

**WHY ERA FAILED: POLITICS, WOMEN'S RIGHTS, AND THE AMENDING PROCESS OF THE CONSTITUTION.** By Mary Francis Berry.<sup>1</sup> Bloomington, In.: Indiana University Press. 1986. Pp. ix, 147. \$17.95.

**RIGHTS OF PASSAGE: THE PAST AND FUTURE OF THE ERA.** Edited by Joan Hoff-Wilson.<sup>2</sup> Bloomington, In.: Indiana University Press. 1986. Pp. xx, 140. Cloth \$22.50; paper, \$6.95.

**WHY WE LOST THE ERA.** By Jane J. Mansbridge.<sup>3</sup> Chicago, Il.: University of Chicago Press. 1986. Pp. xiii, 327. Cloth, \$35.00; paper, \$9.95.

*William L. O'Neill*<sup>4</sup>

Professor Mary Francis Berry has written a short but useful handbook on the amending process as it affects the equal rights amendment. The first half of the book is an historical introduction that deals with five amendment efforts, four that succeeded—attempts to secure an income tax, to enact and then repeal Prohibition, and to secure women's suffrage—and one—the attempt to abolish child labor—that failed. The second half of Professor Berry's text is concerned with the ERA itself. Her thesis, amply documented, is that the framers of the Constitution made altering it so difficult that a national consensus must nearly always exist if an amendment is to pass. In the case of the ERA no such consensus existed; worse still, the longer the struggle went on to ratify the amendment, the more support for it tended to erode. Berry draws sensible conclusions from this experience and ends by implying that no agreement on the ERA will be reached in the foreseeable future. What she does not say, though it would appear to follow, is that by the time unanimity is achieved women will already have secured their rights, obviating the need for a constitutional amendment.

*Rights of Passage* is a collection of articles and, as in most anthologies, some are better than others. Among the most interesting parts are those written by the editor, Professor Joan Hoff-Wilson. In one of her all too brief commentaries, she points out a

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central truth that is neglected by most writers on the subject. She notes that there have always been two kinds of feminism. One, "radical individualism," concentrates on achieving legal equality with men. The other, which she labels "familial" or "relational" feminism, acknowledges that biological as well as socialized differences between men and women mandate something other than strict legal equality. The first type, which I will term equalitarian feminism, is strongest in America, much less so elsewhere. The second type, which American historians usually call social feminism, is most pronounced in Western Europe, where it has been responsible for a great array of programs that benefit mothers and children. Despite the ERA's failure, in America equalitarian feminists have had considerably more impact than social feminists. Hoff-Wilson seems to believe that women ought to concentrate more on social rather than equalitarian issues. This is a theme to which we will return. Of *Rights of Passage* as a whole, it can safely be said that most subjects in it are treated more successfully by *Why We Lost The ERA*.

Professor Janet Mansbridge's study, *Why We Lost The ERA*, is not only a most sophisticated analysis of the gender rights issue but one of the best critiques of a reform movement from the participant's standpoint that I have ever read. Further, it is well and clearly written, outstanding among books of this kind for style as well as content. Mansbridge was involved in the Illinois ratification struggle and believes that the ERA campaign was well worth waging, yet this has not kept her from looking at it with a skeptical eye. An important theme of her book is how and why ERA supporters pursued self-defeating strategies. She believes, on the basis of a careful study of public opinion polls and other evidence, that had the ERA been rushed through state legislatures after being passed by the Senate in 1972, it probably would have been ratified. Instead, the campaign's leisurely progress enabled an opposition to form. Once the anti-ERA forces had coalesced, Mansbridge argues, ratification became virtually impossible. Like Berry, she believes that getting an amendment approved by three-quarters of the state legislatures is so difficult that it can be done only when accord exists. In 1972 there appeared to be a consensus in favor of the equal rights amendment, but after Phyllis Schlafly's STOP ERA organization became effective, it dissolved.

Not only can effective opponents nearly always prevent ratification, but the ERA suffered from a unique handicap. Mansbridge demonstrates that the broad support which the ERA enjoyed at first stemmed from the American belief in equality as a fundamental

principle. Thus, when asked whether women should have equal rights, a majority of both sexes will say yes. This was the case in 1972 and remains so today. The difficulty arises when practical considerations are introduced. STOP ERA was successful because it transferred debate from the abstract realm of equal rights to the real world in which people must decide how they are going to live. Opponents maintained that the ERA would result in female draftees being given combat assignments. School athletic teams and public toilets would be sexually integrated. These and other claims alarmed traditionalists, who were frightened into believing that sex roles and relationships of great importance to them would be changed by the ERA. Actually, as Mansbridge shows, these fears were probably groundless since the ERA would have had few, if any, tangible effects. Mansbridge thinks that had it been ratified at once, the ERA would have been helpful as there were still important areas in which women were being discriminated against. But starting in 1972 the Supreme Court quickly evolved an interpretation of the equal protection clause that made most laws that distinguish men from women unconstitutional. Thus, by 1982 whether the ERA was ratified or not made little real difference.

Paradoxically, its want of practical implications contributed to the ERA's defeat. The very fact that it would not change anything made supporters of the ERA reluctant to compromise. Since nothing material would be lost if they failed they had little reason to sacrifice their equalitarian principles. Mansbridge feels that this attitude may have been decisive, in that it led supporters, especially the National Organization of Women, to agree with STOP ERA on a vital point. Both held that ratification would result, were selective service to be reinstated, in women being drafted for combat duty. The fear of this, Mansbridge argues, was the single biggest reason why ratification was defeated. Yet, had feminists wished to do so, the issue could have been avoided altogether.

Mansbridge's analysis of the draft issue is especially acute, even by the standards of this rigorously logical book. She argues convincingly that the Supreme Court would almost certainly have allowed the military to continue excluding women from military occupations that entail combat duty. She calls this the "deferential" interpretation of the war powers clauses in the Constitution. As it stands now, because of the war powers clauses, military personnel have fewer rights than civilians. Many ERA supporters in Congress took it for granted that even after ratification the Court would go on deferring to the military, allowing the services to decide for themselves how to employ women, including female draft-

ees. This would almost certainly mean the continued exclusion of women from combat roles. The likelihood became even greater in 1980 when the Court ruled that the due process clause does not prohibit an all-male draft.

Unfortunately for the ERA, leading feminist organizations filed briefs against the all-male draft. Thus, after 1980 the ERA movement was committed to the proposition that if a draft is imposed it should apply in equal measure to both sexes. Curiously, this momentous step was never really discussed by feminists. Mansbridge shows that it grew out of earlier efforts to open up all categories of military service to women on the ground that promotion depends to a large extent on serving in combat. Having argued that women should hold combat jobs in the volunteer military made it difficult to argue that they should be excluded from such positions if drafted. The ERA movement became committed to the most extreme equalitarian position by "accretion," Mansbridge says, rather than through debate. A series of actions were taken, largely by feminist lawyers, that led to a crucial, perhaps even decisive, policy being adopted without much realization on anyone's part of what had transpired.

When she was working on this book, Mansbridge pointed out to some legal activists how they had helped defeat the ERA by carrying equalitarianism to such lengths. Their response was that, even knowing what they now knew, they would do it again. As she explains it, this is not so much the triumph of ideology as a product of the volunteer state of mind. As a rule, volunteers "would rather lose fighting for a cause they believe in than win fighting for a cause they regard as morally compromised." When, in addition, losing entailed no sacrifice of practical benefits, it is easy to see why ERA activists preferred defeat to compromise.

Mansbridge concludes that the ERA was worth fighting for anyway because the struggle raised women's consciousness, brought more women into politics, publicized feminist issues, and led judges and state legislators to take more enlightened positions. Possibly so, though such claims are hard to substantiate. However, I agree entirely with her judgment that to renew the fight now would yield few returns and might even be detrimental. Unhappily, this is not the view of NOW, which in 1986 decided to have the ERA reintroduced in Congress. Though irrelevant to the needs of women, doing so makes a great deal of sense organizationally. As one contributor to *Rights of Passage* notes, between 1977 and 1982, when it was largely preoccupied with the ERA, NOW's annual

budget grew from \$700,000 to \$8.5 million, while membership soared from 55,000 to 210,000.

As an historian I find this story all too familiar. Years ago I wrote a book on the old feminist movement, arguing that it had concentrated too much on what became the nineteenth amendment.<sup>5</sup> The result was that after women gained the vote in 1920 feminism collapsed, leaving women in most other respects no better off than before. I maintain that feminists would have been well advised to spend less time and money on equal suffrage, which offered few tangible benefits, and more on efforts to improve the welfare of women and children. With that precedent in mind, it is not surprising that the new feminists of the 1970s and 1980s have repeated the mistake of their predecessors. Like equal suffrage the ERA is glamorous and emotional, a powerful symbol even though unlikely to yield practical gains. By putting most of their apples in this one basket, feminists are running the risk that when they finally do secure an ERA their movement will fall apart, as in the 1920s, leaving the majority of women to carry on in isolation.

Just why American feminists prefer equalitarian to social issues is hard to say. The results, however, are easily established. In a recent book Sylvia Ann Hewlett has documented them.<sup>6</sup> Though living in a rich country American women are worse off than those of most industrial nations. American women are divorced more often, earn—as a proportion of male income—the lowest wages, are more likely to be single parents, have the fewest maternity benefits, and must struggle with the poorest day care system in the western world. All the talk about how much we value children and the family notwithstanding, Americans—in relation to our wealth—provide for them at shamefully low levels. Despite its urgent requirements, which have increased rather than lessened in recent years, the family is being neglected not only by government, but by feminists too. This is the background against which NOW's preoccupation with the ERA must be viewed.

I do not wish to imply that equalitarian feminists are responsible for the American family's lack of support. Government, both political parties, business, and the trade union movement are primarily to blame. But in light of the tremendous needs of children and working women especially, needs which male-dominated organizations seem unconcerned with, to have the principal feminist

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5. W. O'NEILL, *EVERYONE WAS BRAVE: THE RISE AND FALL OF FEMINISM IN AMERICA* (1969).

6. S. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986).

groups devoting their best energies to an unnecessary constitutional amendment suggests, at the very least, a defective set of priorities.

**PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL.** By Norman L. Rosenberg.<sup>1</sup> Chapel Hill, N.C.: University of North Carolina Press. 1986. Pp. 369. \$29.95.

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When defamation suits are often Page One news—and when Attorney General Meese says the Supreme Court must return to the framers' intentions—this book is all too timely. Professor Norman Rosenberg set out to write an interpretive history of the law of libel. Along the way, however, he poked holes in “original understanding” arguments so often hung on the first amendment. Without meaning to, he may have built a snappy little Meesetrap.

This is an ambitious book. Covering the American experience with political libel—both criminal and civil—from colonial times to the 1980s is a tall order, especially in only 270 pages of text plus 100 pages of detailed end-notes. Fortunately, Professor Rosenberg is a seasoned scholar who is equal to the task of generalizing without superficiality. This is not only a book about libel. It is rollicking good first amendment history, and it is a long-needed start toward a synthesis of the many secondary sources that he stirred together with his own research on political libel and on Michigan jurist-scholar Thomas M. Cooley. Rosenberg may have devoted a disproportionate amount of space to nineteenth-century Michigan libel law, but his book should encourage other state-by-state studies of political libel. Rosenberg is generous in crediting other scholars, has read widely, and seems to have no particular axes to grind. Equally important, he does not fall into the pit some revisionists dig for themselves, revising so ardently that their debunking, as has been said, often winds up as re-bunking.

Rosenberg has jumped into the ongoing scholarly fray over seditious libel<sup>3</sup> touched off by Leonard W. Levy in his *Legacy of Sup-*

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3. Defamation law began by protecting the “best men” in England's feudal order, a society that, Rosenberg says, was “held together not by an absolutist state but primarily by personal bonds of honor and loyalty.” Under the common law of England, truth was not a defense to a criminal prosecution for libel. From 1606 to 1641 the infamous Court of the Star