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# Constitutional Amendment; Rescission of Ratification; Extension of Ratification Period, State of Idaho v. Freeman

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## CONSTITUTIONAL LAW

### *Constitutional Amendment • Rescission of Ratification • Extension of Ratification Period*

#### *State of Idaho v. Freeman*

529 F. Supp. 1107 (D. Idaho 1981)

#### I. INTRODUCTION

**I**N *State of Idaho v. Freeman*<sup>1</sup> the District Court of Idaho ruled that once the Congress has “set a reasonable time limit for the states to act in order” to ratify a proposed constitutional amendment, Congress cannot thereafter change the period for ratification.<sup>2</sup> The court also held that a state has the power to rescind its prior ratification of a proposed amendment before “unrescinded ratification by three-fourths of the states.”<sup>3</sup>

The case was granted certiorari and at this writing, is now pending before the United States Supreme Court.<sup>4</sup> On June 30, 1982, the extended time for ratification of the proposed Equal Rights Amendment (ERA)<sup>5</sup> expired<sup>6</sup> without the necessary approval by three-fourths of the state legislatures. Therefore, this current controversy over the construction of article V has apparently become moot. However, the issues addressed by the district court may later be presented by future proposed constitutional amendments.

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<sup>1</sup>529 F. Supp. 1107 (D. Idaho 1981).

<sup>2</sup>*Id.* at 1155.

<sup>3</sup>*Id.* at 1154.

<sup>4</sup>*National Organization for Women v. Idaho*, 102 S. Ct. 1272 (1982).

<sup>5</sup>The full text of the proposed Equal Rights Amendment is contained in the following quotation:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several states within seven years from the date of its submission by the Congress:

“Article \_\_\_\_

“Section 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.

“Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

“Section 3. This amendment shall take effect two years after the date of ratification.”

S.J. Res. 8, 92d Cong., 2d Sess. (1972); H.R.J. Res. 208, 92d Cong., 1st Sess. (1971).

<sup>6</sup>The Congress passed House Joint Resolution 638 by a simple majority vote. This resolution extended the time for ratification of the proposed Equal Rights Amendment from March 22, 1979 to June 30, 1982. The original deadline for ratification was a seven year period contained in the preamble to the ERA. This seven year period was consistent with similar time periods for ratification contained in the preambles for the twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth amendments. 124 CONG. REC. H8, 664-65 (daily ed. Aug. 15, 1978); 124 CONG. REC. S17, 318-19 (daily ed. Oct. 6, 1978).

The District Court of Idaho in *Freeman* was presented with a number of issues requiring interpretation of article V of the Constitution.<sup>7</sup> Since case law on article V has been limited, the questions presented in *State of Idaho v. Freeman* are of first impression.

On March 22, 1972, the United States Senate passed a joint resolution proposing the Equal Rights Amendment to the Constitution. The House of Representatives had earlier adopted the resolution on October 12, 1971.<sup>8</sup> In order to become the twenty-seventh amendment to the Constitution, the proposed ERA had to be ratified by the legislatures of three-fourths of the states.<sup>9</sup>

On October 6, 1978, the Senate passed House Joint Resolution 638 by a vote of sixty to thirty-six.<sup>10</sup> This resolution which had earlier been approved by the House of Representatives by a vote of 233 to 189,<sup>11</sup> extended the ratification period for the ERA to June 30, 1982. Originally "the time for ratification would have expired on March 22, 1979, seven years from the date of proposal of the ERA."<sup>12</sup> The extension period was approved by only a simple majority in both Houses of Congress, while the original time period had been adopted by a two-thirds concurrence. This factor was widely discussed at Congressional hearings conducted on extending the ratification period for the proposed Equal Rights Amendment.<sup>13</sup> The general consensus of the constitutional scholars testifying at those hearings was that Congress could extend the period for ratification of the ERA by a majority vote.<sup>14</sup>

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<sup>7</sup>Article V of the Constitution states in its entirety:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several states, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several states, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress: Provided that no Amendment which may be made prior to the Year One Thousand Eight Hundred and Eight shall in any manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no state, without its Consent, shall be deprived of its Equal Suffrage in the Senate.

U.S. CONST., art. V.

<sup>8</sup>Kanowitz and Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979 (1977) [hereinafter *Can A State Rescind*]. The Senate passed the resolution by a vote of 84 to 8 while the House adopted the resolution by a vote of 354 to 24.

<sup>9</sup>U.S. CONST., art. V.

<sup>10</sup>124 CONG. REC. S17,318-19 (daily ed. Oct. 6, 1978).

<sup>11</sup>124 CONG. REC. H8,664-65 (daily ed. Aug. 15, 1978).

<sup>12</sup>Comment, *ERA: The Effect of Extending The Time For Ratification On Attempts to Rescind Prior Ratifications*, 28 EMORY L.J. 71 (1979) [hereinafter *Effect of Extending The Time For Ratification*].

<sup>13</sup>*Extending the Ratification Period for the Proposed Equal Rights Amendment: Hearings on H. J. Res. 638 Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives, 95th Cong., 1st and 2d Sess. at 1 (1977-1978)* [hereinafter *Hearings, Extending Ratification*].

<sup>14</sup>*Id.* Most of the constitutional scholars participating in the Hearings believed that Congress could extend the period for ratification of the ERA without allowing rescission by the states who had earlier ratified the amendment. The scholars who advocated this position were Lawrence Tribe, William Van Alstyne, Ruth Bader Ginsburg, Thomas Emerson, and William Stanmeyer. The only two scholars who opposed Congressional extension of the ERA without allowing rescission were Erwin Griswold and Charles L. Black.

When the ratification period ended on June 30, 1982, thirty-five states had passed the proposed Equal Rights Amendment, three short of the requisite thirty-eight state legislatures needed to adopt the amendment.<sup>15</sup> In that same period, however, five states attempted to rescind their prior ratification of the ERA. These five states are Idaho, Kentucky, Nebraska, South Dakota, and Tennessee.<sup>16</sup>

On May 9, 1979, the states of Arizona and Idaho, together with legislators from both states, filed this action in the District Court of Idaho. The plaintiffs sought both injunctive and declaratory relief, asserting that states had a right to rescind their prior ratification of a constitutional amendment and that Congress' action in extending the period for ratification was void.<sup>17</sup>

In February, 1977, the Idaho State Legislature, by a simple majority vote, declared its prior ratification of the ERA void.<sup>18</sup> Subsequently, Idaho's Secretary of State "certified Idaho's rescission to the Acting Administrator of the General Services Administration."<sup>19</sup> Idaho brought this action after the Administrator of the General Services Administration, Rowland G. Freeman, questioned the validity of Idaho's rescission.<sup>20</sup>

In 1979, Arizona's State Legislature passed House Concurrent Resolution No. 2014. This resolution requested that the Arizona Attorney General and the Department of Law bring an action challenging Congress' extension of the deadline for ratification of the proposed Equal Rights Amendment.<sup>21</sup> As a result of this resolution, Arizona joined in this suit. Arizona had initially rejected the proposed ERA and had never purported to ratify the amendment.<sup>22</sup>

On June 13, 1979, four individual legislators of the Washington State Legislature moved to intervene as plaintiffs in this case to pursue the same issues. District Judge Callister granted their motion to intervene on June 13, 1979.<sup>23</sup>

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<sup>15</sup>529 F. Supp. at 1112.

<sup>16</sup>*Id.* Idaho ratified the ERA on March 24, 1972 and rescinded its prior ratification on February 9, 1977; Nebraska ratified the ERA on March 29, 1972 and rescinded it on March 15, 1973; Tennessee ratified on April 4, 1972 and rescinded on April 23, 1974. Kentucky ratified the ERA on June 26, 1972 and rescinded on March 17, 1978, however, the rescission resolution was vetoed by the State Lieutenant Governor while the Governor was out of state. South Dakota ratified the ERA in 1973 and rescinded it on March 23, 1979, after Congress had extended the period for ratification.

<sup>17</sup>529 F. Supp. at 1111.

<sup>18</sup>*Id.* at 1113-14. The resolution repealing ratification passed the Idaho House by a vote of forty-four to twenty-six, and the Idaho Senate by a vote of eighteen to seventeen. 1977 Idaho Sess. Laws 950.

<sup>19</sup>529 F. Supp. at 1114.

<sup>20</sup>*Id.*

<sup>21</sup>1979 Ariz. Sess. Laws 1039.

<sup>22</sup>529 F. Supp. at 1114.

<sup>23</sup>*Id.* Prior to intervening in this suit, the four individual legislators had brought an action in the Western District of Washington seeking a nullification of Congress' act extending the period for the ERA's ratification. *Oliver v. Ray*, No. C79-140T (W.D. Wash. 1979). The suit was based on the claim that Washington's earlier ratification of the ERA was conditioned on the amendment being ratified by three-fourths of the states within the initial seven year period. When the legislators filed their motion to intervene in *Freeman*, they filed a notice for voluntary dismissal of this suit.

The court's ruling in *Freeman* is in conflict with both the Supreme Court's apparent trend involving article V issues, and most of the recent scholarly opinion on point.<sup>24</sup> As a result of this departure, and the fact that the ERA failed to be adopted, this decision is likely to have slight precedential value. Nonetheless, the district court's discussion of the ERA in light of recent changes in the political question doctrine has significance in interpreting article V.

## II. JUSTICIABILITY

The district court in *Freeman* ruled contrary to the Supreme Court's decision in *Coleman v. Miller*<sup>25</sup> in finding that the issues requiring constitutional interpretation of article V were justiciable.<sup>26</sup> In 1939, the Supreme Court in *Coleman* held that a ratification after a prior rejection of a constitutional amendment is a political question.<sup>27</sup> The Court said: "[t]he question of the efficacy of ratifications by state legislatures, in light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments with ultimate authority in the Congress. . . ."<sup>28</sup> The Court found two reasons for finding the rescission-ratification question a political determination. First, it found no constitutional language or statutory provision requiring judicial action.<sup>29</sup> Second, it acknowledged that Congress had previously determined that subsequent action regarding constitutional amendments was ineffective "in the presence of an actual ratification."<sup>30</sup> Congress made this finding in determining the validity of the states' ratifications concerning the fourteenth amendment.<sup>31</sup> In holding that the question was a political one, the *Coleman* Court ignored several of its prior cases that had ruled article V issues were justiciable.<sup>32</sup>

<sup>24</sup>Judge Callister possibly should have removed himself from deciding this case due to his conflicting position as a Regional Representative of the Mormon Church. The Mormon Church had officially opposed the ERA and Congress' extension of the ratification period of the proposed amendment. Defendant's counsel had earlier moved for Judge Callister's disqualification under 28 U.S.C. § 455 contending his impartiality might be foreclosed. However, Judge Callister denied this motion claiming his impartiality was not foreclosed and that in the Mormon Church, religion and government operate in separate spheres. *State of Idaho v. Freeman*, 478 F. Supp. 33 (D. Idaho 1979).

<sup>25</sup>307 U.S. 433 (1939). This case involved a challenge to Kansas' ratification of the proposed Child Labor Amendment.

<sup>26</sup>529 F. Supp. at 1145-46.

<sup>27</sup>307 U.S. 433. There was no majority opinion in *Coleman*. Three justices limited non-justiciability to the narrow facts of the case, while the four concurring justices insisted that all article V issues were political, and the two dissenting justices regarded the issues raised in *Coleman* as justiciable. The dissenters pointed out that the Supreme Court had "adjudicated similar issues without hesitation" in *Dillon v. Gloss*, 256 U.S. 368, 471 (1921) (Butler, J. dissenting). *Can a State Rescind*, *supra* note 8, at 986.

<sup>28</sup>307 U.S. at 450.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 449.

<sup>31</sup>Comment, *Rescinding Ratification Of Proposed Constitutional Amendment — A Question For the Court*, 37 LA. L. REV. 896, 905-08 (1977) [hereinafter *Rescinding Ratification*]. On July 21, 1868 "both houses of Congress, without real debate, passed a resolution declaring that three-fourths of the states, including Ohio and New Jersey had ratified" the fourteenth amendment and that it was part of the Constitution. Ohio and New Jersey had earlier withdrawn their ratification of the amendment. This congressional action was never tested in court and is not considered strong precedent due to the era in which the amendment was passed.

<sup>32</sup>The cases prior to *Coleman* where the Supreme Court had rules that issues relating to the amendment

The court in *Freeman* refused to agree with the defendant's contention that the Supreme Court's ruling in *Coleman* was controlling.<sup>33</sup> Instead it found that the questions of "efficacy of a rescission and the proper procedure for establishing a time period for ratification" should be interpreted by the judiciary.<sup>34</sup> In ruling that the issues are justiciable, the court analyzed the standards enunciated in recent cases in judging what constitutes a political question.<sup>35</sup> Article V speaks only of ratification and no mention is made of rescission.

Chief Judge Callister, who wrote the decision in *Freeman*, looked specifically to the six criteria pointed out in *Baker v. Carr*<sup>36</sup> in determining what constitutes a political question.<sup>37</sup> The court in *Freeman* found that *Coleman* was not controlling.<sup>38</sup> In concluding that there was no compelling reason for the district court to withhold its jurisdiction, the *Freeman* court pointed out that "the nature of the question of the effectiveness of a rescission of a prior ratification is essentially different from the question presented in *Coleman* as to the effect of a ratification after a prior rejection."<sup>39</sup> A rescission "revokes the state's assent to being included in the consensus" and requires no further inquiry.<sup>40</sup> On the other hand, a valid ratification requires both the state's consent to a proposed amendment and "congressional assessment of contemporaneousness."<sup>41</sup> It is therefore appropriate to treat a ratification after a prior rescission as a political question, while analyzing a rescission after a prior ratification as one for judicial inquiry.<sup>42</sup> While it is unlikely that the Supreme Court would make such a technical distinction in distinguishing the issues in *Coleman*

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process of the Federal Constitution were justiciable included *Leser v. Garnett*, 258 U.S. 130 (1922); *Dillon v. Gloss*, 256 U.S. 368 (1921); *National Prohibition Cases*, 253 U.S. 350 (1920); *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798); *Can a State Rescind*, *supra* note 8, at 982-84.

<sup>33</sup>529 F. Supp. at 1146.

<sup>34</sup>*Id.*

<sup>35</sup>The three most important cases which the court in *Freeman* reviewed in finding the issues justiciable were *Powell v. McCormack*, 395 U.S. 486 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975). In *Dyer* the district court was presented with similar issues to those in *Freeman*, and it ruled that the issues were justiciable. Former Judge Stevens, now Justice Stevens, in writing the opinion, distinguished the issues before the court from those in *Coleman*. However, as one scholar noted, if *Dyer* was a Supreme Court "decision rather than the opinion of a three-judge panel, it is unlikely that such care would have been taken to distinguish *Coleman*." *Rescinding Ratification*, *supra* note 31, at 922-23.

<sup>36</sup>369 U.S. 186 (1962).

<sup>37</sup>529 F. Supp. at 1124. The six criteria noted in *Baker* are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

<sup>38</sup>*Id.* at 1146.

<sup>39</sup>*Id.* at 1145.

<sup>40</sup>*Id.* at 1146.

<sup>41</sup>*Id.* at 1145-46.

<sup>42</sup>*Id.*

from those in *Freeman*, it is this author's opinion that the court in *Freeman* correctly analyzed that the issues before it were justiciable. As one scholar noted, the political question doctrine should not "frustrate judicial review of the validity of ratification or rescission of Constitutional amendments."<sup>43</sup>

### III. RESCISSION AFTER RATIFICATION

In ruling whether a state may change its initial action on a proposed amendment, the *Freeman* court considered three separate approaches<sup>44</sup> before adopting the approach "that both the subsequent acts of ratification after a rejection and rescission after ratification should be recognized."<sup>45</sup> Accordingly, the court in *Freeman* recognized that Idaho's rescission was effective. It further held that the same was true for any state which properly rescinded its ratification.<sup>46</sup>

One limitation to the *Freeman* court's view is that once three-fourths of the states have ratified a proposed amendment at the same time, "the amendment automatically becomes part of the Constitution. . . ."<sup>47</sup> After this point, attempted rescission by a state is ineffective.<sup>48</sup>

The decision that a ratification can be rescinded is based on the observation that the structure of article V of the Constitution indicates that the states must determine "what the local consent is" when acting on a proposed amendment.<sup>49</sup> In *Dillon v. Gloss*,<sup>50</sup> the Supreme Court pointed out this observation saying, "all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies. . . ."<sup>51</sup> The court in *Freeman* believed that if the state's local sentiment changes during the time period for ratification, it should be allowed to rescind its prior ratification in order to reflect the true will of the people.<sup>52</sup>

In reaching its decision the *Freeman* court also argued that it was illogical to "impute more finality to ratification than to rejection. . . ."<sup>53</sup> The court argued this was especially true since a state's act of ratification has no binding

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<sup>43</sup>Note, *The Equal Rights Amendment: Will States Be Allowed To Change Their Minds?*, 49 NOTRE DAME LAW. 657, 669 (1974). Several other scholars have noted that article V issues should be considered justiciable including Erwin Griswold, former Solicitor General of the United States, see *Hearings* at 110-11 (testimony of Erwin Griswold); Leo Kanowitz and Marilyn Klinger, *Can a State Rescind*, *supra* note 8, at 981; and Grover Rees, *Rescinding Ratification*, *supra* note 31, at 918-22.

<sup>44</sup>529 F. Supp. at 1147-50.

<sup>45</sup>*Id.* at 1147.

<sup>46</sup>*Id.* at 1155.

<sup>47</sup>*Id.* at 1147.

<sup>48</sup>*Id.* at 1147-48.

<sup>49</sup>*Id.* at 1148.

<sup>50</sup>256 U.S. 368 (1921).

<sup>51</sup>*Id.* at 374.

<sup>52</sup>529 F. Supp. at 1148.

<sup>53</sup>*Id.*

effect until three-fourths of the states have concurred during a reasonable period. Furthermore, by not allowing a state to rescind its ratification during this interim period, states may become "hesitant to act" in ratifying a proposed amendment.<sup>54</sup>

The *Freeman* court's view has been advocated by some of the most respected constitutional scholars,<sup>55</sup> however, it is this author's contention that the *Freeman* court's approach in allowing rescission after ratification is both unpractical and unconstitutional. A better approach would be to allow only the act of ratification after a prior rescission.<sup>56</sup> Rescissions of proposed amendments after a prior ratification would be treated as a nullity. This view has been supported by the Congress<sup>57</sup> and several distinguished scholars.<sup>58</sup>

The language of article V supports the conclusion that rescission after ratification is void. Article V speaks only of ratification and, therefore, rescissions arguably were not within the framers' intent.<sup>59</sup> Allowing states to rescind their vote after prior ratification of proposed constitutional amendments could also lead to absurd results. A state could ratify and rescind a proposed amendment several times during the period for consideration.<sup>60</sup> This could result in uncertainty in counting the states which have consented to a proposed amendment.<sup>61</sup>

On several occasions Congress has shown its disapproval of allowing subsequent rescissions of proposed constitutional amendments. The fourteenth amendment is often cited "to support the view that attempted rescissions are ineffectual."<sup>62</sup> Congress passed a resolution on July 21, 1868 declaring that

<sup>54</sup>*Id.*

<sup>55</sup>These scholars include William Stanmeyer, Professor of Law at Indiana University Law School and Charles Black, Professor of Law at Yale Law School. *Hearings, Extending Ratification, supra* note 13, at 360-61 (testimony of William Stanmeyer); at 72 (testimony of Charles Black).

<sup>56</sup>This approach was considered and rejected by the court in *Freeman* at 1147. The third approach considered by the *Freeman* court was that once a state has acted either ratifying or rescinding the proposed Constitutional amendment, any further action is void. 529 F. Supp. at 1147.

<sup>57</sup>*Effect of Extending The Time For Ratification, supra* note 12, at 78-86.

<sup>58</sup>The scholars supporting this view include James Madison, Lester Orfield, and, more recently, William Van Alstyne and Thomas Emerson. Orfield contends that such leaders as James Madison and Alexander Hamilton objected to attaching any conditions or reservations during the period of the drafting of the Constitution. As a result, no reservations are contained in the text of article V. L. Orfield, *The Amending of the Federal Constitution* (1942) at 68 [hereinafter *Amending of Constitution*]; *Proposed Equal Rights Amendment Extension*, H.R. REP. NO. 95-1405, 9th Cong., 2d Sess. 12 (1978) [hereinafter H.R. REP. NO. 95-1405]; *Hearings, Extending Ratification, supra* note 13, at 65,67 (testimony of Thomas Emerson).

<sup>59</sup>*Can a State Rescind, supra* note 8, at 1001-02.

<sup>60</sup>H.R. Rep. No. 95-1405, *supra* note 58, at 12. As William Van Alstyne said in his testimony before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary of the House of Representatives:

No State ought to consider an amendment to the Constitution under the misimpression from this body that it may do it with some sort of celerity or spontaneity because it will always have this interval of additional years while other States are looking at it to reconsider.

That in my view is an atrocious way to run a Constitution.

<sup>61</sup>529 F. Supp. at 1147.

<sup>62</sup>*Effect of Extending The Time For Ratification, supra* note 12, at 79.

the fourteenth amendment had been ratified, with New Jersey and Ohio being counted as states supporting the amendment despite their attempted rescissions. The state legislatures of both Ohio and New Jersey had passed resolutions rescinding their prior ratifications, but the Senate treated these rescissions as ineffective.<sup>63</sup>

On four occasions Congress has also failed to pass amendments which would have allowed states to rescind their ratification of constitutional amendments. In 1925, the Wadsworth-Garnett Amendment which would have altered the text of article V to include rescindment, failed to even reach the floor of either house.<sup>64</sup> Three other proposed amendments which would have allowed states to rescind their ratification were also defeated during 1978-1979.<sup>65</sup>

#### IV. CONGRESS' EXTENSION OF THE RATIFICATION PERIOD

The court in *Freeman* ruled that Congress had no power to extend the period for ratification of the ERA beyond the seven year period originally established by Congress. Once Congress sets a time period for ratification it cannot be changed. As a result, the court held Congress' effort to extend the period for ratification of the proposed Equal Rights Amendment was void.<sup>66</sup>

In reaching its decision, the *Freeman* court refused to recognize the defendant's contention that the proposed Equal Rights Amendment contained no time limitation in its text. The defendant contended that since the seven year period originally set for ratification was only a part of the proposing resolution and not the text, Congress' extension of the time period was not improper. Following inferences in *Dillion v. Gloss*, the court in *Freeman* refused to recognize the defendant's substance-procedure dichotomy.<sup>67</sup> Furthermore, the *Freeman* court felt "that in order to fulfill the purposes for fixing a time limitation for ratification as outlined in *Dillon*" Congress could not change the period for ratification once it was made.<sup>68</sup>

In *Dillon v. Gloss* the Supreme Court was faced with the issue of deciding whether the seven year ratification period set by Congress for the eighteenth amendment was unconstitutional.<sup>69</sup> The Court held that it was proper for Congress to set a reasonable period for ratification of a proposed amendment but that Congress was not compelled to do so. Congress' chosen period of seven

<sup>63</sup>H.R. Rep. No. 95-1405, *supra* note 58, at 13-14.

<sup>64</sup>*Effect of Extending The Time For Ratification*, *supra* note 12, at 87.

<sup>65</sup>*Id.* at 87-88. These three proposed amendments were connected with House Joint Resolution 638 which extended the period for ratification of the ERA.

<sup>66</sup>529 F. Supp. at 1152, 1154-55.

<sup>67</sup>*Id.* at 1151-52. The defendants' substance-procedure argument analyzed in *Freeman* concerns the language of the proposed ERA. Since the text of the ERA contains no time limitation, the defendants contend that the seven year ratification period in the preamble of the amendment serves only as a guideline. As a guideline, the period for ratification can be changed by Congress.

<sup>68</sup>*Id.*

<sup>69</sup>256 U.S. at 368.

years was held to be reasonable.<sup>70</sup> In reaching its decision, the Court in *Dillon* made no reference to a substantive-procedural dichotomy pertaining to setting a period for ratification.<sup>71</sup>

The *Freeman* court, in ruling that Congress' effort to extend the period for ratification of the ERA was void, relied heavily on the fact that in *Dillon* no substance-procedure dichotomy was made for setting a ratification period. Since there was no difference recognized in *Dillon*, the *Freeman* court summarized that in order for Congress to change the time period for ratification it "must flow from the Congress' power to set the mode of ratification."<sup>72</sup> As earlier indicated, the Supreme Court in *Dillon* foreclosed this possibility.<sup>73</sup>

In drawing its conclusion, the district court in *Freeman* failed to recognize the distinct difference in the textual format between the eighteenth amendment and the proposed Equal Rights Amendment.<sup>74</sup> The eighteenth amendment's text specifically contained a time limitation for ratification.<sup>75</sup> On the other hand, the text of the proposed Equal Rights Amendment contained no time limitation for ratification. Instead, the proposed twenty-seventh amendment's preamble contained a seven year limitation acting as a guideline, following the same format as the twenty-third through twenty-sixth amendments.<sup>76</sup>

In considering the issues before the Court in *Dillon*, there was no reason to offer dicta on the effect of Congress setting time limits for ratification of proposed amendments in the preamble instead of the text. This issue was not before the Court. The court in *Freeman* incorrectly read inferences into *Dillon* by contending that there was no difference between placing a time limitation in a proposed amendment's text or preamble. This author believes that the district court in *Freeman* should have ruled that Congress' extension of the time period for ratification of the ERA was a proper function of its power under article V of the Constitution. This view has been supported by several eminent constitutional scholars.<sup>77</sup> There is a distinct difference between placing a time limitation for ratification in the preamble as opposed to the text of a proposed amendment.

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<sup>70</sup>*Id.* at 376.

<sup>71</sup>529 F. Supp. at 1151.

<sup>72</sup>*Id.*

<sup>73</sup>256 U.S. at 376.

<sup>74</sup>Vieira, *The Equal Rights Amendment: Rescission, Extension and Justiciability*, S. ILL. U.L.J. 1, 14 (1981).

<sup>75</sup>The pertinent part of the eighteenth amendment reads, "This article shall be inoperative unless it shall have been ratified as an amendment . . . within seven years from the date of submission. . . ." U.S. CONST. amend. XVIII, § 3.

<sup>76</sup>*Hearings, Extending Ratification*, *supra* note 13, at 40-41 (testimony of Lawrence Tribe, Professor of Law at Harvard University).

<sup>77</sup>These scholars include Lawrence Tribe, William Van Alstyne, Thomas Emerson, and Charles Black. *Id.* at 40-41 (testimony of Lawrence Tribe); at 115 (testimony of William Van Alstyne); at 63-64 (testimony of Thomas Emerson); at 68 (testimony of Charles Black).

In *Dillon v. Gloss*<sup>78</sup> and *Coleman v. Miller*<sup>79</sup> the Supreme Court indicated that the period for ratification of a proposed amendment is a matter for Congress to decide. Since the proposed Equal Rights Amendment contained no set period for ratification in its text, it cannot be said that the states reasonably relied on the guideline contained in the preamble. The terms of the amendment itself were unchanged by Congress' extension of the ratification period and the ratifications would still be sufficiently contemporaneous.<sup>80</sup> Furthermore, even if a state like Washington ratified the amendment while specifically noting the original ratification period contained in the preamble, the state's ratification stands. As Lester Orfield noted in his book, *The Amending of the Federal Constitution*, the framers' intent in drafting article V was that no conditions could be attached to ratification of a proposed amendment.<sup>81</sup> As a result, conditions attached to ratifications of proposed amendments are void. Since the Equal Rights Amendment contained no ratification period in its text, the question of whether Congress could change a deadline set out in the text of a proposed amendment need not be answered.<sup>82</sup>

The court in *Freeman* further indicated that regardless of whether Congress could extend the ratification period of the ERA, its action by majority vote was in violation of article V. Congress must act "by two-thirds of both Houses when exercising its article V powers."<sup>83</sup> The court noted that Congress is bound to act within the parameters of article V when exercising powers granted to it under article V. Under article V, the Constitution grants Congress the power to propose amendments only by a two-thirds vote of both houses. No other power is given. Following the language of article V, the Court concluded that if Congress can extend the ratification period of a proposed amendment, it must do so by a two-thirds vote. Since Congress extended the ratification period of the ERA by a simple majority vote, its act was void.<sup>84</sup>

During the Congressional Hearings on House Joint Resolution 638, a few scholars supported the argument that Congress could only extend the ratification period of the ERA by a two-thirds vote.<sup>85</sup> However, most of the scholars

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<sup>78</sup>256 U.S. at 376.

<sup>79</sup>307 U.S. at 454.

<sup>80</sup>*Hearings, Extending Ratification*, *supra* note 13, at 40-41 (testimony of Lawrence Tribe). In *Dillon* the Supreme Court found that ratifications "must be sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period." *Effect of Extending The Time For Ratification*, *supra* note 12, at 89 (quoting 256 U.S. at 375).

<sup>81</sup>*Amending of Constitution*, *supra* note 58, at 69.

<sup>82</sup>If the issue was at hand, it is this author's contention that the issue would be justiciable, and Congress could not change the period for ratification. In this case, a state's reliance on the ratification deadline period would be reasonable.

<sup>83</sup>529 F. Supp. at 1153.

<sup>84</sup>*Id.* at 1153-54.

<sup>85</sup>Professor Charles Black and Erwin Griswold believed that Congress could not extend the ratification period by a majority vote. Black was of the opinion that a two-thirds vote by Congress was required to validly extend the ERA, while Griswold believed Congress could not extend the amendment without starting the process anew. *Hearings, Extending Ratification*, *supra* note 13, at 68, 107 (testimony of Charles Black and Erwin Griswold).

who testified were of the opinion that Congress could extend the ratification period by a majority vote.<sup>86</sup>

There are several indications why Congress could legally extend the ratification period by a majority vote. First, the structure of the Constitution requires only a super majority vote where it is specifically enumerated. To be consistent with the basic framework of the Constitution, only a majority vote should be required in order to extend the ratification period of an amendment.<sup>87</sup>

Second, article V sets forth the "circumstances where a two-thirds vote is required."<sup>88</sup> Just as Congress may choose the mode of ratification by a majority vote, it should only be required to extend the period of ratification for amendments by a majority vote.<sup>89</sup>

Third, since the time limitation of the ERA was contained in the preamble, it was not voted upon when Congress originally proposed the amendment.<sup>90</sup> As a result, the revision of this provision should only be required to be by a majority vote. For these reasons it is this author's contention that Congress' extension of the ratification period by a majority vote was constitutionally grounded.

#### V. CONCLUSION

On June 30, 1982 the extended period for ratification of the proposed Equal Rights Amendment expired. The ERA will not be made part of the Constitution since the requisite number of states did not ratify the proposed amendment. As a result, the Supreme Court will probably rule that the issues presented in *State v. Freeman* are moot. While these issues will not be addressed in *Freeman* it is likely that many of the questions raised in *Freeman* may come about again: 1.) are the questions justiciable; 2.) can Congress extend the ratification period; 3.) can a state rescind a prior ratification? While the decision in *Freeman* is not binding on the Supreme Court, it may be used as a guideline by the lower court that is first presented with these issues.

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<sup>86</sup>This list includes Lawrence Tribe, Thomas Emerson, and Ruth Bader Ginsburg. *Id.* at 40-41 (testimony of Lawrence Tribe); at 64-65 (testimony of Thomas Emerson); at 121 (testimony of Ruth Bader Ginsburg).

<sup>87</sup>*Id.* at 64-65 (testimony of Thomas Emerson).

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>*Id.*