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# Because We Love You

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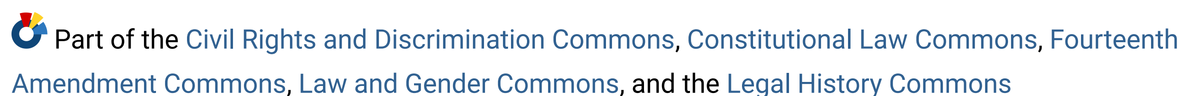
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# BOOK NOTICE

## Because We Love You

*Rosemary B. Quigley*

NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP. By *Linda K. Kerber.* New York: Hill and Wang. 1998. Pp. xxiv, 405. $25.

I remember the impotence I felt on the eve of the Gulf War in January 1991. No one could have known at that moment what a brief conflict it would be. We had every reason to believe that the Middle East would be hurled into turmoil. And if protracted war ensued, a draft would surely follow. I watched my college boyfriend sink into despair, with the help of a Bob Mould CD, at the prospect of being called to give his life for his country. I remained uncharacteristically mute. In the face of this battle, our positions were too unequal for my words or touch to console. I had listened to my male friends deliberate the legitimacy of the war-to-be and the potential for service deferment for some days. Though they were liberal-minded, it was clear that my views brought little to bear upon the situation. We were all people with big plans, but the plans of the women were shielded from the looming threat of life-threatening, wartime service. The potential of a male friend being killed, I was reminded, was nothing in the face of that man conceiving his own death.

Experiencing such a dynamic compelled me to accept gradually the different situations of men and women in American society and under American law. Men and women used to be similarly situated to me and I was befuddled by, and unsympathetic to, many women's seeming incapacity to assert themselves and achieve their goals in a purportedly male-defined world. But as I've worked in a professional climate of bravado, developed intimate relationships with men, and provided legal services to hurting women, I have come to recognize that the genders probably are distinct, and that the best we can hope for is harmonization. *No Constitutional Right to be Ladies* by Linda Kerber[1] has further clarified my resolution of the age-old conundrum of whether women can be equal with, while distinct from, men. Kerber draws women as strong but different, ultimately resolving that the unique characteristics of gender should not be manipulated to un-

1. May Brodbeck Professor of History, University of Iowa.

dermine social equality. Women, she points out, have sought to contribute equally as citizens regardless of gender differences. Kerber sees the remaining barriers to parity, like women's exception from conscription, as enduring from generation to generation. But by focusing on women's assumption of constitutional obligations, Kerber renders an engaging historical framework for considering women as full partners in citizenship.

The book is a rich weaving of stories — legal tales and personal accounts — that Kerber says was born the morning she saw her husband off to service in Vietnam, a duty not required of her (p. xix). Kerber's mission is to collect narratives that demonstrate the obligations and, where appropriate, the corresponding rights women have sought to vindicate in the history of our country. She identifies the obligations that women were "saved" from, and shows how these omissions subsequently denied women their concomitant rights. Adhering strictly to the necessary coexistence of right and obligation, Kerber makes a laundry list of historical exclusions that deprived women of equal citizenship. Some of the obligations she implicates include taxation, jury duty, and military service. The companion rights include voting, fair trial, and opportunity in employment. Several of these areas are not facially gender-sensitive and so their special legal implications for women were not always acknowledged. Kerber charts the triumphs of women over time, representing eras from post-Revolutionary War to post-Equal Rights Amendment. She pays particular attention to the difference in standing between single women versus married women, and white women versus women of color.

Beyond the eloquence of her creative nonfiction, Kerber's historical analysis of women's position as participating citizens, complete with extensive supporting notes, enriches her accounts. She provides generous context for the time and place of a given woman's struggle. Moreover, Kerber tells her tales from multiple viewpoints, often describing the individual woman oppressed in a given situation along with the attorneys who took her cause to the courts. In this way, Kerber identifies a novel hall of heroes to the feminist cause, including such luminaries as Jane Kenyon and Ruth Bader Ginsburg.

It seems important to Kerber that she be a historian and not a feminist.[2] Her accounts are true to the details of legal clashes and their social contexts, though sometimes developing the story while discarding the technicalities. But Kerber is also engaged in a classically feminist experiential project,[3] giving voice to women who fulfilled civic

2. In an example of Kerber's method — documenting reality but reserving commentary — she writes, "And even if, having considered the situation, a majority of women should conclude that they do indeed want to be 'ladies' and to collect the 'wages of gender,' *as a historian* I can only reply that those wages are not there to collect." P. 309 (emphasis added).

3. *See* Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 621 (1990).

obligations throughout history. She identifies the seeds of gender stereotype planted throughout our nation's history and suggests how these misconceptions persist today. Most vitally, Kerber's work creates a duty-bound obligation to confront important questions about gender and legal status. To what extent do women want to be viewed as different under the law? And to what extent can they afford to be viewed as different under the law? In claiming equality, women forfeit some of the comforts historically afforded their gender. Some women may have relished the claimed exemption from jury service simply based upon their sex. But feminists fought for cross-sectional representation on juries, and so women, like men, are now obliged to serve. Similarly, many women may find some relief in knowing they cannot be drafted. But is the price of losing voice when national security is threatened too high?

Most of all, Kerber's stories demonstrate how alone the champions of equal rights for women have been in their personal fights. The fact that women continue to have personal anxiety about identifying themselves as feminists evidences an ongoing difficulty with women's capacity to coalesce as a group, if indeed they should. Women have yet to escape from under burdens of gender stereotypes, and they have yet to fulfill all obligations of citizenship equally. As the book's anecdotes admonish, a first step in achieving this end is for male leaders to abandon their vulnerable image of women. As one judge put it, "It does not suffice under the Constitution to treat women kindly because we love them."[4]

## PROTECTING WOMEN FROM DUTY

Women's citizenship has been distinguished from men's citizenship throughout our constitutional history. Women's citizenship is defined by their relation to men, while men are stand-alone citizens. In some states, only single women were given the franchise because they continued to possess wills of their own (p. 33). Once women married, their husbands became responsible for their actions, even crimes they committed and contracts into which they entered (often illegally) (p. 14). Kerber tells the story of a young wife who obediently followed her British husband out of America during the Revolutionary War era. Years later she was cleared of treason, for "[a] *wife* who left the country in the company of her husband did not *withdraw* herself; but was, if I may so express it, withdrawn by him."[5] Since that time, the federal courts have ruled for dissolution of citizenship when women

4. P. 277 (quoting U.S. District Judge W.D. Murray in *United States v. Reiser*, 394 F. Supp. 1060, 1069 (D. Mont. 1975)).

5. P. 30 (quoting Judge Theodore Sedgwick in *Martin v. Commonwealth*, 1 Mass. 347, 392 (1805)).

marry aliens and move away because it is a volitional act.[6] While this change seems to confer respect on women's independent decision-making, it ignores the social reality of marriage, which defines the wife by the husband's acts.

The historical denial of equal obligations for women was protective in its best light, paternalistic in its worst. For instance, Kerber observes, "Women were understood to be *favored* by the culture, and exemption from jury service was understood to be one manifestation of that privilege."[7] As nurturers of the nation, or "republican mothers" as the early patriots called them, women were to be protected from the filth that came before the court.[8] This posture actually defeated some interests in fair judicial proceedings, as when women committed crimes and sought a jury of their peers. The classic case is that of Gwendolyn Hoyt, discussed in Chapter Four of the book (p. 124). Hoyt was found guilty of second degree murder for killing her husband with a baseball bat. She challenged her conviction on appeal, contending that her constitutional rights were denied by the lack of (potentially sympathetic) female representation on the jury.[9] The Supreme Court upheld her conviction, concluding that Florida could permissibly exempt women from jury duty in the interest of the general welfare because women could reasonably be viewed as "the center of home and family life."[10] This reasoning acted to exclude all women from such service, regardless of whether they actually had domestic obligations.[11]

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6. *See* Mackenzie v. Hare, 239 U.S. 299 (1915). On a related citizenship issue, Kerber notes that until 1934 a child born abroad was only a birthright citizen if the father was a citizen regardless of whether the mother was one — an interesting qualification given the uncertainty of paternity as compared to maternity. P. 43.

7. P. 134. Other examples included different female standards in aspects of tort law, including emotional distress and reasonableness. *See generally* Martha Chamallas & Linda K. Kerber, *Women, Mothers and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990); Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN'S L.J. 79 (1998).

8. Pp. 146-47. Kerber notes that the "republican mother" term initially referred to women who claimed convictions of which men thought them incapable. However, it came to refer to women's role in fulfilling household duties as an obligation of citizenry.

9. P. 161. Also, while there was some history of domestic violence, it is unlikely that Hoyt could have made out a case of self-defense or claimed battered women's syndrome, had that concept existed at the time. P. 174.

10. Hoyt v. Florida, 368 U.S. 57, 62 (1961). In a different case some years earlier, the Florida Supreme Court had denied mandatory jury service of women, stating, "the spirit of chivalry, and of deep respect for the rights of the opposite sex, have not yet departed from the heads and hearts of the men of this country." P. 140 (quoting Hall v. State, 187 So. 392, 401 (Fla. 1939)).

11. Finally, in *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Court ruled that men and women are equally obligated to serve on juries. The Court did not invalidate the use of peremptory challenges to screen for gender until 1994. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).

Kerber documents that in the debates on military service, many legislators saw women's contribution to the national defense as the task of "keeping the home fires burning" (p. 249); this despite their often significant wartime role outside the house, such as in industry.[12] These rationales acted as a scrim on gender stereotyping. In fact, women were thought to lack the reason to deliberate on the law in the jury format (p. 146) and were deemed physically vulnerable in conflict, making them a liability to the state as soldiers (p. 237). Early feminist advocates characterized male treatment of women as nothing short of a plot: "He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life."[13]

"Relieving" women of the obligations of citizenship, however, also deprives them of citizenship's opportunities. For example, to the extent that the public looks for military service in the background of its candidates, denial of combat experience disadvantages politically aspiring women.[14] Favoritism quickly becomes discrimination where gender is concerned.

One would like to think that we are past equal footing being withheld and that to preserve this concern is mere paranoia. But Kerber's account is in some ways a clarion call. She puts us on guard about how the law and policy of the modern era may impinge upon women's rights. Taxation schemes may be the best example of insidious inequity, as "U.S. tax structures continue to combine with social traditions to sustain a system in which wives are understood to be secondary earners and their participation in the waged labor force understood to be a matter of choice."[15] As another example, most women still rely on their relationship to men for obtaining social security benefits, as most elderly women's subsistence is defined by their husband's work history.[16] In fundamental areas, women are still not recognized as autonomously fulfilling the tasks and securing the entitlements of citizenship.

12. Pp. 261-267 (discussing "women of the army" volunteerism). Motherhood itself was dressed as an act of citizenship as women risked their lives in birthing future soldiers. P. 244.

13. SHEILA RUTH, ISSUES IN FEMINISM: A FIRST COURSE IN WOMEN'S STUDIES 473-74 (1980) (quoting the Declaration of Sentiments from the Seneca Falls Convention, 1848).

14. P. 260. Kerber also notes that the military's increasingly permissive attitude toward women in combat may ultimately undermine Chief Justice Rehnquist's reasoning that women were not equally obligated to register for the draft because they are not "similarly situated" to men in their fighting duties. P. 298 (discussing Rostker v. Goldberg, 453 U.S. 57, 77-79 (1981)).

15. P. 122. *See also* EDWARD J. MCCAFFERY, TAXING WOMEN 236-238 (1997).

16. *See* Kathleen Feldstein, *Social Security's Gender Gap*, N.Y. TIMES, Apr. 13, 1998, at A27.

FORECASTING FORECLOSURE OF WOMEN'S RIGHTS

The most useful and fascinating facet of Kerber's work is how predictions foretell the modern status of women. Virtually every tale describes the roots of attitudes, and indeed inequalities, that endure today. This is most compelling in the chapter on Reconstruction Era vagrancy laws.[17] The laws were devised to manage the proliferation of individuals apparently aimless in their newfound freedom. They required individuals to find work, or at least the appearance of self-support. There was a purported obligation not to become a burden on government and many states initiated compulsory work contracts for freedpeople (pp. 56-58). As Kerber notes, however, "vagrancy is a status offense; the crime is not what a person has done, but what a person *appears* to be" (p. 54). Under these circumstances, white women bore little burden of productivity thrust upon them compared to their African-American counterparts. Furthermore, black women searching for formerly enslaved husbands and children were often presumed to be prostitutes (p. 59), and were subsequently detained, fined, imprisoned, and compelled to work. It seems that, unlike white women, their primary obligation was not to family and home.

All of this would be barely palatable if it were mere artifact, but as Kerber notes, "Impoverished black women have been caught in the internal contradictions of a gendered ideology of an obligation to work that succeeded slavery" (p. 80). The social goals and disparate burden of the policies she identifies are echoed in today's welfare reform,[18] as poor women (disproportionately minorities) are ordered to relinquish their primary parental role and work outside the home in order to receive sustaining benefits. The welfare-to-work scheme requires the same "measurable and visible" productivity that early vagrancy laws defined (p. 80). In the light of this "tradition," the welfare policies framed as fostering family independence feel even more deeply regressive.[19]

Kerber ties modern concerns with gender roles in civic participation to their historical mores.[20] Again, in her discussion of the draft,

17. Laws adopted by former Confederate states between 1890-1910 stayed on the books until the 1960s. P. 69.

18. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (enacting work requirements to secure temporary assistance for needy families).

19. Another shocking parallel with this chapter's idleness concerns is the reemergence of loitering ordinances. In 1866 a commentator in the *Houston Tri-Weekly Telegraph* targeted "the black vagrants to be seen on street corners, dressed in the height of fashion, and who sport their jewelry and gold watches when they have no visible means of support — these are the villains we declare war upon." P. 59. Compare this with the discriminatory presumptions that city policy was based upon in *Chicago v. Morales*, 527 U.S. 41 (1999) (holding loitering ordinance restricting activity on city sidewalks void for vagueness).

20. *See, e.g., supra* note 7.

Kerber recognizes a trend toward the "valorization" of male violence first within the military, and then as women were admitted into this domain, preserved outside the military. She concludes that even with the services' promotion of women, "it is possible to revise even this most traditional system of gender difference [the military] while at the same time keeping systems of male domination intact" (p. 301). She concludes that women as a class have had a distinct experience with violence and have not been able to count on the state for protection, most starkly in cases of domestic abuse. It may seem far afield, as Kerber suggests, that women's differential citizenship requirements — being "protected" from military participation, for example — result in victim status, but it is an interesting speculation (p. 302). Even when Kerber doesn't mean to, her historical analysis implicates present-day concerns. For instance, she recognizes that women are characteristically perceived to be more emotional and inclined to mediation (p. 175), which raises persistent questions about the importance of jury composition[21] and the current claims that women are responsible for hung juries.[22] But while she makes clear that the mission is not complete, she avoids heavy-handed advocacy. Her stories spur an understanding of how women ended up where they are, and how far they have to go.

## TEACHING LAW . . .

Readers seeking precise attention to the legal nuances of the cases from which Kerber generates her stories will be disappointed. It seems entirely likely that Kerber understands the details of jurisprudence, for while she is not trained as a lawyer, she is a legal historian. But Kerber has chosen not to instruct the lay reader on the sometimes absurd technicalities that seem to constrain justice. Still, she does her readers a disservice by not explaining the legal standards clearly, either in the text or in the voluminous notes. There are several examples of Kerber failing to identify the exercise of "passive virtues,"[23] the judicial constructs, such as standing, case and controversy, and ripeness that lead to disposition of a case on grounds short of substantive constitutional resolution. Discussing the statutes that prohibited vagrancy, she notes that some of them were deemed "void for vague-

21. *See* MARTHA MINOW, NOT ONLY FOR MYSELF 15 (1997) ("Should juries be selected to mirror the diversity in the population, with individuals representing specific constituencies, or should the selection be random, even if particular juries end up with members who all share a race, a gender, or an ethnic background?").

22. *See* Jeffrey Rosen, *One Angry Woman: Why Are Hung Juries On the Rise?*, NEW YORKER, Feb. 24/March 3, 1997, at 54-55 (arguing that in refusing to convict clearly guilty individuals, some female jurors' (specifically identified are African-American mothers) action is tantamount to jury nullification).

23. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111 (1962).

ness" (p. 79), without noting that this is an important test for legislative interpretation, that statutes must be particular enough so that their precise application can be understood and predicted.[24] In the discussion of male draft registration, Kerber reports that the Justice Department found no "controversy" (p. 271), without acknowledging that this element is essential to whether the case can be litigated.[25] Later in the same discussion, she fails to explain the judicial philosophy of deference to the legislature, writing only that in the Supreme Court, "[t]he dialogue was framed in terms of whether Congress was being reasonable."[26] By not explaining the doctrinal grounds for decisions, Kerber confuses the lay reader as to the courts' actual take on the substantive questions.

In addition to omitting these legally significant details, Kerber chooses not to explore the dynamics of federalism and separation of powers as they pertain to the panoply of citizen's rights and obligations. She deals extensively with laws surrounding jury selection and property disbursement, areas traditionally left to the states, yet generally downplays the significance of state versus federal legal domains. In a rare exception, she discusses the burden women's advocates faced in their effort to amend statutory language on female-inclusive jury service. Due to the fact that jury eligibility was determined by state law, the advocates were forced to amend the laws state by state instead of by mandate of the federal courts (pp. 137-39). Similarly, Kerber rarely acknowledges the delicate power balance between the Congress, the executive branch, and the courts. The best example of this tension in the book is President Carter advocating for a universal draft registration, while at the same time declining to veto a male-only draft provision sent up by Congress. Further, the legislative and executive actions were concurrent with the relevant test case on universal draft registration, which was proceeding from the appellate to the Supreme Court (pp. 288-99). Ultimately, the Court found that women were not required to register and the Congressional agenda went forward. Greater acknowledgment of these legal machinations would bring the challenge of the cases, and their national implications, into sharper relief.

The omission of these dynamics denies the reader the opportunity to explore another quandary embedded in the book; namely, if we are

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24. For discussion of the vagueness doctrine, see HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 212 (4th ed. 1996). *See also* Kolender v. Lawson, 461 U.S. 352 (1983).

25. *See* Muskrat v. United States, 219 U.S. 346, 356-57 (1911).

26. P. 297. As another example, Kerber does not explain the importance of showing intentional discrimination on the part of Massachusetts in setting veteran's hiring preferences, namely that the Fourteenth Amendment requires this to find constitutionally violative state action. *See* Washington v. Davis, 426 U.S. 229 (1976). *See also* the discussion of veterans hiring *infra* notes 31-33 and accompanying text.

to establish equality for women, by what means can that goal best be accomplished? In the past, women may have sought recourse in a detached judiciary unbeholden to an electorate dominated by male power. In contrast, women can more readily push their issues by legislative means in today's world where so many votes seem up for grabs and candidates woo "soccer moms" as an important source of swing votes. But all of this begs the questions as to whether women can be defined as a political group at all, and whether issues can be designated uniquely feminine.[27] In discussing whether women, as a classification, deserve special scrutiny under the law, John Hart Ely observes, "they're not discrete and insular, they're not even a minority!"[28] He argues, "It is true that women do not generally operate as a very cohesive political force."[29] Still, one hopes that they could, and many commentators and political analysts assume that they do.[30]

## OR TELLING STORIES

Even if women could act as a unit, it is clear from Kerber's accounts that progress has been made largely through personal initiative. Her intimate narratives highlight individual struggles for group equality. The fight for reversal of hiring preferences for veterans is one such case. As Kerber notes, women were not absolutely disadvantaged in the Massachusetts hiring queue at issue in *Personnel Administrator of Massachusetts v. Feeney*.[31] The order of preference was from disabled veterans, wives of disabled ex-servicemen and widows of deceased ex-servicemen, any veteran, "natural" mothers of men who had died or been completely disabled in service and who were themselves divorced or widowed.[32] Women found some access to preference, but based on the traditional categories of marital status and maternal relationship. Meanwhile, a slew of qualified women

27. As Kerber documents, these questions reach back quite far to the beginning of women's suffrage. Efforts to reform jury statutes stalled between 1922-1924 because "it became clear that women did not vote as a block, and legislators found it less urgent to treat them as an interest group." P. 139. In some cases, the husband's opinion determined the wife's vote or the husband simply forbade his wife from going to the ballot box. A similar dynamic may have been at play on the jury issue, as women generally did not take advantage of their right to register for elective jury service. P. 159.

28. JOHN HART ELY, DEMOCRACY AND DISTRUST 164 (1980).

29. *Id.* at 166.

30. *See* Bob Herbert, *Women Vote Too*, N.Y. TIMES, Jan. 27, 2000, at A27; Katha Pollitt, *Dead Again?*, THE NATION, July 13, 1998, at 10.

31. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (holding that the veteran's preference statute did not deprive women of equal protection of the laws as the preference was for veterans over nonveterans, not men over women).

32. P. 225. Mothers to men born out of wedlock were excluded from the category of natural mothers. These preferences were also exempted from the purview of Title VII of the Civil Rights Act of 1964. P. 227.

seeking civil service positions were displaced by the policy. What policymakers viewed as an expression of gratitude by a costless reallocation of resources actually had a significant impact on the economic prospects of women.

The lawyers who sought to bring the case reviewed the results of administrative examinations to find women who had been deprived opportunities despite outstanding scores. They found that a lot of women wouldn't talk because they were scared of jeopardizing their provisional, though not ideal, positions with the state government (p. 231). Helen Feeney of Massachusetts, a long-time civil servant, stepped forward in an attempt to overturn the hiring preference. Feeney describes how she felt when she realized she would be the only plaintiff in the case: "I felt like the cheese in the nursery rhyme, you know, 'the cheese stands alone.' "[33]

The means by which women's equality should be pursued provided fodder for debate among activists. From the very beginning of the women's movement, splits emerged not only between suffrage advocates and nonadvocates, but among advocates themselves (pp. 86-87). Some women were suspicious of wide-ranging feminist agendas; that suspicion persists today.[34] In the face of this discord, those women whose stories make law evidence noble strengths.

The solitariness of the mission to vindicate rights and assume obligations is also depicted movingly in the portraits of the advocates. The female lawyers who took up the causes of women were themselves remarkable for all they overcame. Pauli Murray, who articulated the argument that Fourteenth Amendment protections for women should mirror those for blacks,[35] could not use a prestigious graduate fellowship to study at Harvard Law, as the school had yet to admit women (pp. 186-88). Raya Dreben pursued the fairness of jury selection for the accused murderer Gwendolyn Hoyt. Dreben had graduated high in her class at Harvard Law in 1954, taught at the University of Chicago Law School and yet could not find a firm to hire her back in Boston. She was offering part-time, free legal services when she secured the Hoyt case (pp. 165-67). Most notable is the

33. P. 232. While Kerber does a splendid job depicting champions in isolation, she does not address the additional emotional burden of having one's life story reduced to legal jargon.

34. *See, e.g.*, Phyllis Schlafly, *The Radical Goals of the Feminists*, THE PHYLLIS SCHAFLY REPORT, December 1991, at 1 ("The polls are now all reporting that 'feminism' is a negative word. Women absolutely do *not* want to be called feminists."); Ginia Bellafante, *Feminism: It's All About Me*, TIME, June 29, 1998, at 54, 57 (reporting that among white, college-educated women, the cohort most likely to identify themselves as "feminists," only 53 percent embraced the label). For a more thorough account of the attitude, see CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN (1994).

35. *See* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

story of Ruth Bader Ginsburg, who left Harvard Law for Columbia after experiencing appalling treatment based upon her gender. During an annual dinner for the female students hosted by Harvard Law Dean Erwin Griswold, she was grilled along with other women on why they were in law school, taking a place that could be occupied by a man.[36] Among other women's rights work, Ginsburg wrote the brief for the case establishing that discrimination based upon sex was a violation of equal protection.[37] Kerber even notes the professional legal environments in which the early women's rights advocates were raised, though they had no opportunity of their own to become lawyers; for example, Elizabeth Cady Stanton watched her father's law practice carefully (p. 83). The stories behind these women's motivation lends great meaning to Kerber's narrative of litigants. It is certain that the cause of equal citizenship has been significantly bolstered by women's training in the law and the profession's recognition of them.

## MOVING BEYOND FEMINIST THEORY AND RIGHTS DISCOURSE

Kerber's sophisticated scholarship tackles two areas of legal discourse sorely in need of unifying insight — ideas about citizenship and feminism. Kerber overcomes the undue focus on rights in modern constitutional litigation and yokes these entitlements once again to civic obligations. In her storytelling, Kerber offers historical fact patterns to buoy the concerns of feminist legal scholars. But she sublimates the sameness-difference debate and seeks a basis for equality in obligation as much as rights.

Kerber acknowledges that "[t]he language of obligation fits uncomfortably into democratic conversation; talk of obligation is as apt to lead to claims for entitlements as it is to assertions of equal responsibility" (p. 223). But we should be grateful that this book is not about claiming rights nor about gender discrimination per se. In addressing the much-neglected concept of obligation, the work has a fuller depiction of women's citizenship position in mind. As Mary Ann Glendon has observed, political discourse increasingly focuses on rights, a myopic view that is destructive "by its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities."[38] Kerber's tales demonstrate that the assertion of rights has not always had the centrality in political discourse that it does today. Indeed,

36. Pp. 201-02. Noting that her husband was in the second-year class, Ginsburg said she thought it important to understand one's husband's work.

37. *See* Reed v. Reed, 404 U.S. 71 (1971).

38. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE x (1991).

concern for political discourse and its impact on civic sensibilities was elemental to advocating women's equal citizenship since the time of John Stuart Mill.[39] Women may, in fact, be especially inclined to nurture the notion of community upon which citizenship is founded.

Issues born of the modern feminist movement are emblematic of clashing rights characterizing social controversy.[40] National polls demonstrated that a substantial majority of those who supported traditional women's roles also supported the ERA.[41] This finding led one scholar to observe, "[t]he explanation for these figures is quite simple: Americans can favor abstract rights even when they oppose substantive change."[42] This devotion to rights is exactly what Kerber counterpoints with her work. She shows that a grant of rights is accompanied by obligations that necessarily implicate women's traditional roles. In going beyond discussion of the liberal democratic ideals of women's rights, Kerber answers a scholarly call for attention to the historical experience of civic life.[43] As Kerber observes, "American political theory has traditionally had much to say about rights and little about obligation" (p. xxi). Particularly in the case of women, it must be emphasized that rights have often not gone hand in hand with civic equality.[44]

While not so sexy as vindicating rights, duties sometimes offered unexplored leverage to women seeking equal citizenship. "Obligations were hard to dramatize. Women could not refuse to serve on juries, since no one asked them. Women could not refuse militia service, since no one asked them. But women could refuse to pay taxes . . ." (p. 98). Kerber is precise in her articulation of obligation — she is referring not to voluntary civic service but to compulsory duties, for which the failure to perform will be punished by the state (p. xxi). Such obligations have historically run to a sentiment of patriotism among the populace — women needed to assume these obligations to be legitimized in their allegiance. And sometimes refusing to fulfill obligation was tantamount to a sort of civil disobedience in the struggle for social equality. Without possessing duties to eschew, women were at a considerable disadvantage in claiming rights.

Having presented women's unique imbalance with regard to constitutional obligations and rights, Kerber runs head-on into the debate

39. P. 99. *See also* JOHN STUART MILL, THE SUBJECTION OF WOMEN (M.I.T. Press 1970) (1869).

40. See, for example, Laurence Tribe's characterization in ABORTION: THE CLASH OF THE ABSOLUTES (1990).

41. *See* JANE J. MANSBRIDGE, WHY WE LOST THE ERA 22 (1986).

42. *Id.*

43. *See* ROGERS M. SMITH, CIVIC IDEALS 11 (1997).

44. *See id.* at 386.

over sex equality. Summarizing the issue, Catharine MacKinnon writes, "A built-in tension exists between this concept of equality, which presupposes sameness, and this concept of sex, which presupposes difference."[45] She adds, "[M]en's differences from women are equal to women's differences from men. There is an *equality* there."[46] Women have often had to stress differences to make their case for rights and obligations. Advocating simultaneously for the right of citizens to an impartial jury and the obligation of citizens to serve on juries is perhaps the best example (p. 136). Arguments seesawing between sameness and difference of the genders permeated debates on these policies. If women were the same as men they were not needed to provide breadth to juries; if they were different could they possibly lack the rational ability for this sort of deliberation? But as Kerber notes, "Like the White Queen in *Through the Looking Glass*, supporters of women's jury service were capable of thinking of two contradictory things before breakfast" (p. 145). Despite much debate about "separate but equal" as it pertains to race, difference and equality seemed to be incompatible concepts in the instance of gender, at least in the eyes of men sitting on judicial benches.[47] Ultimately, however, the Supreme Court approved of the difference contention where juries were concerned, even if in a somewhat backhanded way. Justice Douglas wrote in *Ballard*, "the two sexes are not fungible .... [A] flavor, a distinct quality is lost if either sex is excluded."[48] Presumably this "flavor" was distinctive experience, perspective, and wisdom.

In light of this insecure balance, it makes sense to refrain from dogmatic group definitions in the law. As Martha Minow argues, we can alleviate group burdens without erasing characteristics distinguishing the group.[49] Translated to gender, we can acknowledge the special challenges women face in gaining equality without purging them of their characteristic femininity. The view in 1997 from our nation's highest court presents a similar best-case scenario that embraces difference among genders while preserving equality. As Justice Ginsburg wrote for the majority in *United States v. Virginia*,

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45. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 33 (1987).

46. *Id.* at 37. MacKinnon ultimately opts for assessment of equality not based on gender distinctions, but on dominance models.

47. Kerber highlights this inconsistency by pointing out that sex, like race, is immutable. But the reality was "if the members of the Warren Court generally were certain that discrimination on the basis of race was not equal treatment under the law — that you could not have difference and equality at the same time — they were not at all certain that discrimination on the basis of sex was equally questionable." P. 172.

48. P. 150. Ballard v. United States, 329 U.S. 187, 193-94 (1946).

49. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 86 (1990).

" 'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity."[50] While she doesn't explicitly endorse this articulation, the trajectory of Kerber's consideration would indicate her support.

In presenting both sides of citizenship, obligation with rights, Kerber describes a purer form of liberty for the American woman. In his explication of positive freedom Isaiah Berlin said,

> I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.[51]

This ability not to have one's rights interfered with, nor one's obligations differently calibrated, is the essence of what we women have sought.

## CONCLUSION

My childhood friends tell the story of how, in the first grade, I one day seized a rear seat of the school bus, a domain generally taken by the boys. When challenged for my occupation, my comeback was a resounding, "It's a free country." It was also about this time, 1978, that I began advocating for the Equal Rights Amendment among my peers at the neighborhood pool. I guess I was a weird kid. But even at this young age, I had a clear conception that I should have equal civic standing with men, while at the same time, I knew that this parity had been, and continued to be, elusive. Not much has changed in my mind over the past two decades. I assume a posture of presumption about my equality, even as I remain vigilant in reinforcing this status.

One is left simultaneously awed and dismayed upon completion of Kerber's account of women's citizenship, come of age. "In the founding era the manikin of the body politic on which the suit of rights and obligations was fitted was explicitly male" (p. 218). Now at least women are heard when they make a play to be the model for the badges of citizenship. This century's astounding progress of women towards equal footing at home, in school and in the workplace is undeniable. But we will do well to remember that progress in the law is not the end-all and be-all of achieving social equality. Kerber is clear

50. 518 U.S. 515, 533 (1996). It is worth noting that other scholars have disavowed the sameness-difference argument, though with different emphases. Catharine MacKinnon, for instance, asserts, "[C]onsidering gender a matter of sameness and difference covers up the reality of gender as a system of social hierarchy, as an inequality." CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF STATE 218 (1989).

51. ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 131 (1969).

that women's desire to be different, while equal, remains an intractable challenge for law and society.