

Michigan Law Review

Volume 86 | Issue 6

1988

Why We Lost the ERA

Judith L. Hudson

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Law and Gender Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Judith L. Hudson, *Why We Lost the ERA*, 86 MICH. L. REV. 1408 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol86/iss6/35>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WHY WE LOST THE ERA. By *Jane J. Mansbridge*. Chicago: University of Chicago Press. 1986. Pp. xii, 327. Cloth, \$35; paper, \$9.95.

In 1972, the Equal Rights Amendment ("ERA")¹ passed Congress by an overwhelming majority; by 1977, thirty-five states had ratified it, and in public opinion polls, a majority of adult Americans consistently reported that they supported the ERA (p. 20). Yet in 1982, the dead-

1. The Equal Rights Amendment read in full: (1) Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex; (2) The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article; (3) This amendment shall take effect two years after the date of ratification. P. 1. *See also* H.R.J. Res. 208, 86 Stat. 1532 (1972).

line for ratification passed and the ERA failed, three states short of the required thirty-eight. In *Why We Lost the ERA*, Jane J. Mansbridge² asks the question "How did this happen?" (p. 1). How did an idea which had initially seemed so simple, natural, and even necessary, fail to become a part of the Constitution? And what does the history of the ERA's failure tell us about political organization and social movements in our time?

Mansbridge's answer to the question "[h]ow did this happen?" is, in a nutshell — politics. Mansbridge believes that the ERA failed because American society was not yet ready for it; because society did not understand what it would do; because the ERA's proponents could not effectively organize their broad, sprawling constituency and instead made "decision[s] by accretion" (ch. 8); and because the breadth and diversity of the ERA's opponents' constituency actually worked to their advantage in that the opposition tapped a previously unorganized demographic group (traditional homemakers) (p. 5). The opposition had a further advantage in that "they had only to disrupt an emerging consensus, not to produce one" (p. 3).

Why We Lost the ERA is in essence a book about understanding the political process, and some of the book's most fascinating moments involve Mansbridge's descriptions of the key issues which defined the ERA activists' platforms.³ Mansbridge identifies, for example, the potential draft of women for combat as one of the key issues of the ERA debate, and she sees the ERA proponents' position on the draft as paradigmatic of both their political ideology and the way in which they made decisions.

Feminist constitutional lawyers and the leadership of the National Organization of Women ("NOW") were committed to a strict egalitarian interpretation of the ERA, and they remained committed to this position as applied to the drafting of women for combat. At the same time that the ERA ratification struggle was going on, NOW's leadership was involved in the *Rostker v. Goldberg*⁴ litigation, a fifth amendment challenge to the all-male draft. It was NOW's position that both the ERA and the fifth amendment would require gender-neutrality in the draft. In *Rostker*, however, the Supreme Court disagreed, relying on the war powers clause to hold that a gender-neutral draft was not required by the fifth amendment.

Mansbridge points out that it might have been politically advantageous for the ERA's proponents to have applied the Court's *Rostker*

2. Jane J. Mansbridge is Associate Professor of Political Science and Sociology at Northwestern University, and the author of *BEYOND ADVERSARY DEMOCRACY* (1980).

3. For another, even more detailed and fascinating account of the tactics employed by the ERA activists, see Rhode, *Equal Rights in Retrospect*, 1983 *LAW & INEQUALITY: J. THEORY & PRAC.* 1.

4. 453 U.S. 57 (1981).

analysis to the ERA; by this time, many people were associating the ERA with the spectre of housewives being sent to the front lines. But the ERA leadership never seriously considered adopting such a deferential interpretation of their amendment. In the first place, they resisted giving greater recognition to the war powers clause (p. 77); it was associated in many people's minds with such ideologically unpalatable cases as *Korematsu v. United States*.⁵ More importantly, the ERA leadership believed that to interpret the amendment as allowing an exception for the draft would leave it open to many other exceptions. The proponents wanted the interpretation of the amendment to remain uncompromised (p. 79).

Yet this decision to maintain the strict egalitarian interpretation of the ERA was made with little or no discussion and, more importantly, with no attention to the arguments of the local activists. In fact, many local pamphleteers and speakers were arguing that the ERA would *not* send women into combat (pp. 81-83). But their arguments lacked credibility; the local activists were for the most part without the legal training to explain the war powers clause analysis, and they were being contradicted by the party line of the ERA leadership.

Thus, Mansbridge concludes, a decision was made "by accretion" (p. 68), without discussion. The decision, which Mansbridge argues was typical of the ERA leadership, was that they would "rather lose fighting for a cause they believe[d] in than win fighting for a cause they [felt was] morally compromised" (p. 3).

Mansbridge chooses to focus on the ERA opponents' claims that the amendment would hurt homemakers and that it would require unisex public toilets as typical of the issues and strategies occupying the opposition. Both claims, she believes, grossly exaggerated the probable effects of the ERA's passage in order to galvanize support. The toilet issue, Mansbridge believes, ultimately hurt the opposition; it made the opposition platform seem less credible, more irrational (pp. 112-14). But while the claim that the ERA would hurt homemakers may in fact have been as exaggerated as the claim that it would require unisex toilets, the homemaker issue was extremely effective politically. As Mansbridge points out, the homemaker issue (and the related themes of disrupted families, devalued marriages, and neglected children) struck at the very heart of American ideology. Furthermore, it galvanized a generation of women who, in the previous two decades, had watched their role as homemakers become increasingly devalued as more women entered the workforce, obtained college degrees, and established careers (pp. 105-08). These homemakers found in the ERA a symbol to fight against, as they fought against the devaluation of their lifestyle.

5. 323 U.S. 214 (1944).

Mansbridge elsewhere points out that the "same sense of impotence in the face of national changes" (p. 5) fueled the growth of the New Right, and provided the opposition with a valuable link to fundamentalist churches. Once they became politically active, the churches became powerful voices in state legislatures because of their "evangelizing culture and . . . stable geographic base" (p. 5).

Mansbridge is excellent at distilling the essence of the ERA activists' platforms; she is also good at describing the context in which the ERA struggle took place, and at analyzing the effect which this social context may have had on the debate. One of the factors which may have jeopardized the passage of the amendment, she believes, is Supreme Court activism.

Mansbridge says that the decisions of the Warren Court, in particular the cases addressing personal issues like pornography, school prayer, busing, and abortion, had all "reinforced the popular view that federal judges could and would use superficially innocuous principles to achieve substantive results that many conservative and middle-of-the-road citizens opposed" (p. 27). It is not true, Mansbridge argues, that the ERA would have given the Supreme Court a "blank check" to write on (for example, the claim that the Supreme Court would use the ERA to require unisex toilets is, in fact, absurd). It is true, however, that the Court has used seemingly unexceptional sections of the Constitution to justify rather surprising results. Thus, unpopular Supreme Court decisions took their toll on the ERA; the American public was suspicious as to just what the Court would do with a principle guaranteeing men and women "equality of rights under the law."

When *Roe v. Wade*,⁶ an opinion which not only exemplified perceived judicial overextension but also connected it to the feminist cause, came down in 1973, the conservative opposition to the ERA grew even stronger (p. 27). Few people wanted the Supreme Court to be able to tell them how to live on the basis of abstract principles. The result, Mansbridge believes, was that a strong ERA, which gave the Court too much power, was doomed to failure.

At the same time, Supreme Court decisions under the fourteenth amendment's equal protection clause may also have impeded passage of the ERA.⁷ Many of the goals sought by the ERA proponents were being won under the fourteenth amendment.⁸ These decisions made most of the statutes and official practices that the ERA would have

6. 410 U.S. 113 (1973).

7. Mansbridge notes though that, while fourteenth amendment jurisprudence hindered the ERA, the ERA encouraged fourteenth amendment jurisprudence: "[T]he fact that Congress passed the ERA almost certainly encouraged the Supreme Court to interpret the Fourteenth Amendment as barring many varieties of discrimination against women, although uncertainty about the ERA's prospects for ratification may have later discouraged the Court from making gender a suspect classification." P. 189.

8. *E.g.*, *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976).

eliminated presumptively unconstitutional, even in the absence of the ERA (p. 46). Consequently, the ERA proponents found it increasingly difficult to claim that the ERA would have tangible benefits — but the opposition had no trouble in pointing out tangible “costs.”

This judicial activism, coupled with the demographic and social changes that were causing so much upheaval in gender roles, created a climate in which passage of the ERA was unlikely, if not impossible.

Mansbridge's book is primarily descriptive and analytical, as opposed to being explicitly political. While she identifies herself as a proponent of the ERA, she is not interested in chastising the nation for its failure to pass the amendment, nor in planning strategies for feminists to overcome its defeat. Mansbridge is instead mining the history of the ERA struggle for the lessons it can teach about political organization and social movements. She has some good insights about those lessons: She goes on at some length, for example, about the extent to which movements are inherently exclusive and drift inevitably toward radical, doctrinally “pure” ideologies. Mansbridge points out that such idealism and exclusion are almost essential in order for a movement to maintain the kind of commitment from voluntary activists that any movement needs to survive.

But Mansbridge has little to say, normatively, about such characteristics of social movements. She does not say much about whether idealism is good or bad; whether a movement should seek to overcome such tendencies; whether the ERA activist should have or even could have, done things entirely differently; or what feminists should do in the future. Mansbridge is a political scientist and a sociologist, and for her the analytic exercise is enough; her tone is often the detached tone taken by the observer of a finished, historical event. To readers in whom the passionate commitments and beliefs of the ERA struggle still linger, and in whom the defeat of the ERA still incites anger, Mansbridge's tone can be frustrating.⁹ For some, Mansbridge's most tantalizing and disappointing chapter may be her brief, final chapter, “Requiescat in Pace,” in which she poses but only sketches the answers to the questions: Was the struggle worth it? Should feminists continue the struggle for the ERA?¹⁰

9. To some, Mansbridge's tone is infuriating. See MacKinnon, *Unthinking ERA Thinking* (Book Review), 54 U. CHI. L. REV. 759 (1987) (reviewing *Why We Lost the ERA*).

10. Pp. 188-91, 195-99. Her answers, in sum, are that, yes, the struggle was worth the effort in that the ERA debate kept attention focused on feminist issues for an entire decade and that attention sparked both legislative (state and federal) reform and grassroots social change: “In the middle part of the country, political work for the ERA kept upsetting the old order.” P. 189. As to whether feminists should continue to try to pass the ERA, Mansbridge would say no. She believes that the ERA would be doomed to failure in today's political climate; notes that “some feminists have begun to articulate a critique of egalitarianism,” (p. 196); and concludes that feminist energy can more productively be spent on working for concrete legislative reforms. For example, she recommends that feminists focus on issues like the feminization of poverty, and violence against women and the women's movement. P. 197.

Still, at what it sets out to do — tell the story of the ERA and analyze that story's meaning — *Why We Lost the ERA* is entirely successful. It is well researched, highly readable, thoughtful, and often insightful. It is a window onto one of the most important political events of our time.

— *Judith L. Hudson**

* I would like to thank the members of Professor Christina Whitman's Gender and Justice seminar, many of whose ideas and insights are reflected in this book notice.