

of several films in the 1930's. I hope to encourage discussion about law and legal issues that does not systematically ignore the way the world actually works for most of us. In a small way, I think Robertson's book on film censorship helps in that endeavor.

CONSTITUTIONAL INEQUALITY: THE POLITICAL FORTUNES OF THE EQUAL RIGHTS AMENDMENT.

By Gilbert Y. Steiner.¹ Washington, D.C.: The Brookings Institution. 1985. Pp. 113. Cloth, \$22.95; paper, \$8.95.

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The death and burial of the ERA appears to have operated as a fertilizer for the blossoming of new scholarship on the subject. While the ERA was clearly in its death throes, only one book on the subject appeared.³ Now that it has vanished from the political spotlight, scholars interested in its fate will be able to luxuriate in a variegated garden of books on ERA politics. Books are due out very soon from lawyer-historian Mary Berry, *Why ERA Failed*; historian Joan Hoff-Wilson, an edited collection of essays, *Rights of Passage: The Past and Future of the ERA*; political scientists Jane Mansbridge, *Why We Lost the ERA*; and political scientist Cynthia Harrison, who wrote a Columbia Ph.D. dissertation on feminist politics at the federal level from 1942-68.

The first flowering of this new crop is Gilbert Steiner's slim volume, published in 1985. The reader who is looking for a meaty political analysis of "the political fortunes of the ERA," the analysis of "what went wrong" that is promised on the book cover, would be well-advised to wait for some of the later harvest. On the other hand, readers with a more narrowly focused intellectual appetite—readers looking for a good, insider's account of the congressional politics surrounding the ERA's overwhelming success in the early 1970's and its narrow defeat when reintroduced in the House of Representatives on November 15, 1983—will find the book quite satisfying. Steiner, a senior fellow at The Brookings Institution, who has previously written about child and family policy, the welfare system, and abortion, is at his best when exposing the intrigues and maneuvers of Capitol Hill politics. An explanation of the defeat of the ERA, however, must do more.

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3. J. BOLES, *THE POLITICS OF THE EQUAL RIGHTS AMENDMENT* (1979).

Constitutional Inequality consists of five chapters. The first is the best. It provides a useful, behind-the-scenes history of the ERA's progress up through its congressional adoption on March 22, 1972. Most of the delay in its progress, from its initial introduction in Congress in 1923 to the first favorable House vote in 1970, resulted from opposition by organized labor. Organized labor had long promoted protective legislation for working women and feared the ERA's impact. The 1964 Civil Rights Act effectively doomed gender-based protective legislation. At this point, the path was cleared for congressional passage of the ERA. Martha Griffiths emerges as the heroine of the Capital Hill victory of the early seventies; she employed savvy parliamentary maneuvers around Emanuel Celler, the obdurate octogenarian chair of the House Judiciary Committee who had been sitting on the bill for decades.

Chapter two criticizes a variety of explanations of the ERA's defeat that have already appeared in print. It is, in general, a creditable contribution, though seriously flawed by egregious inattention to relevant Supreme Court activity during the ratification period. As anyone who followed the ERA debate even slightly knows, two of the most frequently made arguments against the ERA were: (1) it is not needed; and (2) it will deprive wives of their husband's legal obligation to support them. The latter argument was invariably presented by Phyllis Schlafly in her many state legislative appearances as the leader of STOP-ERA.⁴ Despite the apparent salience of these two concerns, the two Supreme Court decisions essential for evaluating them, *Craig v. Boren*⁵ and *Orr v. Orr*,⁶ are nowhere mentioned in this volume. It is as though someone wrote a history of the first sentence of the fourteenth amendment without ever mentioning *Dred Scott*. (In fact the only Court decisions after 1973 that Steiner deigns to discuss are those related to abortion and the draft; he examines those apparently because they are relevant to his causal analysis).⁷

4. She repeated this argument long after 1979, when *Orr v. Orr*, 440 U.S. 268 (1979), destroyed any shred of its validity, by which time, incidentally, she had a law degree and almost certainly knew better.

5. 429 U.S. 190 (1976).

6. 440 U.S. 268 (1979).

7. He slips *Kahn v. Shevin*, 416 U.S. 351 (1974), and *Schlesinger v. Ballard*, 419 U.S. 498 (1975) into a footnote. The book reads as though there were no major judicial development to promote gender equity after *Frontiero v. Richardson*, 411 U.S. 677 (1973). And his explanation of the import of the suspect classification debate in *Frontiero* is mindbogglingly inadequate: "A finding of unconstitutional discrimination could be based narrowly on the particular statutes in question or could be based broadly on the rationale that ERA supporters had long urged—that sex is a suspect classification." One page later he cites *Wilkinson, The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 977, 983 (1975), for the idea that the concept of suspect classi-

The first argument Steiner assesses is that the ERA failed because the constitutional amendment process has become too difficult. Ten thousand amendments have been submitted over the past two hundred years; only twenty-six succeeded, ten of which came as a package deal in the founding period and three of which (the thirteenth through fifteenth) resulted from a bending of the rules during the secession crisis. On the other hand, once Congress has proposed an amendment by a two-thirds vote in each house, the norm is ratification. Only seven amendments that made it over that high hurdle failed to achieve ratification. In the period since the Civil War, only three have so failed. One of the three, the child labor amendment, was rendered clearly unnecessary by changes in Supreme Court decisions during the ratification process. Another was the ERA. The third was the proposal for congressional repre-

fication is both "highly arbitrary and badly confused." Steiner then concludes, "The argument that the amendment has become unnecessary could only be sustained if the Supreme Court forbade all classifications based on sex." No ERA proponent has asserted that the ERA would ban all statutory gender classifications. Instead, ERA proponents repeatedly acknowledged that the ERA would permit certain exceptional gender classifications: One permitted category covered laws imposing "reasonable classifications based on characteristics that are unique to one sex," such as laws providing the medical costs of childbearing or laws punishing rape. *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess. 183, 299, 303 (1970); H.R. REP. NO. 359, 92d Cong., 1st Sess. 7 (1971); S. REP. NO. 689, 92d Cong., 2d Sess. 12, 16, 20 (1972); and Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 893-96 (1971). (The House chief sponsor, Representative Martha Griffiths, distributed this article by Professor Thomas Emerson of Yale Law School and three of his students, to every member, and Senator Birch Bayh, chief sponsor in the Senate, had it inserted into the *Congressional Record*.) The second permitted category covered affirmative-action-style laws designed to ameliorate the effects of societal discrimination against women.

On the only occasion where the Supreme Court discussed the impact of the ERA, *Frontiero v. Richardson*, *supra*, seven of the nine Justices showed an apparent inclination to fit these intended exceptions into the "compelling government interest" rubric, in that they viewed the ERA as rendering gender a suspect classification. As readers of this journal of course know, suspect classifications are not totally prohibited (*contra* Steiner) but are prohibited unless necessitated by a compelling governmental interest. Steiner repeats his error about the meaning of "suspect classification" on page 102. However, at page 109 he seems to indicate at least a question as to whether suspect classifications are totally forbidden classifications, for he suggests that the Court should now declare sex to be a suspect classification "without mixing that ruling, at least for the time being, with consideration of its effects on . . . military combat, . . . [a subject] on which it has previously ruled." Also, he hedges slightly with the word "virtually": "If sex were suspect, any sex-based classification would be subject to 'close judicial scrutiny,' virtually an automatic death sentence for any classification under challenge." Apparently, no one told Steiner about the wide range of first amendment and voting rights cases where laws facing the "virtually automatic death sentence" of "close judicial scrutiny" miraculously survived, nor of such cases as *Korematsu v. U.S.*, 323 U.S. 214 (1944); *North Carolina State Board of Education v. Swann*, 402 U.S. 43 (1971); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); where the Court indicated that some governmental interests are indeed compelling enough to justify even that most suspect of suspect classifications, race.

sentation for the District of Columbia proposed by Congress in 1978.

Steiner concludes, probably too readily, that the "stacked deck" argument is unconvincing because the ERA is the only example of "stacking." He excludes the District of Columbia representation case as a persuasive example because he does not see much appeal in that amendment. The District of Columbia has "fewer than a million people" and the change "significantly dilutes the voting power in the Senate of each of the fifty states."

His own account, however, should have given him more pause: the only two congressionally proposed amendments that really failed in the postbellum period were both proposed after the widely discussed weakening of political parties during the decade of the 1960's. The only amendment to get ratified since that time was the twenty-sixth, adopted in direct response to *Oregon v. Mitchell*⁸ which had, in effect, put a multi-million dollar price tag on failure to ratify, (*Mitchell* would have forced states to run two separate systems of state and federal elections). Steiner notes that six amendments were adopted between 1913 and 1933 and five between 1951 and 1971, implying that the pace has not slowed. But since the decline in political parties in the 1960's,⁹ the pace of amendments certainly has slowed to something very like a halt. It appears highly unlikely that the 1972 to 1992 period will produce the formerly routine figure of a half-dozen amendments every two decades. The Constitution may not be in theory a deck stacked against change, but the current political environment of drastically weakened political parties may well have rendered the amendment process impracticably difficult. When an amendment endorsed for many years by both political parties, capable of garnering over ninety percent of the congressional vote in both houses, and supported consistently in public opinion polls, including majorities in every state, cannot attain ratification, that failure suggests that the current political environment may necessitate easing the amendment process, if the Constitution is to continue to express the will of "the people" as to the fundamental rules governing them.

The second postmortem diagnosis, the blame-it-on-the-President analysis, is accorded somewhat more credibility by Steiner. But he transforms the diagnosis from presidential indifference to presidential ineptness. He notes that the crucial period when a sup-

8. 400 U.S. 112 (1970).

9. From 1964 to 1972 the number of eligible voters reporting their party loyalty as "independent" shot up from just over 20% (where it had rested since 1952) to approximately 35%, around which it has hovered since then. R. BAKER, G. POMPER, *AMERICAN GOVERNMENT* (1983).

portive president could have helped was 1974-80, so the onus of responsibility (to the degree that it falls to the Presidency at all) goes to Ford and Carter. Steiner faults not their sincerity of support but their leadership skills and energy: "When it [the ERA] most needed a strategist of the Lyndon Johnson or Richard Nixon school, Gerald Ford found it expedient to hand this ball off to his wife." Steiner leaves unexplored the interesting normative question of whether the President should play a strong role in the state ratification process.

Steiner next takes up what he calls the "in lieu approaches," i.e., the analysis that attributes ERA's demise to the "body of favorable legislative actions and judicial rulings that appeared in the 1960s and 1970s." In brief, this explanation says that the ERA failed because people believed it was no longer needed. This analysis pays heed to the teaching of political scientist Clement Vose that Congress, the President, or the Supreme Court can issue statutes, orders, or rulings that carry no less weight than a formal constitutional amendment.¹⁰ In this century one constitutional amendment, the child labor amendment, became the law of the land through a shift of Supreme Court decisions, and Vose for one has suggested that, for all practical purposes, the same has happened with the ERA.¹¹ Gilbert Steiner, taking the remarks of ERA advocates at face value, is unpersuaded that Supreme Court decisions have effectively enacted the ERA. But his discussion remains both unconvincing and disappointing, because he ignores the advances in constitutional law produced by the Supreme Court in the critical period after 1973. He shows no awareness of *Craig v. Boren*, wherein the Court announced an explicit rule of intermediate scrutiny. (Some would argue, intermediate in label but strict in fact).

Steiner rejects the "in lieu approaches" analysis because the ERA still had active, vocal proponents in 1983 who believed (perhaps sometimes in ignorance) that the Supreme Court had not done enough. But Steiner's treatment lacks the careful review of Supreme Court doctrine that would seem to be a minimal requirement for intelligently assessing the "in lieu" explanation. Not only is there no effort made to see if any state legislator was swayed by

10. C. VOSE, *CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900*, at xxiii, 65 (1972); quoted at pp. 36, 38.

11. This suggestion was made in oral remarks at a panel of the annual conference of the American Political Science Association in September 1984, in commenting on L. Goldstein, *The ERA and American Public Policy* (paper delivered at conference). There is no reason to believe Steiner knew of the remarks. Goldstein's paper argued that the Court has been behaving since 1972 as though the ERA were law, but she had not drawn the parallel to the child labor amendment. Jane Mansbridge in *Why We Lost the ERA* (forthcoming), chapter 4, like Vose, also draws the parallel to the child labor amendment.

the belief that the ERA was no longer needed, there is not even a serious effort made to determine whether there was a factual basis for such a belief by, say, 1977.

Next Steiner takes up the 1982 analysis by Janet Boles,¹² author of what had previously been the only book on the ERA.¹³ In her 1982 reading of the situation, she suggested that the National Organization for Women (NOW), en route to ratification of the ERA, became distracted by its interest in increasing its membership. Steiner makes the sensible point that an organization may grow and flourish while pursuing a substantive goal (other than growth). He concludes persuasively that there is simply no good evidence of "a shift in primary purpose away from enacting [the] ERA in favor of sustaining NOW."

Finally, Steiner considers Andrew Hacker's argument that older and more old-fashioned housewives, fearing the impact of an ERA on divorce settlements and other protections available to housewives, buried the ERA.¹⁴ Here Steiner's analysis is of mixed quality. On the plus side, he astutely points out that a great many quite traditional women's organizations (including the National Council of Senior Citizens and mainstream church groups) actively supported the ERA and that majorities of "housewives committed to traditional roles" consistently showed up on opinion surveys as favoring the ERA.¹⁵

On the minus side, Steiner neglects the fact that a group does not have to be a majority to be influential, especially in amendment politics where only thirteen of the ninety-nine state legislative houses (13.1%) are enough to block ratification, and where two of those houses (in Illinois) permit votes of forty percent plus one to block ratification. Secondly, he neglects the indisputably sharp decline of social status experienced by housewives from 1960-80, an experience likely to promote anxiety about further change.¹⁶

12. Boles, *Building Support for the ERA: A Case of "Too Much, Too Late,"* 15 PS 572, 576 (1982).

13. Boles, *supra* note 3. In her book Boles suggested that the constitutional amendment process is such that an amendment can pass if it is contained within the arena of (elite-dominated) established interest group politics, but that if conflict over the amendment spreads to the grass-roots level (as happened), the amendment is doomed. A more sophisticated version of this early Boles analysis might supplement it with attention to the decline of parties discussed above.

14. Hacker, *E.R.A.-R.I.P.*, HARPER'S, September 1980, at 10, 14.

15. Daniels, Darcy & Westphal, *The ERA Won—At Least in the Opinion Polls*, 15 PS 578, 580 (1982). Gallup Opinion Index, no. 178 (June, 1980), cited at pp. 46-47.

16. Mansbridge, *supra* note 11, provides concrete facts to support this common sense perception of a status decline. In 1962, 37% of married women were employed outside the home; by 1978, 58% were. But the shift was totally the product of movement by higher status women into the labor force. The percentage of wives of men with a grade school

Thirdly, he looks at the incidence of alimony awards (only fourteen percent) and at the infrequency of actual payment, but he totally ignores the 1979 Supreme Court decision¹⁷ declaring unconstitutional all gender-based alimony laws. Finally, he seriously underestimates the symbolic role of the husband-support argument. It was no accident that Phyllis Schlafly routinely combined it with the woman-in-draft-and-combat argument. For the two issues together vividly called up the image of a way of life in which Man was the protector and guardian of his Little Woman. This image struck a very deep chord in the hearts and minds of a substantial minority of Americans, a great many of them associated with fundamentalist Christian churches.¹⁸ Although Steiner notices that this same group of people are intensely concerned about the abortion issue, he fails to accord adequate significance to the power of their fears concerning changes in their life and in the status of the traditional family. To the degree that the ERA was successfully rendered a symbol of such changes, these fears influenced its defeat. Steiner fails to notice or acknowledge that impact.

Steiner concludes his second chapter, in just about the middle of the book, with the assertion that something must have changed dramatically in 1973, for the ERA's fortunes did. He elaborates this point in chapter three. Steiner cannot believe that the combat argument or the change-in-family-law argument, of their own force, really affected anything, since they had been made by ERA opponents during its period of greatest success, 1970-72. Having just edited a book on abortion,¹⁹ Steiner recalls that *Roe v. Wade*²⁰ was handed down on January 22, 1973. He believes that this decision contributed greatly to the defeat of the ERA. *Roe* made abortion a national political issue, and NOW was very much identified publicly with both pro-ERA and pro-abortion politics. "A substantial part of the explanation lies in the accident of timing that made abortion policy a national issue during those crucial years."

As "another part of the explanation" for the ERA's failure to

education who were in the paid labor force was unchanged from 1962 to 1978—it held steady at 34%. But the percentage of employed wives of men with some college education jumped dramatically from 1962 to 1978, from 38% to 65%.

17. *Orr v. Orr*, 440 U.S. 268 (1979).

18. Burris, *Who Opposed the ERA? An Analysis of the Social Basis of Antifeminism*, 64 SOC. SCI. Q. 305 (1983) (finding that the only major demographic groups where a majority did not favor the ERA in late 1980 were Mormons and persons who attended church every week). A variety of studies associated ERA opposition with political conservatism and with religious fundamentalism. See, e.g., Daniels, Darcy & Westphal, *supra* note 15; Tedin, *Religious Preference and Pro/Anti Activism on the Equal Rights Amendment Issue*, 21 PAC. SOC. REV. 55 (1978).

19. THE ABORTION DISPUTE AND THE AMERICAN SYSTEM (G. Steiner ed. 1983).

20. 410 U.S. 113 (1973).

achieve ratification in the original 1972-78 period, he proffers the rise to national hero status of Sam Ervin, long-time opponent of the ERA, as a result of the Senate Watergate hearings. As to calculating the latter's actual influence in the state rejections of ratification, Steiner poses that question and then responds to it:

The question is unanswerable. What is certain is that the views of Ervin as a constitutional hero figured far more significantly in the evolution of a climate of doubt, hesitation, and restraint nurtured by ERA's opposition than those same views had figured when Ervin was merely a small town constitutional lawyer in a Senate seat.

This quote pretty well captures the cavalier tone of this whole book regarding evidence for its claims. Steiner presents no evidence that even one citizen, one lobbyist, or one legislator was in fact influenced to oppose the ERA, or even claimed to have been so influenced, out of respect for Sam Ervin and his anti-ERA testimony. The essence of Steiner's purported causal analysis is that he noticed a timing coincidence. Sam Ervin rose to public prominence in the second half of 1973, just as the ERA's popularity seemed to slow. Abortion was legalized nationwide by Supreme Court fiat early in the same year. Steiner fails to note that it had been legalized in a number of states by judicial and legislative action in the 1969-72 period. He does acknowledge that abortion was a matter of controversy at the state level, but he somewhat misleadingly says that *Roe* provided women with an "instant new right . . . to be rid of an unwanted fetus."

The supposedly new insight contributed by this book is that Steiner noticed three coincidences: (1) the national legalization of abortion and (2) the rise to heroic status of Sam Ervin occurred in the critical 1973-74 period, when the pace of ERA ratification slowed. Then (3), in the extended ratification period of 1978-82, the Soviets invaded Afghanistan, stimulating President Carter to reinstate registration for the draft in 1980. According to Steiner, this coincidence raised the salience and plausibility of the women-in-draft-and-combat critique of the ERA. Perhaps it did, as compared to, say, 1976, when no Americans were being registered. (The draft ended in January 1973 and registration for the draft ended in April 1975). But it simply beggars belief to claim that the draft/combat issue was more salient and influential in 1980, when no Americans were being drafted or sent into combat—and when no states ratified the ERA—than it was in 1972, when many thousands of American soldiers were being drafted and sent into combat, and the draft and war in Vietnam were burning political issues—and when twenty-two states ratified the ERA.

This sort of argument putting forth timing coincidences as

causal analysis is the stuff of Potomac community cocktail parties, not reputable policy analysis.

Steiner does not report that he either conducted or examined any public opinion polls, any interviews or questionnaires of legislators or lobbyists, or even that he looked at newspaper accounts of legislators' speeches in the nonratifying states. How could he have gotten so carried away with this flimsy analysis as to make it the core of a book? One can only speculate. Steiner, well-attuned to insider Capitol Hill politics, is on solid ground when he explains the failure of a renewed ERA as tied to difficulties involving amendments denying any connection to abortion funding and exempting women from the draft. He seems to have reasoned backwards in time: if the abortion funding and combat questions hurt the ERA in 1983, they must have led to its defeat in 1972-82. Since the ERA failed ratification by such a tiny number of votes (a switch of three votes in the Nevada Senate in 1975, two votes in the North Carolina Senate in 1977 and two votes in the Florida Senate in 1979 would have put the ERA in the Constitution), one can suggest almost anything as the cause. But not all suggestions are equally persuasive. That the debate over abortion funding and combat, orchestrated by Orrin Hatch, a much cagier politician than old Sam Ervin, was influential in the 1983 Congress simply does not demonstrate that it influenced ERA history in 1972-76, the critical years for the amendment.

As indicated above, Steiner's Sam Ervin argument is just an unsubstantiated suggestion, and his Afghanistan/registration argument is highly implausible even by his own standard of what looks like a credibly significant coincidence. His linkage of the abortion argument to the failure of the ERA thus boils down to the book's central argument, and it deserves further examination.

On Steiner's side, one can cite a discernible and prominent coincidence of timing and organizational structures. Although legislatures in four states (Alaska, Hawaii, New York, and Washington) legalized abortion in 1970, and courts declared unconstitutional abortion statutes of eight states between 1970 and 1972, *Roe v. Wade*, handed down on January 22, 1973, certainly stimulated the formulation of an influential national anti-abortion movement. It is also true that the anti-abortion movement and the anti-ERA movements had overlapping memberships. (Most anti-ERA-ers are anti-abortion. Some, but by no means most, anti-abortion people are anti-ERA). Finally, the leading pro-ERA group, NOW, is also a very prominent pro-choice group.

Steiner actually makes two separate abortion issue arguments.

The first is a *Roe* argument: anti-ERA people benefitted from the powerful anti-abortion backlash generated by *Roe*. This is an extremely weak argument, as I shall demonstrate below. Steiner's second argument comes into play after the first Hyde Amendment was enacted in 1976. It ties the ERA's difficulties to a purported ERA implication of a right to abortion funding. This is a much more persuasive argument, for the abortion funding question clearly troubled ERA forces in Congress in 1983. In the last few pages of the book, Steiner acknowledges this disparity in the quality of his two arguments: "Without Hyde, [the Hyde amendment funding restriction] the connection between ERA and abortion does not exist, and the extraordinary majorities necessary to achieve renewal of the ERA should become more likely."

This comes as a considerable surprise given the emphasis Steiner had earlier placed on Phyllis Schlafly's insistence that the right to obtain an abortion "was clearly not intended by those who ratified the Fourteenth Amendment" but would be "easier to find . . . [in the] ERA." Schlafly's argument was extraordinarily weak (as Steiner belatedly, admits), and it is hard to believe that the legal staff of the state legislators considering ratification did not so inform them. Schlafly's argument unwisely presupposes two unlikely things: (1) the Supreme Court would, with no particular incentive to do so, abandon its right to privacy doctrine as the girding for abortion choice, a doctrine that it has been steadily reaffirming since 1965; and (2) that the Supreme Court would directly flout the guidelines of all the official congressional reports on the meaning of the ERA, which had insisted repeatedly that the ERA would not affect laws directly focused on actual, physiological differences between the sexes, such as laws dealing with maternity, rape, sperm donors, etc.

Politics can, of course, be affected by irrational forces, but even as a political matter, Steiner's *Roe* argument is unconvincing. It is important to understand the timing. The ratification pace of the ERA was as follows: twenty-two of the thirty-two state legislatures that convened after the ERA left Congress in the calendar year 1972 ratified. Eight more states ratified by the anniversary of ERA's congressional adoption, March 22, 1973. *Roe* was handed down on January 22, 1973; each of these eight were subsequent to *Roe*. Three more ratifications came in January and February 1974, one in February 1975, and one in January 1977. Every previous constitutional amendment adopted was ratified within four years of congressional adoption. After March of 1976, momentum operated against the ERA. A full year had passed with no ratification—the

ERA, despite opinion polls to the contrary, had acquired the look of a "loser." Failure to achieve ratification within the first few years creates the appearance that an amendment cannot garner a wide enough consensus to warrant altering the Constitution.

Steiner realizes that the 1974-75 period was critical. He musters the following facts for the influence of *Roe* in these years: (1) Janet Boles noted that mailings were sent in 1974 to Illinois legislators attempting to link the ERA with the pro-abortion movement and with the idea that women's rights would mean a denial of fetal rights; (2) NOW visibly led both the pro-choice and pro-ERA movements and there was similar organizational overlap in the "anti" camp; (3) on January 9, 1975, Professor Joseph Witherspoon of the University of Texas Law School sent a telegram urging rescission on anti-abortion grounds to the Texas legislature; and (4) a Notre Dame law professor, Charles Rice, sent a letter to the Indiana legislature in January 1975 urging a vote against the ERA on anti-abortion grounds. But what is the evidence that any of these facts mattered? As to Illinois, where abortion was described by Janet Boles as only "a leading peripheral subject" both Boles and Steiner concluded that tangential forces of race and party leadership politics really determined the ERA's failure there.²¹ The Texas legislature, where Witherspoon sent his telegram in 1975, did not vote to rescind; Indiana, where Rice sent his telegram in 1975, voted two years later to ratify the ERA. The year 1975 is cited by Steiner as a disaster for the ERA, among other reasons, because both New York and New Jersey voters defeated referenda for state ERAs that year. But New York was one of the few states that legislatively legalized abortion (in 1970) and continues to this day to fund abortions for the needy out of its own state funds. Steiner is correct that ERA opponents tried from 1974 on to tie it to abortion, as they tried to tie it to unisex toilets, but there is no good evidence that either argument had much impact in the critical 1972-76 period, when the ERA really lost.

Steiner concludes his book with an extensive discussion of how Hyde Amendment politics became commingled with ERA politics.²² He blames the Court for *Harris v. McRae*,²³ which he says

21. Although Boles calls abortion "leading" as a "peripheral" subject, she says, "The draft was the most commonly mentioned objection to the ERA [by legislators] in Illinois. . . ." Boles, *supra* note 3, at 170. Her interviews were done in the first half of 1974.

22. Steiner's fourth chapter is unremarkable and noncontroversial. Here he simply elaborates and assesses the widely held view that the use of unorthodox parliamentary procedures did hurt ERA proponents twice. First, this happened at the stage when Congress extended the ratification period for three years, rather than start over in 1978 when they looked beat, and they even did this by simple majority rather than two-thirds vote. Among other things, this probably created a certain appearance of desperation, further confirming the

“delivered it [the ERA] into the hands of its enemies.” Recall that he earlier blamed the court for *Roe*: “Fervent opponents [of *Roe*], including opponents who before had been largely indifferent to the ERA, were moved to take up arms against the proposed amendment *lest its inclusion in the Constitution be understood to legitimize a judicial opinion they were determined . . . to overturn.*” The Court is damned when it doesn’t (void restrictions on abortion funding) and damned when it does (void restrictions on abortions). It is hard to imagine why Steiner does not see that if the Court had produced exactly the opposite holding in *Harris* he could have reiterated the same italicized remark about *Harris* that he gave us on *Roe*.

Apart from this peculiar penchant for blaming the Court for almost everything that goes wrong (I left out his critique of *Rostker v. Goldberg*),²⁴ Steiner’s last chapter is persuasive in detailing the current congressional deadlock. Hyde Amendment stalwarts have too many votes to let an unamended ERA go through; pro-ERA forces tend to be pro-choice and do not wish to add an amendment that would appear to put the Constitution against public funding for abortion. Strangely enough, Steiner then concludes that the Supreme Court should rescue us from this dilemma by simply declaring sex to be a suspect classification. However, again, he does not seem to understand what this would mean.²⁵

If the question of what killed ERA is taken, as Steiner takes it, to mean—“what dramatic event occurred after 1972 to lower support for the ERA?” it is worth entertaining the idea that the question is misguided. It may well be that from 1972-78 nothing changed. Twenty-two of the thirty-two states that held legislative sessions between congressional adoption in March and the end of 1972 voted to ratify. That comes to just about sixty-nine percent.

ERA’s “loser” image. But, as Steiner quite rightly points out, a damaged image hardly mattered, since by 1979 the ERA had lost in fact. So it does not make sense to attribute causal force to this first major bending of the rules.

The second procedural unfairness alleged against the pro-ERA leadership occurred at the 1983 renewal stage. Faced with the apparent certainty of debilitating amendments on the draft and abortion funding, Representative Patricia Schroeder persuaded the Speaker to prevail upon the Rules Committee to bring the ERA to the floor with no permission for amendments. The members of the House who wanted amendments cried foul, and several ERA proponents apparently agreed. Twelve of the ERA cosponsors voted against it under these rules, and the ERA vote came to six short of the needed two-thirds. This time, procedures mattered.

23. 448 U.S. 297 (1980).

24. 453 U.S. 57 (1981). Predictably, his view is that the Court could have defused the draft/combat issue by ordering women drafted (or registered thereof) on fourteenth amendment equal protection grounds. Of course, if the Court had done that, the anti-ERA forces could have reacted just as Steiner says they did to *Roe v. Wade*—the draft could have become even more salient an issue—so the Court would be blameworthy again.

25. See note 7, *supra*.

By the end of the original time period, thirty-five of the fifty states had ratified (seventy percent). To be sure, the pace of ratification slowed but it may simply be the case that the states where support for the ERA was strong enough for passage (or where opposition to it was weak enough) were inclined to act within the first two years after congressional adoption. Sixty-six percent of the states had ratified by February 1974. Steiner rejects out of hand, as "unconvincing," the comment by a leading ERA activist in January 1973.

The momentum for passage . . . has sort of worn out, because it has already gone through in most of the states where it was a natural. . . . [I]t's going to be tougher to get the last 16 states we need because there's a natural backlash setting in towards the gains that women are making.

Her explanation may in fact get to the heart of why the ERA failed. It had enough support, or lacked enough opposition, to succeed in over two-thirds of the state legislatures, but simply not three-fourths of them.²⁶

Perhaps the current weakness of American political parties to some degree explains how an amendment with such wide support can be blocked from ratification. Perceiving the wide popular support for a legal principle against gender discrimination and the apparent demise of the ERA (no ratification from February 1975 through all of 1976), the U.S. Supreme Court stepped into the breach with *Craig v. Boren*²⁷ on December 20, 1976. This Christmas present to American women declared that a series of cases beginning with *Reed v. Reed*²⁸ in 1971 had already established as law the principle that "to withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."²⁹ This test of intermediate scrutiny is arguably so close to the test of strict scrutiny ("necessary for attaining a compelling governmental interest") that the *Craig* rule accomplishes virtually all the policy results that an ERA would accomplish.

26. All the nonratifying states except Illinois were either southern (where religious fundamentalism is very strong) or Mormon. Illinois had a three-fifths passage rule and a third of the state is dominated by a rural southern culture. Mansbridge, *supra* note 11.

27. 429 U.S. 190 (1976).

28. *Reed v. Reed*, 404 U.S. 71 (1971) was handed down after the House voted in August 1970 by better than twenty to one to adopt the ERA. *Reed* and its pre-*Craig* progeny, however, pointedly refrained from explicitly altering the traditional "rational basis" test for sex discrimination. The Court's deeds in these cases often belied its words. For an analysis of these cases, see Goldstein, *The Constitutional Status of Women: The Burger Court and the Sexual Revolution in American Law*, 3 L. POL'Y Q. 5 (1981). *Craig* actually involved discrimination against males (in the age of eligibility to purchase 3.2% alcohol beer), so it was a gift to all Americans who favored the gender equity principle of the ERA.

29. 429 U.S. 190, 197 (1976).

If a widely desired constitutional amendment cannot succeed in our political environment of weakened political parties and powerful narrow interest groups, one may ask: Would it be preferable to allow the Constitution to be amended more easily, say by two-thirds of the state legislatures, rather than having to rely on our unelected judges to save us from constitutional rigidity via "judicial amendments?" The answer does not seem to be obvious.

Still, questions remain. What, for instance explains the gap in support between over ninety percent at the congressional level in the early seventies and only seventy percent at the state level? What was the basis of the intense interest group opposition to the ERA, opposition so intense that it managed to push state legislators against the tide of public opinion?

Those who have done the kind of research eschewed by Steiner—the public opinion surveyors, those who have studied the state legislative debates, sent questionnaires to legislators, or interviewed legislators—can tell us something that his speculative analysis cannot: how these decisionmakers understood themselves and their motivations. Of course it is true that decisionmakers may lie or engage in self-deception, but the incentives to do so are not particularly strong on this issue. The picture that emerges from that type of research is quite different from the bifurcated focus on abortion and the draft that emerges in Steiner's portrait.

Janet Boles's interviews with legislators and lobbyists in Illinois and Georgia identified as a major source of ERA opposition hostility to the federal courts and a generalized fear that the ERA would provide the courts with just one more weapon with which to attack state prerogatives.³⁰ This finding was corroborated in other scholarship.³¹ This fear is not totally unrelated to *Roe v. Wade* but its roots extend farther. It grows out of such developments as the

30. Boles, *supra* note 3, at 170.

31. Jane Mansbridge reports the same objection as having been influential. Her research utilized interviews of legislators and lobbyists and survey data. Mansbridge, *supra* note 11. Bokowski, State Legislator Perceptions of Public Debate on the Equal Rights Amendment, (September 1982) (paper delivered at annual meeting of American Political Science Association), reported a similar finding on the basis of newspaper coverage of ERA legislative debates preceding ratification and rescission votes in six states. "The most frequently given argument put forth by state legislators [in opposition] was that the ERA would remove legislative powers from the states." Bokowski noted that in sheer frequency of mention by the opposition (including lobbyists), "dilution of states' rights" ranked second to concerns about the draft/combat, but in the legislators', as distinguished from lobbyists', concerns, states' rights vs. Court power moves into first place. Bokowski's finding from newspaper coverage was confirmed in the results of her retrospective questionnaire survey of legislators who had been in office in these states during these votes. She reported that "unforeseen problems, especially court interpretations" was the "most mentioned anti-ERA justification" for legislative vote.

school prayer decisions of the early sixties, the reapportionment decisions, the exclusionary rule, the requirement of *Miranda* warnings, and busing. As one Georgia legislator warned about the ERA: "Who could have predicted in 1954 that the *Brown* decision would lead to massive busing in 1974?"³²

There is deep irony and perhaps a political lesson here. This kind of argument, extremely effective with opposition state legislators, was not publicly countered, as it conceivably might have been by ERA opponents. They might well have replied that the ERA was a much more narrowly focused, clearly directed command, with a much more lucid legislative history (and thus intent), than the extraordinarily unbounded fourteenth amendment (which, of course, mentions neither race nor gender and the legislative history of which has spawned a large body of scholarly controversy). Thus the ERA could have been viewed as a tool against judicial activism, as an implement of those political forces who believed the Constitution should be amended by "the people" rather than by judges. But this argument was not in the repertoire of leading ERA proponents, for they were, by and large, liberals who liked judicial activism. Indeed, prominent in the 1970's congressional reasoning as to why the ERA was needed was insistence that the Supreme Court should have interpreted the equal protection clause as a shield against gender discrimination, but, since the Supreme Court had failed to be properly activist in this direction, the ERA was needed. Representative Martha Griffiths's censure of the Court set the tone: "There never was a time when decisions of the Supreme Court could not have done everything we ask today . . . [but] the Court has held for 98 years that women, as a class, are not entitled to equal protection of the laws."³³

In short, the argument that could have been used to counter the most effective opposition point against the ERA—that the ERA would set the Court adrift to roam in unchartered, dangerous territory—was not publicly presented because it was contrary to the judicial ideology dominant within the pro-ERA leadership.

Apart from fear of the judiciary, opposition to the ERA apparently was motivated largely by fear of cultural disruption. The only evidence that seems convincingly to point in the direction of a drop in support for the ERA during the ratification period is that four states did vote to rescind their earlier ratification votes.³⁴ The rescis-

32. Boles, *supra* note 3, at 170.

33. 116 CONG. REC. 28,005 (1970). For similar testimony, see *Equal Rights 1970*, *supra* note 7, at 163-64, 174, 180-81, 186, 225, 228, 372-73.

34. While probably not of legal significance, rescission surely is an indicator of legislative mood.

sions, however, were not concentrated in the late 1970's. Nebraska rescinded in 1973, Tennessee in 1974, Idaho in 1977, and Kentucky in 1978. Deborah Bokowski surveyed legislators who had voted for rescission in Nebraska and Tennessee and also some who had done so in Indiana, where rescission was defeated. (Indiana had ratified only in 1977, so this was a much later vote than in the first two states). She noticed that on her questions regarding expectations of the ERA's impact these rescission-prone legislators formed a very distinctive group of her legislative sample. Fifty percent of these legislators believed the ERA would contribute to disintegration of the family, forty percent believed women would be drafted and sent into combat under the ERA, and fifty percent believed the ERA would mean a loss of privacy between the sexes. (None of her questions mentioned the abortion issue).³⁵ Contrary to her finding, loss of privacy—the unisex toilet issue—shows up as thoroughly negligible in a National Opinion Research Center (NORC) public opinion survey done in 1982, in a Roper public opinion survey of 1981,³⁶ and in Janet Boles's interviews of legislators in three states.³⁷ And although a somewhat sizable portion of the people who opposed the ERA (in response to open-ended NORC questions: "Why do you favor/oppose the ERA?"—for which up to three responses were recorded) indicated a concern that the ERA would promote abortion (53 out of 585 responses) or would involve women in the draft or combat (73 out of 585 responses), the vast bulk of the responses indicated opposition to the amendment on grounds that were much more a matter of general lifestyle preference. For instance, 144 of 585 responses gave answers along the lines that men and women should not be equal, 71 expressed fear that the ERA will lead in some way to disintegration of the traditional family, 88 thought the ERA in some way would hurt women, 79 that it in some way would hurt men or relations between the sexes, 85 worried that the ERA was too extreme or was favored by extremists. These concerns completely overwhelm the comparatively rare opposition response that showed concern for any specific legal impact, such as the draft or abortion.³⁸

35. Bokowski, *supra* note 27.

36. NORC General Social Survey, 1982, and AIPO No. 177G, July 17-20, 1981 (both available through the Roper Center, Storrs, Conn.).

37. Boles, *supra* note 3, at 166-80.

38. The only other negative legal-impact issues mentioned were that women would become priests—five responses—and that unisex toilets would be required—ten responses. Another reply that showed up was general hostility to more legislation (twenty-four responses). If that one is excluded, the general lifestyle concerns total 420 as against 141 for specific legal impact concerns. The Roper survey exhibited a similar pattern of predominance of general lifestyle concerns among the objections to ERA.

It appears that the concerns expressed by the ERA opponents about a loss of financial support for wives, women being sent into combat, and the promotion of abortion are best understood as the concrete expressions of a more generalized fear of a change in traditional sex roles. The ERA—for its supporters a symbol of the equal dignity of women citizens—to its opponents functions as a symbol of the transformation of gender roles. It lived as a symbol and died as a symbol. Joyce Gelb and Marian Palley, surveying the relative success of a variety of proposals for federal policies affecting women, argue that, across the range of these policies, those perceived as promoting “role equity” for men and women are more likely to achieve legislative acceptance than those perceived as promoting gender “role change.”³⁹ While most Americans favored the ERA and did not believe it would dramatically affect gender roles, enough Americans feared that it would do so that it failed passage.

And it was not just the general public who reacted to the ERA on a symbolic basis. One woman legislator was not above giving as the sole explanation for her “no” vote: “I like having men open doors for me.” Legislators frequently called the ERA “an attack on motherhood” or “an attack on the home.”⁴⁰ Janet Boles concluded her 1979 study, based on interviews in three states, with this sentence: “The basic reason for nonratification . . . is that the statewide conflict over the ERA caused many legislators to look beyond the narrow legal merits of the amendment and instead to base their votes on personal attitudes on government, society, societal change, and the proper role of women.”⁴¹

Something, however, certainly did change by 1983 when congressional sentiment had declined from virtual unanimity of support to just short of two-thirds. We can take Steiner’s word on the problem with entangling amendments. But the draft should be distinguished from abortion funding on this score. For the draft question had been pressed continually in the early 1970’s in each of the Senate hearings; whatever force the issue may once have had, by March 22, 1972, that force was not enough to produce even substantial minority opposition in Congress. This was so even though the war was still raging in Southeast Asia and American men were still being drafted into combat. Surely the draft issue was not more problematic in 1983, with no active draft and with the nation at peace.

Abortion funding is a different story. But Steiner is looking in the wrong direction when he points the finger of blame at the

39. J. GELB & M. PALLEY, *WOMEN AND PUBLIC POLICIES* 7 (1982).

40. Boles, *supra* note 3, at 6, 160.

41. *Id.* at 178.

Supreme Court's decision in *Harris v. McRae* (1980), which upheld as constitutional the Hyde Amendment's denial of Medicaid funds for abortion. The United States Supreme Court, in cooperation with the early 1970's ERA proponents, had done all that it reasonably could to keep the matter of abortion funding separate from ERA politics. But feminists more radical in their goals than in the early 1970's ERA proponents ended up transforming the very concept of "sex discrimination" on their way to ratification. It was this transformation that produced the abortion-funding dilemma.

When the ERA was debated and adopted in Congress in the 1970-72 period, its supporters were very careful to create a clear record of legislative intent: "[The ERA] would not prohibit reasonable classifications based on characteristics that are unique to one sex. For example a law providing for payment of medical costs of childbearing could only apply to women [and thus is not sex discrimination]."42 Laws directly aimed at differences of physiological reproductive function were explicitly and repeatedly said to be outside the reach of the ERA.

In 1974, when the Supreme Court decided *Geduldig v. Aiello*,⁴³ it hewed closely to this approach. It reasoned that for a state to refrain from providing maternity benefits to women employees was not discriminating against women (only against pregnant people; just as providing benefits for pregnant people, according to the official ERA reports, would not have been discriminating against males).⁴⁴ *Geduldig* was a case interpreting the fourteenth amendment equal protection clause; the Court reiterated this analysis in 1976 in *General Electric v. Gilbert*,⁴⁵ a Title VII case. The Court, had it wanted to, could have buttressed its argument with quotes from congressional testimony of ERA proponents explaining the limited meaning of the command, "Equality of rights under the law shall not be denied . . . on the basis of sex."

But the denial of maternity benefits (unlike the provision thereof) displeased many feminists in and out of Congress. A bill defining employer pregnancy discrimination as part of sex discrimination, in an amendment to Title VII, passed the Senate in September 1977 with a seventy-five-to-eleven vote. (It stalled in the House). The Supreme Court promptly produced a holding that,

42. *Equal Rights 1970*, *supra* note 7; H.R. REP. NO. 359, *supra* note 7; S. REP. NO. 689, *supra* note 7; Brown, Emerson, Falk & Freedman, *supra* note 7, at 893-94.

43. 417 U.S. 484 (1974).

44. The Court did declare unconstitutional a law firing pregnant teachers, but it did not base its decision on sex discrimination. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

45. 429 U.S. 125 (1970).

although *General Electric v. Gilbert* was not (yet) overruled as to medical insurance provisions for maternity benefits, if employers deprived women of accumulated seniority when they returned from unpaid maternity leave and did not so deprive workers who took off for paid medical disability leave, that practice was sex discrimination within the meaning of Title VII.⁴⁶

Congress straightened out this mess by passing the Pregnancy Discrimination Act in October of 1978 amending Title VII, so that pregnant women are protected against employer discrimination in hiring, firing, seniority rights, and in the fringe benefits of health insurance coverage for childbearing and of medical disability leave policy. But one way to discriminate against pregnant women is to refuse to insure the medical costs (when every other employee medical cost is insured) of abortions. In order to achieve passage of the Pregnancy Discrimination Act, Senate backers of the bill agreed to a compromise with pro-life forces in the House that explicitly permits abortion funding exclusions from employer-provided health care plans.

So Title VII now defines as forbidden sex discrimination the exclusion of childbearing medical costs from comprehensive, employer health plans, but it does not forbid as sex discrimination the exclusion of medical costs for abortion. This sort of zigzagging compromise is the stuff of legislative politics; it is a far cry from the clear, general principle suitable for a constitutional amendment. Thus the ERA currently languishes⁴⁷ in the Judiciary Committee of both houses of Congress.

46. *Nashville Gas v. Satty*, 434 U.S. 136 (1977).

47. In the current Congress Representative Peter Rodino has introduced it in the House, and Senator Edward Kennedy has introduced it in the Senate. See H.R.J. Res. 2, 99th Cong., 1st Sess., 131 CONG. REC. H73 (1985); S.J. Res. 10, 99th Cong., 1st Sess., 131 CONG. REC. S73 (1985).