other rights of citizenship, is an interesting question. In any event, he acknowledged that under these theories the property of women who did not have the right to vote was nonetheless subject to taxation, citing *Wheeler v. Wall*, the 1863 case in which the Massachusetts Supreme Judicial Court responded to Sarah Wall's suffrage tax resistance in just those terms.[8]

Yet Cooley also offered support on public policy grounds for taxpayer suffrage for women. He advised that "all those who pay the taxes should be allowed a voice in raising them." Although he limited this argument with the caveat "so far as can be prudently and safely permitted," it is unlikely that he was suggesting that prudence would dictate the exclusion of women.[9] In his own state of Michigan, partial suffrage had been extended to women property owners in school meetings as early as 1867 and was still in place even after the disastrous defeat of its first woman suffrage referendum in 1874.[10] Moreover, while Cooley offered in his text the rationale that "those [taxes that] they vote they will more willingly and cheerfully pay," his supporting footnote gave an impassioned defense of what he called the principles of "self-taxation," citing Burke and quoting Locke.[11]

In Chapter Four, Kerber leaps into the mid-twentieth century, to the history of women's jury service. This is the longest chapter in the book (ninety pages) and the principal support for Kerber's central arguments. It is also a wonderful piece of contemporary legal and social history scholarship. The "second suffrage campaign," as it was called by earlier generations of advocates (p. 136), has yet to find a modern historian, and here Kerber stakes a strong claim to that title.

The right to trial by jury for women seems to have been of long standing in the Anglo-American tradition. But the right of American women to sit as jurors and share in the exercise of the power of the jury is a late twentieth-century attainment. For decades after women

were fully enfranchised, the states still were permitted to bar women from jury service if they saw fit. Kerber dates the end of this era to the *White v. Crook* case, decided by the United States Supreme Court in 1970. The practice of *de facto* exclusion of women from juries, which was the result of making women's jury service voluntary, continued to be permitted until the Court's decision in *Taylor v. Louisiana* (1975). But, Kerber maintains, equality in jury service was not fully imposed until 1994, when in *J.E.B. v. Alabama* the Supreme Court announced that "gender, like race, is not a constitutional proxy for juror competence and impartiality" (p. 217).

From 1920 onward, woman's-rights advocates labored to open jury service to women, recognizing it as both a right and an obligation and focusing their efforts on courts as well as legislatures. Kerber effectively presents instances of advocacy and resistance through narratives and contemporary cartoons. But her main interest is the litigation campaign. The chapter unfolds around the story of *Hoyt v. Florida*, 368 U.S. 61 (1961), and the Court's holding in that case that it was constitutionally permissible for states to make jury service voluntary for women even if it meant that female criminal defendants like Mrs. Hoyt would be tried by all-male juries.

Kerber insightfully brings the historian's questions to this subject, focusing as much on the stories of the lawyers and the litigants as on legal theory. Sketches of Ruth Bader Ginsburg and her work in her years with the ACLU's Women's Rights Project are well-drawn and of compelling interest. Kerber also discusses at length the role of Pauli Murray, a theorist and advocate whose work in the 1960s linked the civil rights movement and the women's rights movement, as well as the contributions of New York lawyer Dorothy Kenyon.

The history of women's jury service supports Kerber's conclusion that reduced obligations produce diminished rights, but does it sustain her thesis about the centrality of coverture in defining the civic obligations of women? Some readers will be skeptical about Kerber's claim that a long-discredited common-law doctrine is at work in the decisions of the United States Supreme Court in the latter part of the twentieth century. But Kerber finds a surprisingly strong level of textual support for her thesis.

Whether in 1961–when he wrote the opinion for a unanimous Court in *Hoyt*–Justice John Marshall Harlan really believed that the common-law doctrine of coverture continued to impose domestic obligations on wives, or whether he merely thought it provided a convenient justification for the Court's willingness to tolerate the preference of the Florida legislature to maintain a male monopoly on the power of the jury, is not clear. Even in earlier phases of the life of this remarkably pervasive doctrine, it is sometimes hard to see it as anything other than window dressing for gender politics. But Harlan's reasoning strongly suggests the influence of the culture of coverture, if not its legal doctrine as well.

In his opinion, Harlan referred to "the enlightened emancipation of women from the restrictions and protections of bygone years" but concluded that nonetheless "woman is still regarded as the center of home and family," implying that "woman" could therefore reasonably be excused from a vital civic obligation to enable her to fulfill this domestic role (p. 181). One of the residues of the doctrine of coverture commonly found in domestic-relations law in that period was the requirement that wives maintain the home and care for the children and that husbands provide support and maintenance. Kerber does not discuss this point, but it gives added meaning to Justice Harlan's further reference to the "special responsibilities" of women. Reading his words in context, it is hard to think that Justice Harlan is referring to nothing more than social mores.

Kerber's fifth chapter explores a number of questions about military service, gender, and citizenship. Her primary focus is the period surrounding President Carter's unsuccessful 1980 attempt to institute universal draft registration. Although this chapter is full of interesting ideas and historical vignettes and is nearly as long as the jury service chapter, its argument is diffused and it does not achieve the clarity of the earlier chapters. Kerber builds her discussion of gender and the obligation to defend the state around two cases: *Rostker v. Goldberg* (1979) and *Feeney v. Commonwealth of Massachusetts* (1981).

Helen Feeney's case posed an unsuccessful challenge to veterans' preferences, and it serves as a reminder that the obligation of military service can carry with it significant economic benefits and opportunities. *Goldberg* challenged the draft law and briefly stopped the newly authorized draft registration in 1981 when the U.S. District Court for the Eastern District of Pennsylvania held that a draft that excluded women denied young men the equal protection of the law. (The Supreme Court quickly reversed.) Kerber also records the intense debate over the Carter proposal, which pitted feminists reluctantly supporting it on egalitarian grounds against social conservatives fighting a pitched battle to preserve traditional

gender roles, the "constitutional right to be treated like American ladies" of the book's provocative title (pp. xxiv and 287).

The contributions of *No Constitutional Right to Be Ladies* are numerous and considerable. Foremost among them is its enrichment of the legal history of American women. In an influential article that appeared in the *Law and History Review* more than a decade ago, medieval historian Janet Loengard pointed to the need to augment institutional legal history of the status and rights of women with histories of the experiences of women with law.[12] Kerber manages to provide a good deal of both in this new book. Although the book is by no means a systematic doctrinal history, its inquiry into the uses of the doctrine of coverture in the judicial interpretation of the civic obligations of women adds considerably to our understanding of the scope and impact of that doctrine. At the same time, Kerber's narratives document the experiences of women with coverture in a broad range of settings; in the process a much clearer picture of the impact of doctrine on the lives of women emerges.

No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship is a carefully crafted work that tells its complex and persuasive story at many levels. By its focus on the law of civic obligation, it makes an innovative contribution to the study of citizenship as both a legal and a political institution in the United States. By following the "antique legal tradition" of coverture (p. 11) out of the treatises and into the arena of public law, this absorbing book also represents a significant expansion of the legal and social history scholarship of that doctrine in America. Its sweeping survey provides a timeline of the status of women as citizens that is a provocative reminder of how much in the past we still live. Informative and accessible, this study will be useful to legal historians and feminist theorists as well as to more general students of American history. Although some parts of this ambitious work are not as fully realized as others, this takes little away from the value of the book as a whole. Kerber's book is so full of interesting ideas and thought-provoking questions that it will inspire the research agendas of scholars for years to come.

Notes

[1]. Norma Basch, *In the Eyes of the Law, Women, Marriage, and Property in Nineteenth Century New York* (Ithaca, N.Y.: Cornell University Press, 1982); Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1984); Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930," *Georgetown Law Review* 82 (1994): 2127.

[2.] There seems to be some disagreement about whether the *Martin* case (1805) or *Shanks v. Dupont*, 3 Pet. 242 (U.S., 1830) (which Kerber also discusses) represents the dominant view in early nineteenth-century jurisprudence of the capacity of married women to form and change political allegiance. Nancy Cott argues that the view that married women retained this capacity, as expressed by Justice Story in the later *Shanks* case, is the norm. Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830-1934," *American Historical Review* 103 (1998): 1440, 1456n44. Rogers M. Smith, in *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997) 543n48, describes *Martin* as "widely followed." But all agree that in 1907 Congress resolved the divided authority of case law on the question of the U.S. nationality of American women married to aliens against the women at a time when men were able to confer their U.S. citizenship on alien wives and children (providing the alien wife was white).

[3]. Thomas M. Cooley, *The Treatise on the Law of Taxation* (Chicago: Callagan, 1876).

[4]. Cooley, 45-46.

[5]. Cooley, 45.

[6]. Cooley, 45 (emphasis in the original).

[7]. Cooley, 45.

[8]. Cooley, 46n1.

[9]. Cooley, 45.

[10]. Virginia Ann Paganelli Caruso, "A History of Woman Suffrage in Michigan" (unpub. Ph.D. diss., Michigan State University, 1986), 55, 67-68.

[11]. Cooley, 45.

[12]. Janet Senderowitz Loengard, "Legal History and the Medieval Englishwoman: A Fragmented View," *Law and History Review* 4 (1986): 161.