SUPREME COURT OF KENTUCKY

No. 2009-SC-000086-TG
(2009-CA-000219)

Virginia G. Fox, **Appellant,**

v.

Trey Grayson et al., **Appellees.**

On Appeal from Franklin Circuit Court
The Honorable Thomas D. Wingate, Judge
No. 08-CI-1426

BRIEF FOR APPELLANT VIRGINIA G. FOX

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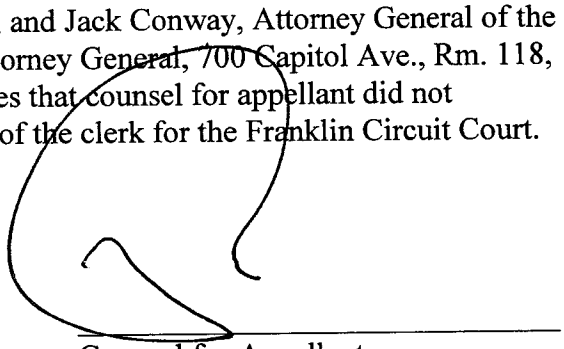
(Certifications under Civil Rules 76.12(5) and (6) are on the next page.)

CERTIFICATE OF SERVICE

In accordance with Civil Rules 76.12(5) and (6), the undersigned hereby certifies that copies of this Brief for Appellant were served upon the following individuals by hand this 8th day of July, 2009: The Honorable Thomas D. Wingate, Judge, Franklin Circuit Court, 214 St. Clair St., P.O. Box 678, Frankfort, KY 40601; Angela Evans, Office of the Attorney General, 700 Capitol Ave., Rm. 118, Frankfort, KY 40601, *Counsel for Trey Grayson, Secretary of State of the Commonwealth of Kentucky*; Ellen M. Hesen and Edmund S. Sauer, Office of the Governor, 700 Capitol Ave., Rm. 101, Frankfort, KY 40601, *Counsel for Steven L. Beshear, Governor of the Commonwealth of Kentucky*; Dennis Taulbee, Council on Postsecondary Education, 1024 Capitol Center Dr., Ste. 320, Frankfort, KY 40601, *Counsel for Pam Miller*; and Jack Conway, Attorney General of the Commonwealth of Kentucky, Office of the Attorney General, 700 Capitol Ave., Rm. 118, Frankfort, KY 40601. The undersigned certifies that counsel for appellant did not withdraw the record on appeal from the office of the clerk for the Franklin Circuit Court.



Counsel for Appellant
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INTRODUCTION

This appeal arises from a conclusion that, despite its express reference only to the Senate, Ky. Const. § 93 also permits the House of Representatives — and indeed would permit *only* the House of Representatives, if the General Assembly so desired — to exercise a power of confirmation. Ms. Fox respectfully submits that such a construction is contrary to both the logical meaning of Section 93 and to the overwhelming nature of our constitutional tradition.

STATEMENT REGARDING ORAL ARGUMENT

According to its Order of April 23, 2009, this Court will set this case for oral argument after the parties have submitted their briefs.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts of this case are not in dispute. On July 13, 2007, Governor Ernie Fletcher appointed Virginia G. Fox to the Council on Postsecondary Education ("CPE") for a term to conclude on December 31, 2012. Because the legislature was not in session at that time, Ms. Fox was permitted to take her seat immediately.

Consistent with Ky. Const. § 93, the Senate confirmed Ms. Fox to her seat on April 15, 2008. Since 1997, however, KRS 164.011(1) has purportedly required appointments to the CPE to be approved by both the Senate and the House of Representatives. *See* Ky. Acts 1997, Extr. Sess., ch. 1, § 73, amending KRS 164.011(1). Because the House did not confirm Ms. Fox's appointment, Governor Beshear deemed her seat to be vacant and purported to appoint Mayor Miller in her place on June 6, 2008.[1]

On August 29, 2008, Ms. Fox brought this action, seeking a declaration of rights, relief in the nature of mandamus, and relief under KRS 415.070, if applicable. Specifically, Ms. Fox argues that she is and has been since July 13, 2007, the sole and rightful occupant of her seat on the CPE.

On September 26, 2008, the Governor brought a motion to dismiss under Civil Rule 12.02. Mayor Miller joined this motion the same day. The Franklin Circuit Court granted this motion on January 6, 2009. Ms. Fox thereupon gave timely notice of appeal and asked this Court to transfer the case to its own docket. This Court granted Ms. Fox's motion on April 23, 2009.

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[1]The House of Representatives and Senate purported to confirm Mayor Miller to Ms. Fox's seat during the last regular session of the legislature. *See* 2009 HR 47 (BR 1077) (Mar. 12, 2009); 2009 SR 192 (Mar. 26, 2009). Because Ms. Fox is the rightful occupant of the seat, however, these purported confirmations are void. The House's purported confirmation is also beside the point, given Ky. Const. § 93.

SUMMARY OF ARGUMENT

Ky. Const. § 93 provides that the "manner" by which certain appointments are made "may include a requirement of consent by the Senate." No one would logically construe this language to authorize confirmation *solely by the House*, yet interpreting this language as "merely an example" would allow this result, if the General Assembly so desired. Under the familiar maxim "to say the one is to exclude the other," the effect of Ky. Const. § 93 is to preclude a power of confirmation in the House, provided there is a material difference between the Senate and the House where confirmation is concerned. This material difference is more than amply established by the overwhelming emphasis on exclusively senatorial confirmation in Kentucky's constitutional tradition, as well as in the traditions of her sister states and the federal government.

To be sure, *expressio unius* and *inclusio unius* do not apply in all cases, and Ms. Fox does not argue to the contrary. But this leads to an important question: Do these maxims apply haphazardly, without any rhyme or reason, or does some principle guide their application? The missing principle, as common sense would suggest, lies in determining whether there is a material difference between what is stated and what is omitted. If "A" is stated and "B" is omitted, and there is some logical reason why "A" and "B" are not fungible, then the expression of "A" is in fact the exclusion of "B." *See Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d, 387 391 (1940) (noting that *expressio unius* is the product of "[l]ogic and experience").

The central question, then, is whether the Senate and House of Representatives are fungible with respect to confirmation, such that the language of Ky. Const. § 93 — "which may include a requirement of consent by the Senate" — may logically be interpreted to allow confirmation by the House as well — and indeed may logically be interpreted to allow confirmation *only* by the House, if the General Assembly so desired. The answer to this question is *no*. Under our system of government, in Kentucky

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Co. of America v. Fuqua's Adm'r, 314 Ky. 166, 234 S.W.2d 666, 670 (1950); *Thomas v. Dahl*, 293 Ky. 808, 170 S.W.2d 337, 340 (1943); *Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325 (1943); *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 390 (1940); *City of Harrodsburg v. Southern R. Co.*, 278 Ky. 10, 128 S.W.2d 233, 235 (1939); *Republic Building v. Gaertner*, 201 Ky. 509, 256 S.W. 1111, 1112 (1924); *Western & Southern Life Ins. Co. v. Weber*, 183 Ky. 32, 209 S.W. 716, 718 (1919); *Lynch v. Snead Architectural Iron Works*, 132 Ky. 241, 116 S.W. 693, 697 (1909); *Pritchett v. Frisby*, 112 Ky. 629, 66 S.W. 503, 504 (1902); *Commonwealth v. Fowler*, 96 Ky. 166, 28 S.W. 786, 787 (1894); *Commonwealth v. Scowden*, 92 Ky. 120, 17 S.W. 205, 205 (1891); *State Board of Pharmacy v. White*, 84 Ky. 626, 2 S.W. 225, 226 (1886); *Henry's Ex'r v. Robertson*, 13 Ky. Op. 683, 684 (1885); *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 708 (1878); *City of Louisville v. Baird*, 54 Ky. (15 Mon.) 246, 257 (1854); *Essex v. Carey*, 8 Ky. (1 Marsh.) 60, 60 (1817); *Moody v. Head*, 2 Ky. (1 Sneed) 333, 333 (1804).

specifically, in her sister states, and in the federal government, the Senate has a virtual monopoly on confirmation, and always has. This Court may, and indeed must, impute awareness of such an overwhelmingly lopsided tradition to the citizens of the Commonwealth who ratified the amendment to Section 93 in 1992.

I. The overwhelming tradition in Kentucky is to authorize only the Senate to exercise a power of confirmation.

As this Court is well aware, Kentucky has had four constitutions over its 217 years as a state, with quite a bit of evolution in the rules governing appointment and confirmation. Notwithstanding this evolution, however, what has remained constant is reference to the Senate *and only the Senate* where a power of confirmation is conferred. As the court below noted, the Senate was explicitly authorized to sit in confirmation of virtually all gubernatorial appointments under Kentucky's first Constitution:

> [The Governor] shall nominate, and by and with the advice and consent of the Senate, appoint all officers, whose offices are established by this Constitution, or shall be established by law, and whose appointments are not herein otherwise provided for . . . .

KY. CONST. art. II, § 8 (1792). Explicit exceptions were made for the Attorney General and Secretary of State (who was referred to as simply the "Secretary"). With respect to these offices, the Governor exercised a unilateral power of appointment. *See id.* § 16 (Attorney General); § 17 ("Secretary"). These provisions remained essentially unchanged in the Constitution of 1799. *See* KY. CONST. art. III, § 9 (omnibus power of confirmation in the Senate); *id.* § 23 (Attorney General); *id.* § 24 ("Secretary").

Although this structure underwent a radical transformation in the Constitution of 1850, this had almost nothing to do with the Senate, and almost everything to do with the

executive. As delegate after delegate declared at the Convention of 1849, the leading structural change the voters sought in their new constitution was a transfer of the power of appointment from the executive to the people. "[W]e came here with a view of making three or four essential changes in our organic law," noted Archibald Dixon of Henderson County. "One is, to take the appointing power from the executive and give it to the people . . . ." REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF KENTUCKY 113 (1849) (Oct. 15, 1849). As William R. Thompson of Bullitt County asked:

> What were the questions discussed, and what were the reforms demanded by the people when the delegates to this convention were elected? . . . . The questions which were discussed in my county were a curtailment of the sessions of the legislature . . . — **the placing of the appointing power in the hands of the people, instead of in the hands of the executive** — the limiting of the elections of officers of the commonwealth to one day — and the restricting of the power of the legislature in the passage of local acts, and in contracting state debts.

Id. at 529 (Nov. 15, 1849) (bold emphasis added). *See also id.* at 192 (Mr. Chambers) (Oct. 21, 1849) ("What sir, are our instructions with regard to the executive branch of this government? Are they not that we shall strip him [the Governor] of all appointing power and patronage?"); *id.* at 1056 (Mr. Hardin) (Dec. 18, 1849) ("[W]e have fulfilled the expectations of the people; we have taken away the appointing power from the governor; we have changed the tenures of office; we have given them an elective judiciary.").

Notwithstanding this bold and massive assault on the Governor's general power of appointment, the Constitution of 1850 **preserved** the role of the Senate to the extent confirmation was still required. Thus, although all judicial and many executive offices

were made elective, the office of Secretary of State remained appointive and **remained subject to confirmation by the Senate**. *See* KY. CONST. art. III, § 21 (1850) (making the office of Secretary of State subject to appointment by the Governor and confirmation by the Senate); *id.* § 25 (making the offices of Treasurer, Auditor, Register and Attorney General elective); *id.* art. IV, § 3 (making the office of Judge of the Court of Appeals elective); *id.* § 23 (making the office of Judge of the Circuit Court elective); *id.* art. VIII, § 23 (making the office of President of the Board of Internal Improvement elective, so long as the office continues to exist); *id.* art. XI, § 2 (making the office of Superintendent of Public Instruction elective.).

To be sure, the Constitution of 1850 also provided that "inferior State officers, not specifically provided for in this Constitution, may be appointed or elected in such manner as shall be prescribed by law, for a term not exceeding four years." *Id.* art. III, § 25. But this language said nothing about confirmation, one way or the other. More to the point, it gave no indication whatsoever of an unheard-of interest in allowing the House to confirm appointments.

As adopted in 1891, our current Constitution retained the basic structure and language of its predecessor, with the exception of making the office of Secretary of State elective. *See* KY. CONST. § 91 (as originally adopted) (making the offices of Treasurer, Auditor of Public Accounts, Register of the Land Office, Commissioner of Agriculture, Labor and Statistics, Secretary of State, Attorney General and Superintendent of Public Instruction elective); *id.* § 93 (as originally adopted) (providing that "[i]nferior State officers, not specifically provided for in this Constitution, may be appointed or elected, in

such manner as may be prescribed by law, for a term not exceeding four years . . . .").

Again, the new constitution gave no indication whatsoever of an inclination to depart from the established principle that, where a power confirmation exists, it lies in the Senate. Indeed, the only offices that the Constitution of 1891 did make subject to confirmation — the last appointed members of the Railroad Commission — were to be confirmed by the Senate. *See id.* § 209 (as originally adopted):

> A Commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three Commissioners. During the session of the General Assembly which convenes in December, [1891,] and before the first day of June, [1892,] the Governor shall appoint, **by and with the advice and consent of the Senate**, said three Commissioners . . . . The Commissioners so appointed shall continue in office during the term of the present Governor, and until their successors are elected and qualified.

KY. CONST. § 209 (as originally adopted) (bold emphasis added).

Our unwavering adherence to this tradition was further demonstrated in 1893, just two years after adoption of our current Constitution, when the General Assembly enacted a statute conferring an omnibus power of confirmation on the Senate, much in keeping with Kentucky's first two constitutions:

> No person appointed to an office by the Governor, by and with the advice and consent of the Senate, shall be removed therefrom by the Governor, during the term for which he was appointed, unless for failure to discharge, or neglect in the performance of the duties of his office . . . . **Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold office, subject to the advice and consent of the Senate, which body shall take appropriate action upon such appointments at its first session held thereafter.**

Ky. Acts 1893, ch. 202, § 11 (codified as RS § 3750) (bold emphasis added). Although the language emphasized above was repealed in 1934, the preceding sentence was amended and retained, along with its reference **only to the Senate** where confirmation is concerned:

> Any person heretofore or hereafter appointed to an office by the Governor either **with or without the advice and consent of the Senate** may be removed therefrom by the Governor, during the term for which he was appointed, for any cause the Governor may deem sufficient . . . .

Ky. Acts 1934, ch. 138 (codified as RS § 3750) (bold emphasis added). Indeed, this statute remains on the books of the Commonwealth in substantially this form, contemplating confirmation exclusively by the Senate. *See* KRS 63.080(1).

Until 1990, in keeping with this statute and the constitutional traditions described above, statutes establishing specific boards and commissions appear to have contemplated either no power of confirmation at all or a power of confirmation exclusively in the Senate. In 1964, for example, the legislature authorized the Governor to appoint members of the Kentucky Board of Tax Appeals, subject to senatorial confirmation. *See* Ky. Acts 1964, ch. 141, § 2, codified at KRS 131.315(1). Other statutes in this vein are as follows:

- Ky. Acts 1976, Extr. Sess., ch. 33, § 1, codified at KRS 27A.050 (Director of the Administrative Office of the Courts).
- Ky. Acts 1982, ch. 82, § 9, codified at KRS 278.050(1) (members of the Public Service Commission).
- Ky. Acts 1982, ch. 448, § 10, codified at KRS 18A.050(4) (members of the Personnel Board).

- Ky. Acts 1987, Extr. Sess., ch. 1, § 25, codified at KRS 342.230(3) (Administrative Law Judges for claims for worker's compensation).
- Ky. Acts 1988, ch. 341, § 40, codified at KRS 121.110(1) (members of the Registry of Election Finance).
- Ky. Acts 1988, Extr. Sess., ch. 1, § 3, codified at KRS 154A.030(1) (members of the Kentucky Lottery Corporation).

As the Governor has noted and as the court below recognized, the General Assembly did enact statutes authorizing both the House and the Senate to confirm appointments sometime in the vicinity of 1990, but this is a very recent development in constitutional terms, and hardly stands for much in comparison to the extensive tradition described above. In fact, of the statutes identified by this Court in 1994 as conferring a power of confirmation, seven conferred a power **only on the Senate**, and the other two had authorized bicameral confirmation **only within the preceding four years**. *See Kraus v. Kentucky State Senate*, 872 S.W.2d 433, 437 (Ky. 1994):

Board or Office	Enactment Requiring Confirmation	Power of Confirmation	Codified at
ALJ, Workers' Compensation Commission	Ky. Acts. 1987, Extr. Sess., ch. 1, § 25	**Senate only**	KRS 342.230(3)
Personnel Board	Ky. Acts 1982, ch. 448, § 10	**Senate only**	KRS 18A.050(4)
Director, AOC	Ky. Acts 1976, Extr. Sess., ch. 33, § 1	**Senate only**	KRS 27A.050
Registry of Election Finance	Ky. Acts 1988, ch. 341, § 40	**Senate only**	KRS 121.110(1)
Board of Tax Appeals	Ky. Acts 1964, ch. 141, § 2	**Senate only**	KRS 131.315(1)
Kentucky Lottery Corporation	Ky. Acts 1988, Extr. Sess., ch. 1, § 3	**Senate only**	KRS 154A.030(1)

State Board for Elementary and Secondary Education	**Ky. Acts 1990**, ch. 476, Pt. II, § 35	House and Senate	KRS 156.029(1)
Council for Education Technology	**Ky. Acts 1990**, ch. 476, Pt. I, § 21, *repealed*, Ky. Acts 1992, ch. 195, § 15	House and Senate	n/a
Public Service Commission	Ky. Acts 1982, ch. 82, § 9	**Senate only**	KRS 278.050(1)

Indeed, appointments to the board at issue in this case — the Council on Postsecondary Education — only became subject to bicameral confirmation in **1997**. *See* Ky. Acts 1997, Extr. Sess., ch. 1, § 73, codified as amended at KRS 164.011(1).[3]

As the foregoing analysis demonstrates, Kentucky's well-settled constitutional tradition as of 1992 was to confer a power of confirmation **exclusively on the Senate**. Research indicates that, before that year, the legislature had only twice attempted to confer a power of confirmation on both houses, and it had **never** attempted to confer a power of confirmation solely on the House. Were this Court to adopt the Governor's espoused interpretation of Section 93, whereby the Constitution's reference **only to the Senate** is seen as merely an example, nothing would prevent the legislature from authorizing *only the House* to exercise a power of confirmation, a consequence that the

[3]In its Opinion and Order of January 6, 2009, the court below suggested that the General Assembly authorized bicameral confirmation of members of the CPE in 1992, the year the voters ratified the amendment to Ky. Const. § 93. *See* Opinion and Order at 17 (included herewith as Appendix A) ("Further, KRS 164.011, challenged here by the Petitioner, was enacted contemporaneous with Senate Bill 226, which contained the . . . constitutional amendments submitted to the people for ratification in 1992."). This is not the case. To be sure, the General Assembly *first enacted* what is now KRS 164.011 in 1992, *see* Ky. Acts 1992, ch. 10, § 7, but it did not make seats on the CPE subject to bicameral confirmation until 1997. *See* Ky. Acts 1997, Extr. Sess., ch. 1, § 73.

people ratifying the amendment in 1992 could not possibly have contemplated, particularly in light of our tradition.

II. The overwhelming tradition elsewhere in the United States is to authorize only the Senate to exercise a power of confirmation.

As Ms. Fox demonstrated to the court below, constitutions across the country contain well over a hundred provisions referring to **only the senate** in connection with confirmation, whereas **not a single provision** refers solely to the House. Some allow a choice between senatorial confirmation or no confirmation at all — hence the word "may" before the word "include" in Section 93. KY. CONST. § 93 (emphasis added) ("which *may* include a requirement of consent by the Senate"). *See also* OHIO CONST. art. III, § 21 ("When required by law, appointments to state office shall be subject to the advice and consent of the Senate."); ORE. CONST. art. III, § 4(1) (emphasis added) ("The Legislative Assembly in the manner provided by law *may require* that all appointments and reappointments to state public office made by the Governor shall be subject to confirmation by the Senate."). Other provisions mandate senatorial confirmation, at least for certain officers. The federal Constitution, for example, provides that:

> [The President] shall nominate, and **by and with the Advice and Consent of the Senate,** shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. [2] (bold emphasis added).

As Ms. Fox notes in Appendix B, the constitutions of at least 39 states contain at least 166 provisions referring **only to the Senate** in connection with confirmation of appointments. Compare this with the number of constitutional provisions that refer only to the House of Representatives (or an equivalent, such as an Assembly or House of Delegates) in connection with appointments. Diligent research indicates that this number is **zero**. An electronic search through the constitution of every state for any provision that includes the word "Senate" (or a related word, such as "senatorial") within ten words of the word "consent," the word "confirm" (or a related word, such as "confirmation"), or the word "approve" (or a related word, such as "approval") yielded the 166 entries noted in Appendix B. Searches through the same constitutions for the words "House of Representatives" (or an equivalent, for the relevant states) within ten words of the same three terms (or a related word) yielded **no provisions** referring exclusively to the House or a comparable body in connection with confirmation.[4]

Searches such as the foregoing did reveal approximately fourteen provisions **explicitly** authorizing or requiring some form of bicameral confirmation, or confirmation by the legislature in joint session.[5] *See also* U.S. CONST. amend. XXV, § 2 ("Whenever

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[4]California, Nevada, New York, and Wisconsin each have an "Assembly" instead of a House of Representatives. New Jersey's lower house is the "General Assembly." Maryland, Virginia, and West Virginia have a "House of Delegates." Nebraska's legislature is unicameral.

[5]*See* ALA. CONST. amend. Talladega County, § 6 (non-lawyer members of the Talledega County Judicial Commission); ALASKA CONST. art. III, § 19 ("general and flag officers of the armed forces of the State"); *id.* § 25 (single executives at the head of principal departments); *id.* § 26 (boards and commissions at the head of principal departments or regulatory or quasi-judicial agencies); *id.* art. IV, § 8 (non-attorney members of the judicial council); *id.* § 10 (non-judicial members of the Commission on

there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress."). But these are the exceptions that prove the rule. First, they are **explicit** in authorizing both houses to exercise some power of confirmation. Second, they are exceedingly small in number in comparison to the 166 provisions noted earlier that refer **explicitly and only to the Senate**.

III. The legislature's enactment of statutes contemplating bicameral confirmation in 1992 is not dispositive in construing the amendment to Ky. Const. § 93 of that year, because the people as a whole, not the legislature, ratified that amendment.

In granting the Governor's motion to dismiss, the court below justified its opinion in part on the ground that the legislature that proposed the amendment to Ky. Const. § 93 in 1992 also enacted statutes contemplating bicameral confirmation. *See* Opinion and Order at 17 (citing 1992 Ky. Acts, ch. 103, § 3; *id.*, ch. 10, § 3). *See also* 1992 Ky. Acts, ch. 415, § 1, codified at KRS 11.160(2). What this argument misapprehends, however, is that the legislature does not amend the Constitution in a vacuum. Instead, it *proposes* amendments that are then "*submitted* to the voters of the State for their ratification or rejection . . . ." KY. CONST. § 256 (emphasis added). As Section 4 of our Constitution

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Judicial Conduct); *id.* art. VII, § 3 (Board of Regents of the University of Alaska); CAL. CONST. art. V, § 5(b) (vacancies in the office of Superintendent of Public Instruction, Lieutenant Governor, Secretary of State, Controller, Treasurer, and Attorney General, or in the Board of Equalization); ME. CONST. art. V, Pt. 1, § 8 (general authority of bicameral committee to recommend action on appointments, with a power in two-thirds of the Senate to reject such recommendations); MD. CONST. art. II, § 6 (vacancy in the office of Lieutenant Governor); N.C. CONST. art. X, § 4 (non-*ex officio* members of the State Board of Education); R.I. CONST. art. X, § 4 (vacancies in the office of justice of the Supreme Court); VA. CONST. art. V, § 7 (reference to general authority); WISC. CONST. art. XIII, § 10 (vacancy in the office of Lieutenant Governor).

provides, "[a]ll power is inherent in the people, and all free governments are founded on their authority . . . ." KY. CONST. § 4. "In the ultimate sense," this Court noted in *Gatewood v. Matthews*, "the legislature does nothing unless and until the people ratify and choose to give the revised constitution life by their own direct action." 403 S.W.2d 716, 720 (Ky. 1966) (allowing a wholesale revision of the Constitution to be presented to the voters). The question, then, is not simply what the legislature thought the amendment of 1992 meant, but also what its accessible public meaning is. That is, what would the people who read the proposed amendment in 1992 have thought *they* were being asked to ratify? When they approved the words:

which may include a requirement of consent by the Senate,

KY. CONST. § 93 (bold emphasis added), would *they* have thought they were being asked to ratify language that would allow *only the House* to exercise a power of confirmation, if the General Assembly so desired?

As the Supreme Court of the United States recently observed, "[t]he Constitution was written to be understood **by the voters**; its words and phrases were used in their normal and ordinary **as distinguished from technical meaning**." *District of Columbia v. Heller*, 128 S.Ct. 2783, 2788 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (bold emphasis added). A "normal and ordinary" construction of the amendment of 1992, which referred expressly and only to the Senate, given the overwhelming tradition and practices noted above, and given as well the intimate familiarity that the voters of Kentucky would have had in 1992 with the process of senatorial confirmation from having recently watched the hearings of Clarence Thomas,

John Tower, and Robert Bork, among others, squarely precludes a comparable power in the House. As this Court has recognized, contemporaneous legislative construction of a constitutional provision is not binding on the courts, and such provisions should be interpreted with an eye toward common sense. *See Shamburger v. Duncan*, 253 S.W.2d 388, 392 (Ky. 1952) ("Legislative construction of a constitutional provision is not conclusive."); *Keck v. Manning*, 231 S.W.2d 604, 607 (Ky. 1950) (quoting *Meredith v. Kauffman*, 293 Ky. 395, 169 S.W.2d 37, 39 (1943)) (noting that the framers of the Constitution "did not intend to forbid a common-sense application of its provisions"). In light of this predicate, any inference that might arise from the General Assembly's actions in 1992 is not entitled to deference.

Finally, the argument that a *statute* can control an inconsistent and contemporaneous *constitutional provision* proves too much, for it would allow the legislature to profess fidelity to the Constitution while neglecting to adhere to it. As Chief Justice Marshall asked in *Marbury v. Madison*:

> **To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?** The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. **It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.**

5 U.S. (1 Cranch) 137, 176-77 (1803) (bold emphasis added).[6]

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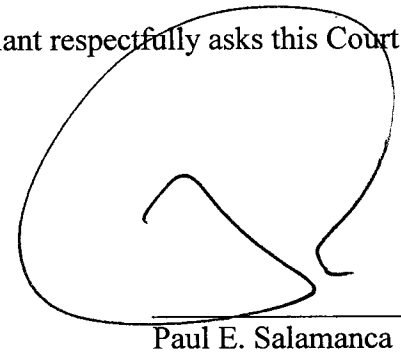
[6]The court below also suggested that the voting public might have lacked a specific understanding of the amendment to Section 93 in 1992 because it was only part of a larger amendment. *See* Opinion and Order at 12-13. This argument also proves too

CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to reverse the decision of the Circuit Court.



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much, for it contradicts the basic supposition of our constitutional system, that the people are ultimately responsible for adopting and revising their Constitution. *See* KY. CONST. § 4; *Gatewood*, 403 S.W.2d at 720.